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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 26
WITH
NOTES ON CAL. REPORTS

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JULY TERM 1864.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

JULY TERM, 1864.

JOHN O'CONNOR v. GEORGE DINGLEY.

CONSTRUCTION OF WRITTEN CONTRACT.—O. and D. entered into a written contract, by which O. was to erect a building for D., and D. was to pay him certain amounts in instalments as the building progressed, and at its completion, for the balance due, O. was "to take the second party's (D.'s) note, (secured by real estate,) to bear interest at the rate of two per cent. per month, and payable twelve months after date, or before, if the party of the second part wishes to do so." *Held*, that the words, "if the party of the second part wishes to do so," relate to the time when the note should be payable, and do not mean that he had the option of giving the note or not.

SPECIAL CONTRACT TO GIVE NOTE AND MORTGAGE — DEMAND NOT NECESSARY.

—When by the terms of a written contract for the erection of a building, the party for whom it is to be erected, at the time of its completion, is to take the note of the party for whom it is to be erected, (secured by mortgage,) payable twelve months after date, for the balance due, it is incumbent on the party by whom the note and mortgage are to be given, to make a tender of the same, and not on the other party to demand them, and if the same are not tendered, the other party may bring his action without waiting the twelve months, the time the note was to run.

COMPLAINT FOR LABOR DONE UNDER SPECIAL CONTRACT.—Under the rules of pleading established by the code, the party to a written contract for the

Argument for Appellant.

erection of a building who has performed his part of it by the erection of the same, cannot bring an action against the other party who has failed to fulfil, for work and labor done and performed, but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages thereby sustained. If, by the terms of the contract, the party who has failed to fulfil was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note.

SAME.—In such case, if there has been any variation from the terms of the written contract, in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

We submit that the action is prematurely brought, and cannot be sustained; that in any event it should not be maintained in its present form, but should be brought upon the contract.

If the contract be to pay money, it is due at any time or place, without demand.

If by a merchant to pay in goods, demand must be made where goods are.

If debtor contracts to pay in farm produce, creditor must demand payment at farm of debtor. (*Greenleaf on Evidence*, Sec. 609; *Lobdell v. Hopkins*, 5 Wend. 516.)

The case of *Moore v. Hudson River Railroad Company*, 12 Barbour, S. C. 159, was a case where a party had agreed to perform certain work on a railroad, and receive payment in the stock of the company at a specified time, and it was therein distinctly held that the defendants were not bound to seek the contractors and tender the stock, and that in such cases a demand, or its equivalent, was necessary.

It was, then, only necessary that the defendant should perform at a reasonable time and proper place, after notice; without such notice he could be in no default, and certainly a different place would be implied for the performance of such acts than that chosen by the plaintiff when he made his demand.

Argument for Appellant.

In Edwards on Bailments, p. 862, a special agreement had been made for repairs, payment to be made at different times as the work progressed, and the balance on completion, to be paid by bill at six months.

After proceeding to a certain extent, the parties deviated from the contract, and completed the repairs in a manner to which the former estimate did not apply.

Mr. Chief Justice Gibbs says:

"I have always understood the rule to be, that you may recover for work executed as for work and labor generally, if the terms contained in the written agreement are not of such a nature as to preclude a recovery otherwise than on the contract itself. It is every day's experience that a party may recover in the general counts for work and labor done under a special contract; but this case does not range itself within that class, for here are particular terms which render it impossible to recover under the common counts;" and further—"the plaintiff is entitled to recover on the general count for work and labor done at defendant's request, for the additional work; but as to so much as arises out of the special contract, I do not see how he can recover, since, *according to that contract, payment is not yet due.*"

Unless there had been an abandonment or rescission of the contract, or such a departure from it as would evidence the intention of the parties to treat it as at an end, then the action is prematurely brought, and plaintiff cannot recover.

This involves our second point, which is, that the action cannot be maintained in its present form, but should have been brought on the contract.

The facts that constitute the cause of action are not stated here.

The rule is laid down by Greenleaf on Evidence, Vol. 2, section 104:

"In case of a special agreement, a party can only elect to sue on the common counts when he has fully performed on his part, or when the contract has been abandoned by mutual consent, or has been rescinded and become extinct by some

Argument for Respondent.

act on the part of defendant, or when the contract, though not fully performed or in strict accordance with its provisions, is nevertheless beneficial to defendant, has been accepted and enjoyed by him."

The author goes on to say:

"If the mode of payment was any other than money, the count must be on the original contract, and if it was to be in money, and a term of credit was allowed, the action, though on the common counts, *must not be brought until the term of credit has expired.*"

If such be the rule, the conclusions of law drawn by the Court, to the effect that there was such a departure from the terms of the contract as would authorize the suit in the form and at the time it was brought, are clearly erroneous. (2 Smith's Leading Cases, 41, *et seq.*)

Swan & McMurtry, for Respondent.

It is insisted by the appellant that these variations from the original contract do not in any manner affect the time and mode of making the eight hundred dollar payment. We think that the variations, taken in connection with other facts shown by the evidence, materially affect the note and mortgage clause in the original contract; that, under the facts of the case, the plaintiff certainly had, as we contend, a right to treat the special contract as at an end, and commence his suit at the time he did.

As the law and evidence applicable to the first point made by appellant's counsel are so intimately connected with that of the second point, we will make our references to the first point in our argument on the second point.

In reference to the second point made by appellant's counsel—that "the action cannot be maintained in the present form, but should have been brought on the special contract"—we have only to refer to the following cases, decided by this Court: *De Boom v. Priestly*, 1 Cal. 206; *Reynolds v. Jourdan*, 6 Cal. 108; *Adams v. Pugh*, 7 Cal. 150.

Argument for Respondent.

These cases decide that in a case like the present, a recovery not only *may*, but *must* be had (if had at all) on the implied contract.

In the case of *Reynolds v. Jourdan*, above cited, 6 Cal. 111, this Court said:

"Where the entire performance of a special contract has been prevented by one of the parties; or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract; but the contract may be introduced in evidence by either party, as an admission of the standard value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion."

And, as far as the form of the action is concerned in such cases, the same principle was afterwards affirmed by this Court in the case of *Adams v. Pugh*, above cited, (7th Cal. 150.) We know of no case wherein this Court has modified or overruled these decisions.

E. A. Lawrence, also for Respondent.

The suit could not have been maintained upon the original contract between the parties, because that had not been performed; the variance would have been fatal to the action. A recovery by O'Connor could only be had upon the *implied contract* in an action of *assumpsit*; and the contract which was rescinded could be given in evidence by either party only for the purpose of graduating the measure of damages, and *not for the purpose of controlling the argument or fixing the time or method of compensation or the rate of interest*. It could not be given in evidence as a substantive contract, *binding upon the parties*, but would be received like any other admission, as evidence tending to show the amount of compensation O'Connor is entitled to.

The Court find as a matter of fact that the parties to the

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agreement "*disregarded*" the same after December 7, 1859. Probably it would have been better to have said *abandoned* instead of *disregarded*; still, the legal significance of the two terms is the same. This fact being found against appellant is conclusive, and if abandoned the agreement could not be given in evidence for any purpose. The Court so treated it, because it allowed interest on the judgment at the rate of ten per cent only, whereas the contract called for two per cent per month.

Even if there had been no abandonment of the contract, the term of the credit to be given has long since expired, and had prior to the entry of judgment, and the Court would not remit the party to a new action, when it is apparent he would be entitled to recover, but make such final disposition of the case now as will be equitable between the parties.

Again: Even if the parties had not abandoned and disavowed the contract, O'Connor had the right to rescind it, because Dingley refused to pay him or "to settle."

If the party who is to pay for work and labor in pursuance of a special contract be delinquent in the advancement of funds, the other party may take advantage of the omission and declare the contract at an end. (*Shaw v. Lewistown Turnpike Company*, 3 Pa. 445; 2 Parsons' Conts. 191, note *m*; *Pribble v. Bottom*, 1 Williams, Vt. 249.)

By the Court, RHODES, J.

The parties entered into a contract in writing, bearing date December 30, 1858, whereby O'Connor agreed to build for Dingley a stone building of given dimensions, for which Dingley was to pay him two thousand one hundred dollars; of which sum four hundred dollars was to be paid when the first story was completed; four hundred dollars when the second story was completed; and five hundred dollars when the third story and gables were completed; and the agreement continues as follows: "And the balance, being eight hundred dollars, the party of the first part agrees to take the

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second party's note (secured by real estate) for the same, the said note to bear interest at the rate of two per cent per month, and payable twelve months after date, or before, if the party of the second part wishes to do so." Dingley agreed to board O'Connor's workmen, but subsequently it was agreed that O'Connor should board them, and that Dingley should pay him therefor three hundred dollars, and a certain amount of flour. Before the completion of the building, it was agreed between them that O'Connor should not build the gables, but the amount to be deducted therefor was not agreed upon. On the 7th of December, 1859, O'Connor ceased work on the building, claiming that it was completed according to the agreement, as varied by them in respect to the gables, and Dingley took possession of it; and they, disagreeing as to the amount to be allowed for the omission of the gables, did not settle, and nothing was done or said respecting the promissory note, which, according to the agreement, was to be given for a portion of the contract price. Suit was commenced by O'Connor in April, 1860, and judgment was rendered for him for the balance of the contract price.

The leading questions in the case arise upon that portion of the contract which provides for the execution of the note by the appellant to the respondent.

Upon the completion of the third story and the gables, the respondent was entitled to five hundred dollars in money, and the appellant's note secured by mortgage of real estate for the balance due him not exceeding eight hundred dollars—bearing interest at two per cent per month, and payable on or before one year after date.

The words "if the party of the second part wishes to do so," have relation to the time the note should be payable—that is, the appellant was to have the right to pay it before the expiration of the year—and do not mean that he had the option to give the note or not, as he might elect. It makes no difference, so far as the points we shall consider are concerned, whether the one hundred and fifty dollars, allowed

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by the Court below, to be deducted from the contract price for the omission of the gables, are taken from the cash or credit instalments. There can be no doubt—and it is so conceded by the appellant—that it was the duty of the appellant to have executed, and the respondent to have received the note. By the terms of the contract, the appellant had no right to tender anything but the note, secured as provided for in the contract, nor had the respondent the right to demand anything in its stead.

The Court below found that the respondent did not demand, and the appellant did not tender, the note. If it was incumbent on the respondent to make the demand, he had no cause of action against the appellant at the commencement of the suit; but if it was the duty of the appellant to make the tender, then a cause of action in some form did exist in favor of the respondent. A demand would not be required, unless it would subserve some beneficial purpose relative to the note or the security, either in fixing the rights of the parties or in informing the appellant of some fact of which he was not bound to take notice.

Both parties knew the time of the completion of the work—taking as true the finding of the Court that the appellant received the building on the 7th of December—the date the note should bear, its time of maturity and the rate of interest; and they would be held to know the amount then due on the contract, and for which the note was to be given. The appellant had the right to designate the real estate that was to serve as security for the payment of the note, but the respondent had no election in that respect—he could simply accept, if it was sufficient, or object, if insufficient, as the security provided for in the contract. No benefit would result to the appellant from the demand, and the relative situation of the parties would not have been changed or more clearly defined upon its being made. The duty of the parties in respect to the demand and tender was the same as it would have been if the agreement had been, that, upon the completion of the work, the appellant should assign to the respon-

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dent a specified note and mortgage then held by the appellant, and there is no doubt that, in such case, it would as clearly have been the duty of the appellant to have delivered the note, without demand, as to have paid the money if it had then become due.

The appellant failed to perform his contract, and therefore he was liable to the respondent for the breach.

This is not the case of a contract where, for the services rendered, the party is required to pay a portion of the contract price, and has credit simply for the balance, but he has the credit upon his executing a specified note, with certain security, and not otherwise. If the Court should require the respondent — the note not being given — to delay his action until such time as the note, if it had been given, would have fallen due, it would thus deprive him of the security for his money, that he expressly contracted for, and, in effect, strike out one of the terms of the contract. The Court cannot make a new contract for the parties in whole or in part, and is not authorized to direct the respondent to give the appellant credit on different terms than were agreed upon by the parties in their contract.

The appellant's second point, that the action in its present form — which is for work and labor done and performed by the respondent for the appellant — cannot be maintained, but should have been brought upon the special contract, is well taken. Under the system of pleading at common law, it was the general rule that a party to a special contract, who had performed his part of it, and nothing remained to be performed under the contract but the payment of the money, could maintain general assumpsit to recover the amount due him on the contract. It was also a general rule, that while the special contract remains open and unrescinded, the party whose part of it is unperformed, in any respect, cannot sue in general assumpsit, but must sue in special assumpsit on the contract. To the latter rule there were several exceptions, and among them was the case where the special contract has been deviated from or modified by common consent and the

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service has been performed: the party claiming compensation for his services must sue in general assumpsit.

The Supreme Court in *De Boom v. Priestly*, 1 Cal. 206, affirmed the doctrine of the exception just stated, and that case was followed by *Reynolds v. Jourdan*, 6 Cal. 108, and *Adams v. Pugh*, 7 Cal. 150.

These rules and their several exceptions had their foundation in the rules of pleading as established and recognized at common law, and depended in but a small if any degree upon an essential difference in the real causes of action. It was the policy of the Courts from an early day, to keep the several classes of actions distinct, and to clearly mark the dividing lines between them. The rules of pleading in many cases were arbitrary, and in others the reason of the rule was almost too dim to be traced; but whatever the grounds of the rules may have been, the Courts steadily adhered to them and applied them to the cases brought before them. In their application to the cases differing among themselves only in some particulars, the Courts were lead into many refinements and subtle distinctions, which subserved no purpose but to preserve the rules of pleading, without any substantial benefit to the parties before the Court. The adjudications upon the distinction between trespass and case furnish familiar instances, and many others are found among the cases of the class of the one now before the Court. It would be difficult, indeed, for any one to assign any reason, except that such was a rule of pleading, why a party who has performed all his part of a special contract, could sue specially on the contract, and why a party to a similar contract, who has performed all his part according to the contract, save in a single deviation made by consent, and fully performed, must resort to a different form of action.

The language of the Practice Act, that "there shall be in this State but one form of civil action," etc., unmistakably indicates that the Legislature intended to abrogate those rules of pleading having for their object the preservation of the sev-

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eral forms of action, and the distinctive allegations employed in each class.

This is made apparent also by the provisions of the Act requiring the complaint, in all cases, to contain a statement of the facts constituting the cause of action in ordinary and concise language, thus destroying all mere technical rules and formal allegations.

There is no difficulty, in a case like the present, in stating the facts constituting the plaintiff's cause of action. He can allege the execution of the contract, its terms, and subsequent modification or deviation made by agreement or consent of the parties, the performance of his part of the contract as altered or affected by the modifications or deviations, the non-performance by the other party of his part of the contract, and the damages thereby sustained by the plaintiff. All the cases hold that in an action brought in general assumpsit, in consequence of a deviation from the terms of the contract made by consent of the parties, the plaintiff may, and should, introduce in evidence the contract, and if it has not been wholly lost sight of in the services as performed, the rates and terms of compensation fixed in the contract will be the measure of damages, so far as the same can be traced in the performance. He must, of course, prove the performance of all his part of the contract, except so far as the same has been deviated from by consent. The contract therefore does constitute the basis of the action, and if there is any meaning in the rule that the evidence offered must correspond with the allegations, there can be no question that, according to the rules of the Practice Act requiring the facts to be stated, the contract should be set forth in the complaint, together with the necessary allegations of deviations, performance, etc., which the plaintiff must prove instead of the general allegation that the defendant is indebted to the plaintiff for work and labor, etc. (*Green v. Palmer*, 15 Cal. 412; *Jerome v. Stebbins*, 14 Cal. 457.)

The Court below found as facts that the contract had been modified in respect to the boarding of the respondent's workmen, and that the parties had by consent deviated from the

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contract by omitting the building of the gables, and found as a conclusion of law that "there was such a departure from the written contracts as would entitle the plaintiff to maintain his action in the form he has elected." The Court also found as a fact, that on and after the 7th of December, 1859, the parties "disregarded said agreements." The work on the building to be performed by the respondent was completed on that day, and the appellant then received the building, leaving nothing further to be done except the execution of the notes; and there is no evidence going to show that the parties disregarded the contract in that particular, or in any manner waived the execution of the note. The conclusion of law found by the Court would have been upheld under the rules of pleading at common law (though not, in our opinion, by the rules established by our Practice Act), if the part of the contract to be performed by the appellant had consisted merely of the payment of money. But he did not promise to pay in money at the time of the completion of the work. He undertook to execute his note, as specified in the contract, and the grounds of the action against him was his failure to execute the note according to the contract, and not his liability for the payment of money upon the completion of the work. It was held in *Musser v. Price*, 4 East. 147, which was a case in *indebitatus assumpsit* to recover the price of goods sold and delivered, to be paid for in three months by a bill of two months, that the action would not lie in that form, that the proper ground of the action was the non-performance of the agreement to pay in a bill of two months, and that the contract was broken by his not giving the bill. (See *Hoskins v. Duperoy*, 9 East. 498; *Dutton v. Solomson*, 3 Bos. & Pull. 582; *Brooks v. White*, 1 Bos. & P. N. R. 330; *Ward v. Whitney*, 8 N. Y.; 4 Seld. 442; *Lutz v. Ey*, 3 E. D. Smith, 621; *Hanna v. Mills*, 21 Wend. 90.) In the last case Mr. Chief Justice Bronson says: "When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has

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expired, but he can sue immediately for a breach of the special agreement." The respondent was entitled to sue at the time he commenced this action, but he should have sued specially for the breach in failing to execute the note according to the contract.

Judgment reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings.

Mr. Justice CUNRY expressed no opinion.

ERWIN DAVIS v. BRIDGET DAVIS.

THREE HUNDRED AND NINETY-THIRD SECTION OF PRACTICE ACT.—The word "representative," used in the three hundred and ninety-third section of the Practice Act, as amended in 1863, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of the deceased, whether by purchase, or descent, or operation of law.

A PARTY TO AN ACTION A WITNESS IN HIS OWN BEHALF.—One of the parties in an action to recover possession of land, cannot make himself a witness in his own behalf, on the trial of the same, for the purpose of defeating the title of the adverse party to the land in dispute, if the adverse party is the grantee of a person no longer living, and the facts he offers himself to prove transpired before the death of the grantor of the adverse party.

EQUITABLE ESTOPPELS *In Pate*.—The party relying upon an equitable estoppel *in pats* in an action at law, must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity.

WAIVER OF DEFECTIVE PLEADING OF ESTOPPEL *In Pate*.—Where an equitable estoppel *in pats* is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence, without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded.

WHAT WILL CONSTITUTE AN ESTOPPEL *In Pate*.—Whenever an act is done or statement made by the party which cannot be contravened or contradicted by him without fraud on his part and injury to others, whose conduct, without fault on their part, has been influenced by the act done or statement made, the character of estoppel will attach to what would otherwise be mere matter of evidence.

WHAT FACTS NECESSARY TO CONSTITUTE AN ESTOPPEL *In Pate*.—In order to constitute an equitable estoppel with respect to the title of property, it must appear that the party to be estopped has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to the title, or with such carelessness or culpable negligence as to amount to a constructive fraud, and that at the time of making the admissions or declarations, or doing the act, he was apprised of the true state of his own title,

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and that the other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge.

WHAT FACTS DO NOT CONSTITUTE AN ESTOPPEL *in Pote*.—B. was the owner of a lot of land; C. had it inclosed, and was residing on it, and claimed to own it; D. bargained with C. to purchase it from him, but before making the purchase called on B. and told him she wished to buy the lot of C., and B., in reply, disclaimed having any claim or title thereto. D., relying on this disclaimer, purchased the lot of C., and paid its full value. D., at the time, was not destitute of all knowledge of the true state of the title. B., when he made the disclaimer, was not apprised of the true state of his own title, nor did he intend to deceive or defraud D., nor was he guilty of gross carelessness or culpable negligence; *Held*, that these facts did not estop B. or his grantee from afterwards setting up title to and recovering possession of the lot from D.

EVIDENCE OF ORAL DECLARATIONS AND ADMISSIONS.—Parol evidence of declarations and admissions of persons made long anterior to the trial, upon which an estoppel *in poto* is sought to be founded, should be carefully scrutinized by the Courts and juries, as it is a dangerous species of evidence, and liable to abuse.

INSTRUCTIONS TO JURY.—It is not error for the Court to refuse to instruct a jury "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose."

KNOWLEDGE OF ONE'S OWN TITLE.—The doctrine "that a man claiming to own land" is "bound to know the state of his own title," is not the law in all cases.

STATUTE OF LIMITATIONS — PUEBLO LANDS OF SAN FRANCISCO.—An action may be brought and maintained to recover possession of land within the Pueblo of San Francisco, by one holding title derived from the pueblo at any time within five years after the issuance of a patent for the pueblo lands by the United States.

Biddle Boggs v. Merced Mining Company, 14 Cal. 267, commented on and explained.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

Sections three hundred and ninety-two and three hundred and ninety-three of the Practice Act are copied substantially from the New York Code. Under that statute *McCray v. McCray* was decided. (12 Abbott's P. R. p. 1.) That was an action to recover possession of a farm. Defendant claimed the farm by virtue of a parol contract between plaintiff and James G. McCray, deceased, or by a parol gift from the former to the latter.

"The defendant," say the Court; "was not an executrix or

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administratrix. She claimed the farm in question by an alleged parol gift of it from the plaintiff to her husband, or under an alleged parol agreement between them. She was guardian in socage of an infant daughter that she had by her deceased husband, and claimed to hold possession of half of the farm as such guardian. She claimed a right to the other half as a mother or heir of her deceased daughter; and also an unad-measured dower-right in the whole farm as widow of her husband.

"The legal title to the farm was in the plaintiff, and the defendant's defense to the action was an equitable one. She insisted on the trial that she had shown a right, by parol evidence of transactions between the plaintiff and her husband, to a legal title to the farm; which alleged right the plaintiff disproved by his own evidence.

"The defendant defended the action in her own right, and in that of her living infant daughter; not as the representative of her deceased husband, or of her deceased infant daughter. Was her position as defendant, in any sense, that of a representative of a deceased person? I answer, it was not. I am aware that in construing wills, Courts have held the words, 'representative,' 'legal representative,' and 'personal representative,' may mean next of kin or heirs. But the same Courts have also held that those words in their ordinary sense are to be understood as synonymous with executors and administrators. (2 Lomax on Ex., 2d ed. 58, 59; 2 Jarm. on Wills, 4 Am. ed. 29.) Williams says: 'The ordinary legal sense of the term *representatives*, without the addition of *legal*, or *personal*, is executors or administrators.' (2 Will. on Ex., 5 Am. ed. 1015.)

"The word 'representative' is not defined in Jacob's Law Dictionary; but under the word 'representation' it is therein stated 'executors represent the person of the testator to receive money and assets.'"

Bouvier says: "A representative of a deceased person, sometimes called a 'personal representative,' or 'legal representative,' is one who is executor or administrator of the person

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described." He cites 6 Mad. 159, and 5 Ves. 402. (See 2 Bouv. Law Dict. Tit. Representative.)

"There is no conflict in the old authorities as to the ordinary legal sense of the word 'representative,' and Bouvier's definition of it is adopted in Worcester's Dictionary, which is regarded by many of the most learned men in our country as the best dictionary of the English language now in use.

"Noah Webster, in defining the word 'representative,' says: 'In law, one that stands in place of another as heir, or in the right of succeeding to an estate of inheritance, or to a crown.' (Webster's Dictionary, ed. of 1855.) He gives no authority for his definition, and it should not be adopted against the well understood and long received legal signification of the word.

"I think the natural and most obvious meaning of the words 'representative of a deceased person,' as they are used in section three hundred and ninety-nine of the code, is executors and administrators, and we must hold that they have that meaning. (See *Evans v. Charles*, 1 Anst. 128; *Price v. Strange*, 6 Mad. 104; *Anon.* 1 Dyer, 6; 2 Comst. 87; *Bridge v. Abbott*, 3 Bro. C. C. 221; 3 Ves. Jr. 48, 146, 184, 186; 5 Ib. 401; 20 Wend. 561, 562; 7 Hill, 408; 1 Kern. 601, 902; Ib. 360.)

"The defendant, therefore, cannot be regarded as a representative of a deceased person within the meaning of section three hundred and ninety-nine of the code."

In *Buckingham v. Andrews*, 34 Barb. 434, the plaintiff's action was upon a note payable to himself as *executor*, given after the death of his testator. Defendant offered himself as a witness as to transactions between himself and plaintiff's testator. He was excluded, and the judgment was *reversed on that ground*.

In *Bolton, Adm'r, v. Smead*, 37 Barb. 141, the three hundred and ninety-ninth section of the New York Code was again construed, and it was *held*: That the administrator was a competent witness on his own behalf, to prove a claim in his own favor against the estate.

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Plaintiff was not the representative of Broderick, because the estate of Broderick had no immediate nor remote interest in the result of the action. A recovery by plaintiff could in no manner result to the benefit or prejudice of the *estate*. Plaintiff, as the *remote vendee and grantee* of Broderick, might deny that he acquired any title by the conveyance from Broderick. (*Blight's Lessee v. Rochester*, 7 Wheat. 535; 18 Cal. 466; 1 Comst. 253; 11 Barb. 498; 6 Id. 111; 1 Ala. 292.)

How can plaintiff be said to *represent* Broderick, when he was at liberty to say he got no title from Broderick?

The plaintiff is as much bound by the estoppel as Broderick would be if he were plaintiff. (Washburn on Real Property, Vol. 1, 4th ed., [51]; *Phelps v. Blount*, 2 Dev. 177; *Douglas v. Scott*, 5 Ohio, 199; *Mark v. Willard*, 13 N. H. 389.)

The plaintiff had a notice of the estoppel from defendant's actual possession at the time plaintiff took his conveyance from Gallagher. (*Mesick v. Sunderland*, 6 Cal. 315; *Stafford v. Lick*, 7 Cal. 305; *Lestrade v. Barth*, 19 Cal. 660; *Dutton v. Warschauer*, 21 Cal. 610.)

The case at bar is exactly parallel with *Storrs & Brooks v. Barker*, 6 John. Ch. 166.

The result of the authorities is, that when one has done an act or made a statement to controvert or impair which would amount to a fraud on his part, and such act or statement has so influenced any one that it has been acted upon, the party making it will be estopped and cut off from the power of retraction; and this, whether the party making the statement made it innocently and by mistake, or with intent to deceive, if he knew, at the time of making it, that the other party relied upon it and might be induced to act upon it. In other words, statements and declarations of one's rights to property may amount to a fraud in law though not in morals. (*Den ex dem. Richman et al. v. Baldwin*, 1 Zabriskie, 403; *Crout v. DeWolf*, 1 R. I. 393; *Duell v. Bear R. & A. M. Co.*, 5 Cal. 85; *Mitchell v. Reed*, 9 Id. 205; *McGee v. Stone*, 9 Id. 606; *Snodgrass v. Ricketts*, 13 Id. 362.)

Broderick disclaimed title directly to defendant, after hav-

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ing been apprised by defendant that she intended to purchase of Braddick. Broderick disclaimed having title to the lot—a case much stronger than where the true owner stands by, and by *mere silence* permits another to purchase his property under the belief that he is acquiring the title.

Hoge & Wilson, for Respondent.

The question is: What is the proper construction of the three hundred and ninety-third section of our Practice Act, as amended in 1863, and in what sense is the term “representative of a deceased person” used in that section?

The term “legal representative” has not always necessarily the same signification. Its meaning must in every case depend upon the context, the subject matter, and the intention.

As was said by the Supreme Court of Illinois in the case of *Delaney v. Burnett*, 4 Gillman, 494, in speaking of this subject: “There is a question of intention to be considered in its construction, and this is not to be gathered solely from the instrument itself, but in part from concomitant circumstances, and the existing state of things, and the relative situation of the parties to be affected by it.”

In Bouvier’s Law Dictionary, p. 357, the term representative is defined to be “one who represents or is in the place of another.”

Webster, in his dictionary, defines it thus: “1st. One that exhibits the likeness of another. 2d. In *legislative* or *other business*, an agent, deputy, or substitute who supplies the place of another or others, being invested with his or their authority. 3d. In *law*, one that stands in the place of another as heir, or in their right of succeeding to an estate of inheritance, or to a crown. 4th. That by which anything is exhibited or shown.”

In the case of *Montgomery v. Landuskey*, 9 Missouri, 714, the Supreme Court of Missouri affirm the principle that a purchaser or grantee may be the “legal representative” of an original claimant.

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In the case of *Phelps v. Smith*, 15 Illinois, 572, the Supreme Court of Illinois again affirm the doctrine of *Delaney v. Burnett*. The case involved the construction of an Act of Congress, granting a right of pre-emption to "each and every person, or his, her, or their legal representative or representatives," etc. In this as in the former case, the Court held that a purchaser from a person entitled to a pre-emption of his interest in the land or right of pre-emption, is as to such land the legal representative of the person entitled to the pre-emption within the meaning of the Act of Congress, and would take the land directly as grantee by the description of legal representative. The Court go into an examination to ascertain the intention of the law, and on page five hundred and seventy-four, the Judge who delivered the opinion says: "Nothing can be more clear to my mind than that the term 'legal representative,' as used in this law was designed to describe a party in interest whose identity was uncertain, and that by that description it was designed to designate the person or party who had succeeded to the right of the deceased, whether by purchase or descent, or operation of law. It means the party who has the right to and who does legally represent the interest which was once vested in the deceased," etc. (See, also, *Grand Gulf Railroad and Banking Company et al. v. Bryan*, 8 Smede & Marshall, 275.)

These authorities, and many others which might be cited, in our judgment sufficiently establish our position, that the term "legal representative" does not always and necessarily have the same signification. That it is always a matter of construction and intention. The sense in which it is used may be gathered outside of the law itself, from concomitant circumstances and the existing state of things and the relation and situation of the parties to be affected. Keeping these principles in view, let us see if the Court below did not give the sections of our Practice Act upon the subject of the testimony of the parties to a suit their true construction.

It was undoubtedly the policy of the law that both parties should be in a position to testify about the same transac-

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tions. The language of the section effectually carries out this policy.

But by the Act of the 27th of April, 1863, the Legislature amended sections three hundred and ninety-one, three hundred and ninety-two, and three hundred and ninety-three of the Practice Act, and then repealed the sections four hundred and eighteen, four hundred and twenty-one, four hundred and twenty-two, and four hundred and twenty-three.

These amendments stripped the law of 1861, which we have just commented upon, of its complicated machinery, but retained its entire substance and policy. Section three hundred and ninety-three now reads: "No person shall be allowed to testify, etc., where the party, etc., is the *representative* of a deceased person, when the facts to be proved transpired before the death of such deceased person."

The terms "assignee, executor, or legal representative," are dropped, and the generic term "representative," which includes them all, is preserved. Nor is the term qualified by the prefix, "legal," or "*personal*." The object undoubtedly was to preserve the substance of the old law. It is not to be supposed that any change of policy had occurred. The contrary is apparent from the whole language. The object was to simplify the sections regulating these matters, get rid of the limitations and restrictions in the four hundred and twenty-second section, and at the same time to retain its essence. This is attempted to be done by language sufficiently comprehensive to cover all the cases specially named in the former law. That law *ex industria* specified every possible case requiring the application of the principle; this does the same thing by the use of a term which, manifestly, the Legislature thought effected the same object. We submit that the whole operation of the amendments of 1863, was merely to simplify the law on this subject, and remove the necessity for considering the numerous and perplexing questions which arose upon the construction of the four hundred and twenty-second section as it previously stood, and that the exemption of the three hundred and ninety-third section, as it now stands, includes precisely the same

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classes as the former provision. It results that there was no error in the rulings of the Court below upon this subject.

The principles governing the application of the doctrines of estoppel to questions of title to the realty, are no longer open to discussion in the Courts of this State. If repeated decisions of this Court can be supposed to settle any question of law, then certainly this question must be considered at rest.

. This case, upon the findings of fact by the jury, falls directly within the rules laid down by this Court in the case of *Biddle Boggs v. The Merced Mining Company*, 14 Cal. 367, etc. Upon an elaborate consideration of the authorities, the Supreme Court in that case deduced the true rules governing the application of the doctrine of estoppel *in pais*, when applied to the title to real estate. Those rules have become the settled law of the State upon this subject. In the case of *McCracken v. The City of San Francisco*, 16 Cal. 626, the Supreme Court repeat and enforce the rules established in the *Biddle Boggs* case.

Again: in the case of *Carpentier v. Thirston*, 24 Cal. 268, the rules thus established were again recognized and enforced.

By the Court, CURREY, J.

This is an action of ejectment brought to recover a certain fifty-vara lot of land in the City of San Francisco. The action was commenced by filing a complaint in the usual form, in July, 1863. The defendant by her answer controverted the material allegations of the complaint, and as an affirmative defense, pleaded the Statute of Limitations, and also an estoppel *in pais*, arising from the conduct and declarations of the Honorable David C. Broderick, from whom the plaintiff claimed to derive his title to the demanded premises, of which it is alleged the plaintiff had notice by the defendant's actual possession of the lot at the time he purchased the property. By the answer it is alleged that on the 27th of August, 1853, one Henry Braddick was in possession of the

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lot, claiming the same as the owner thereof in fee simple, who at that time sold and conveyed it to the defendant for seven hundred dollars; that while the defendant was negotiating with Braddick for the purchase of the lot, and before the bargain between them was consummated, Mr. Broderick, knowing that the defendant was about to purchase the lot of Braddick and pay him therefor, disclaimed having any title to the same, and represented to the defendant that she might safely purchase the premises of Braddick; that upon the faith of such declaration and representation she consummated the purchase, paid the consideration, which was the full value of the property, obtained a deed for it from Braddick, and entered into the possession of the same; and from that time held, occupied and improved the lot, claiming it as the owner thereof adversely to Mr. Broderick, and all other persons claiming it by, through or under him.

To maintain the issue on his part the plaintiff produced and gave in evidence a grant of the lot in question, made in 1849, by the authority of the Pueblo of San Francisco, to David C. Broderick and Frederick D. Kohler; a conveyance from Kohler in 1852 of his interest in the lot to Broderick; a conveyance in October, 1858, from Broderick to John A. McGlynn; a conveyance in November, 1858, from McGlynn to Hugh P. Gallagher; and a conveyance in October, 1862, from Gallagher to the plaintiff. Mr. Broderick died on the 16th of September, 1859.

The defendant claimed title derived from Henry Braddick by deed bearing date on the 27th of August, 1853, and produced and gave the same in evidence; and also produced witnesses who testified of and concerning the declarations and representations alleged to have been made by Mr. Broderick in his lifetime, which are set forth in the defendant's answer.

The defendant was also sworn as a witness on her own behalf; and her counsel then proposed and offered to prove by her the facts set up in the answer pleaded, as an estoppel *in pais*; and also that she received a deed from the person in possession of the premises, viz: Henry Braddick, on the 27th.

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of August, 1853, and therefor paid him seven hundred dollars, and that she entered into possession of the lot at the time of her purchase, and during that year built a dwelling house upon and a fence around it; that while in possession she graded the lot, and had since she purchased it been in the exclusive possession and occupation of the same.

The plaintiff objected that the defendant was incompetent as a witness to testify as to any matter of fact which occurred between her and Mr. Broderick in his lifetime. The Court sustained the objection, and the defendant's counsel duly excepted.

The jury rendered a general verdict in favor of the plaintiff; and also a special verdict in response to special issues submitted to them. The result of the special verdict may be stated as follows:

First—On the 27th of August, 1853, the defendant purchased of Henry Braddick the lot in controversy, for the sum of seven hundred dollars, which she paid to him, and at the same time he executed to her a deed of conveyance for the same, bearing date on that day, when she entered into the possession of the lot, and from that time until the trial of this action has been in the exclusive possession of it.

Second—Before the defendant received the deed from Braddick, and before she had paid him the consideration of seven hundred dollars for the premises, she informed Broderick that she wished to purchase the premises, when Broderick disclaimed having any claim or title thereto. He was then aware that she intended to purchase the lot of Braddick.

Third—The defendant, relying upon this disclaimer of Broderick, purchased the lot and paid seven hundred dollars for it, when she would not have done so if Broderick had not made such disclaimer.

Fourth—When Mr. Broderick stated that he had no claim or title to the lot, he was not apprised of the true state of his own title, and in making such statement or representation to the defendant he did not intend to deceive or defraud her.

Fifth—Mr. Broderick, in making this statement or repre-

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sentation, was not guilty of gross carelessness or culpable negligence.

Sixth — The defendant was not, at the time she purchased of Braddick, wholly destitute of all knowledge of the true state of the title to the lot, nor of all means of acquiring such knowledge.

Each party moved for judgment. The Court entered judgment for the plaintiff in accordance with the general verdict. The defendant applied to the Court for a new trial, which application was denied. The appeal is from this order, and also from the judgment.

Several points are made on the part of the appellant on which she relies for a reversal of the judgment.

I. It is claimed on the part of the appellant that she was competent as a witness to testify on her own behalf as to declarations and statements made to her by Broderick, notwithstanding he had departed this life previous to the trial.

By section three hundred and ninety-two of the Practice Act, in force at the time of the trial, parties as well as strangers in interest to the controversy were competent as witnesses, except as otherwise provided in that act.

The three hundred and ninety-third section of the Act provides that no person shall be allowed to testify under the provisions of the next previous section where the adverse party or the party for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person.

The point here presented may not be particularly material in this case, inasmuch as the jury by their special verdict found the facts in every essentially important particular to be as the defendant sought to establish them by her own testimony. But, notwithstanding, the question is one of much practical importance in the administration of justice, and we deem it proper to dispose of it now that it is before us.

The import and effect of the word "representative" is the question to be determined in the disposition of the exception

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taken to the ruling of the Court sustaining the objection to the competency of the defendant as a witness in her own behalf. This statute is an innovation upon the rule of the common law, which refuses to permit any person, even under the sanction of an oath, who has an interest in the event of a suit, to give evidence in support of such interest. This rule of exclusion was founded on the known infirmities of human nature, which is often too weak to be restrained by religious or moral obligations, when tempted in a contrary direction by temporal interests. (1 Starkie's Ev. 83.) The law, as it stood before the enactment of statutes rendering parties to actions competent as witnesses, either for or against themselves, and the reasons existing as the foundation of the law are not to be disregarded in the consideration of such statutes. The old and the new laws are to be compared *in pari materia*, if necessary, in order to ascertain the design of the law-making power, and the scope and objects of the statute to be construed.

In 1851 the rule of the common law on this subject was changed so far as to render competent as witnesses persons interested in the event of the action, other than parties or persons for whose immediate benefit the action might be prosecuted or defended. (Practice Act of 1851, Sections 392 and 393.) By that Act a party could examine the adverse party, who thereby became competent as a witness on his own behalf, if he elected so to do; but if he testified to new matter not responsive to the inquiries put to him by the party who called him, or not necessary to explain or qualify his answer thereto, or to discharge, when his answer would charge himself, then his adversary might offer himself as a witness, on his own behalf, as to such new matter. (Id., Sections 418-421.) In 1854 (Laws of 1854, p. 84,) it was provided that "parties may be witnesses on their own behalf when the action is brought for the settlement of, or in relation to, the business and accounts of a copartnership then existing, or which had previously existed between them, to prove vouchers or items of an amount under one hundred dollars." In 1861 (Laws of 1861, p. 522,) the Act was so amended as to permit a party to an action to

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be examined as a witness in his own behalf, under certain limitations and regulations. One limitation was, that "such examination shall not be had, nor shall any other person for whose immediate benefit the same is prosecuted or defended, be so examined, unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person."

In 1863 (Laws of 1863, p. 70,) the Legislature again amended the Act, making parties competent witnesses, except that "no person shall be allowed to testify, * * * when the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person."

It is manifest, from the legislation on the subject, that the policy of opening the door to the admission of parties as witnesses, to testify generally in their own cases, has been contemplated with no light degree of apprehension; and to guard against the mischiefs and to secure the benefits arising from the change of the law, the Legislature, in respect to it, provided, as amply as practicable, to place the parties on an equality.

By the Act of 1861, the party who proposed to become a witness was required to give his adversary notice of the particular matters concerning which he intended to give evidence, that the adverse party might be prepared to meet it by his own testimony or that of other witnesses; and even with this protection against surprise a party was not permitted to become a witness in his own behalf unless the adverse party was living, nor where he might be an assignee, administrator, executor or legal representative of a deceased person. The change effected by the amendment of 1863 seems to have been intended to dispense with the necessity of the notice required under the law as it stood previously, and yet to retain in substance the portion of it which disabled one party from testifying concerning matters of which the others, as the

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representative of a deceased person, could not be presumed to have any knowledge. In the Act of 1861 the words "assignee, executor, administrator or legal representative" are employed; while in the Act of 1863, in the place of these, the word "representative" is the only term used; and it is insisted on the part of the appellant that this term is alone descriptive of the executor or administrator of a deceased person. If this construction of the amendment of 1863 be proper, it would seem that the words "legal representative," in the former Act, were meaningless; for what is the difference between the terms "representative" and "legal representative," as used?

In *Grand Gulf Railroad and Banking Company v. Bryan*, 8 S. & M. 275, Mr. Chief Justice Sharkie said: "In legal parlance, the executor or administrator is most commonly called the legal representative." And in the same case he denied that the terms "legal representative" were limited to this use alone, saying: "In regard to things real, the heir is also the legal representative, and so is the devisee, who takes by purchase;" and that "an assignee or grantee is a legal representative of the assignor or grantor in regard to the thing assigned or granted;" and he also said that "general expressions in law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense. Representative is one who exercises power derived from another. A purchaser derives his power over the estate from his vendor." (*Phelps v. Smith*, 15 Ill. 574.)

We are of opinion that the word "representative" in the amendment of 1863, was intended by the Legislature to designate the executor or administrator of a deceased person, and also the person or party who had succeeded to the right of the deceased, whether by purchase or descent, or operation of law. Any other construction would leave the purchaser of an estate from a grantor, who subsequently died, in a worse condition than the grantor's executor would be had no conveyance of the estate been made. There is no reason why the plaintiff in this case should be exposed to the interested

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testimony of the adverse party more than that the executor of the deceased grantor should be, had the property in controversy been a portion of the estate committed to his charge. We do not think the point one of serious doubt. If it were so, the construction we give to the word "representative" is reasonable and equitable, and therefore should be adopted.

II. The defendant claims that the special verdict is inconsistent with the general verdict, and that by the special verdict she was and is entitled to judgment; and the doctrines of the law of estoppel *in pais* are relied on as requiring a judgment for the defendant. On the part of the plaintiff it is maintained that neither the facts pleaded by the defendant nor the findings of the jury, as contained in their special verdict, authorize a judgment different from that given and entered in the case.

Estoppels *in pais* seem, in their common law origin, to have arisen only in the case of those solemn and peculiar acts to which the law gave the power of creating a right, or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Mere acts, statements, or admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by the law, were not considered as estoppels, and had no other weight than that of evidence, more or less strong, but which might be explained or rebutted.

By the rules of the common law an estoppel by deed or by matter of record must be specially pleaded, unless the circumstances be such as to prevent it from being placed on the record by a plea. (7 C. B. 310; *Howard v. Mitchell*, 14 Mass. 242; *Bartholomew v. Candee*, 14 Pick. 167.) On the other hand, estoppels by matters *in pais*, of a nature of which Courts of law would take cognizance, could be relied on in evidence as conclusive without being pleaded by way of estoppel. (*Sanderson v. Collman*, 4 M. and Gr. 209; *Darlington v. Pritchard*, Id. 783.)

But equitable estoppels *in pais*, generally, if not univer-

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sally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other; and it is but just and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel *in pais* should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet. To do this he must plead it with the same fulness and particularity as is required in cases involving like subjects of inquiry, in suits of equity. (*Brinkerhoff v. Lansing*, 4 John. Ch. R. 70; *Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Cal. 660; and *Downer v. Smith*, 24 Cal. 114; *Blum v. Robertson*, 24 Cal. 127; *Clarke v. Huber*, 25 Cal. 593.)

The answer does not show by averments that Broderick was, at the time of the conversation between him and the defendant, apprised of the true state of his own title, nor that he made the statements and representations imputed to him, and found by the jury, with the intention to deceive or defraud the defendant, or with such carelessness and culpable negligence as to amount to a constructive fraud; nor that the defendant was without knowledge of the true state of the title to the premises, or without the means of readily acquiring such knowledge, when she purchased of Braddick.

Some of these facts at least we deem material and essential to the creation of an equitable estoppel in this case; but as evidence was produced on the trial in the same manner as if these facts had been properly pleaded, and the jury have rendered a special verdict which negatives such facts, we shall consider the case upon the special verdict without regarding the objection made on behalf of plaintiff to the answer.

According to the modern decisions of the Courts, both in England and in the States of the American Union, it is established that wherever an act is done or statement made by a party which cannot be contravened or contradicted without

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fraud on his part, and injury to others whose conduct, without fault on their part, has been influenced by the act or statement, the character of estoppel will attach to what would otherwise be mere matter of evidence.

In *Pickard v. Sears*, 6 Ad. & Ell. 447, Lord Denman, Chief Justice, said: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In order to create an equitable estoppel there must be an admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct which would be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. For the prevention of fraud, the law holds the admission to be conclusive. (Cowen, J., in *Dezell v. Odell*, 3 Hill, 219.) It was held in the same case by Mr. Justice Bronson, that to constitute an estoppel *in pais* against a party, there must be, first, an admission which is clearly inconsistent with the evidence which the party proposes to give, or the title or claim which he proposes to set up; second, that the other party has acted upon such admission and will be injured by allowing the truth of the admission to be disproved. (3 Hill, 221, 222; *Welland Canal Company v. Hathaway*, 8 Wend. 483.)

It will be observed that in the decision of Lord Denman, to which we have referred, the word "wilfully" is of potent import, and is made to characterize the act of the wrongdoer in effecting the injury done; and in all the cases in which the doctrine of equitable estoppel is applied, it will be found that it rests for its foundation upon the equitable principle that is ever invoked for the prevention of the mischievous consequences of fraud. (*Copeland v. Copeland*, 28 Maine, 539, 540; *Commonwealth v. Moltz*, 10 Barr, 531; *Adams' Equity*, 151.)

In *Biddle Boggs v. Merced Mining Company*, 14 Cal. 367, 368, Mr. Chief Justice Field held that to the application of

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the principle of equitable estoppel "with respect to the title of property, it must appear, first, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness or culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved;" and he further said, "there must be some degree of turpitude in the conduct of a party before a Court of equity will estop him from the assertion of his title." We are satisfied the learned Judge who pronounced this opinion did not intend by the language employed to hold that a person must be destitute of all possible means of acquiring knowledge of the true state of the title, but rather of all convenient or ready means to such end; and with this construction we accept the doctrine declared in that case. (*Whitaker v. Williams*, 20 Conn. 104; 1 Story's Eq., Sec. 391; *Carpentier v. Thirston*, 24 Cal. 268.)

The doctrine of estoppel *in pais* should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statute was to render estates secure. In *Parker v. Barker*, 2 Met. 423, the Supreme Court of Massachusetts held that a parol stipulation made by one party and acted on by the other will not constitute an estoppel with reference to land unless it be attended by actual fraud or concealment. (5 Metcalf, 461 and 478.)

In *Jackson v. Sherman*, 6 John. 21, it was held that parol declarations are inadmissible to prove or disprove a title; and in *Jackson v. Vosburgh*, 7 John. 186, that like evidence of a disclaimer of title is inadmissible. This rule cannot be too closely adhered to, and a departure from it can only be justi-

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fied when necessary to prevent frauds, against which the injured party could not guard by the exercise of proper diligence. By the special verdict it is found that the defendant was not destitute of all knowledge of the true state of the title. If she had any knowledge respecting it she cannot justly complain, if by her indifference to the ordinary means of information she failed to become fully informed of the true state of the title. *Vigilantibus non dormientibus jura subveniunt*, is an ancient maxim of the law, and forms an insuperable barrier against the claim of an improvident purchaser, and especially so when such claim is made against one who is a stranger to the contract between the vendor and vendee. (2 Kent, 285; 1 Sugden, V. and P. 2; *Ferris v. Coover*, 10 Cal. 632.)

The case of *Storrs v. Barker*, 6 John. Ch. R. 166, on which the defendant places reliance, does not, in our judgment, at all militate against the doctrine maintained by the decisions which we have cited, but may be cited in their support. In that case it was held that one knowing certain facts, which had the effect to create a title in himself to property, though not aware of such effect, if active in inducing one who, to all appearances had a title to it, to sell and another to purchase it, should not be permitted afterward to allege his ignorance of the law, in attempting to recover the property of the purchaser. In the case here referred to both parties claimed from the same source—the one through a devise made by a *feme covert*, which was void, and the other as her heir at law. The heir at law recognized for years the devise as valid, and as passing the estate to the devisee; and while the devisee and the purchaser were negotiating in respect to the matter, which lasted through several weeks, he repeatedly advised the one to sell and the other to buy, declaring that he considered the title under the will good (pp. 167, 172); and for three years thereafter permitted the purchaser to make improvements, and exercise acts of ownership upon the land without interposing any claim as the heir at law, founded on the invalidity of the devise. Chancellor Kent, after referring to these circumstances, said: "If the case rested upon these facts alone, it

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would fall within the rule of equity, that when one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of the property; and especially if he encourages the parties to deal with each other in such sale and purchase. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief or be considered as a sufficient indemnity against the injurious consequences of a deception practised upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate that he and not the purchaser ought to suffer. His ignorance of the law ought not to protect him from the rule of equity. * * If he may be allowed to plead his voluntary ignorance in destruction of equitable rights, growing out of his own acts and assertions, the grossest impositions and the greatest fraud might be practised with impunity."

The statement which the jury have found that Broderick made, to the effect that he had no claim to the lot, was a mistake of fact which the jury, upon all the evidence before them, say was not made with any intent to deceive or defraud the defendant, nor with gross carelessness or culpable negligence, and we think it would be carrying the doctrine of estoppel *in pais* to an extent that would encourage the grossest frauds and perjuries, and would result in many instances in divesting the owner of his title and transferring it to another upon evidence of declarations unwittingly and innocently made, were we to hold that the facts found by the jury create an estoppel against the plaintiff's assertion of his title to the demanded premises.

We may say in respect to parol evidence of the declarations and admissions of persons made long anterior to the trial, upon which an estoppel *in pais* may be sought to be founded, that it cannot be too carefully scrutinized by Courts and juries.

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In all cases it is the most dangerous species of evidence that can be admitted in a Court of justice, and the most liable to abuse. In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes, even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. And more than this, it is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false. (*Law v. Merrills*, 6 Wend. 277; *Jackson v. Sherman*, 6 John. 21; *Lench v. Lench*, 10 Vesey, 517; *Cleveland v. Burton*, 11 Vermont, 139; *Snelling v. Utterback*, 1 Bibb, 611; *Morris v. Morris*, 2 Bibb, 311; *Bernard v. Flourney*, 4 J. J. Marshall, 102; *Perry v. Gerbeau*, 5 Martin, N. S. 18.)

III. The defendant requested the Court to give certain instructions to the jury, which were refused, and now assigns this action of the Court as erroneous.

The first requested instruction was: "That where two innocent parties must suffer, that party who had been the cause of another's loss must lose."

In *Lickbarrow v. Mason*, 2 T. R. 70, Mr. Justice Ashurst said: "Wherever one of two innocent persons must suffer by the act of a third, he who enabled such third person to occasion the loss must bear it." But great caution should be exercised in applying this principle, and the Court should be satisfied that the case is one calling for its application, before the question is submitted to the jury, as to which of the parties is entirely *in delicto*. The instruction requested is ambiguous, if not entirely unintelligible. It does not inculcate the doctrine enunciated by Mr. Justice Ashurst. In legal contemplation the person who causes a loss to another is not innocent, and it would have been improper for the Court to have charged the jury that, both parties being innocent, one of them could be found guilty of a wrong to the other.

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The second requested instruction was: "That the grant made by Geary to Broderick and Kohler was not recorded in August, 1853, so as to impart notice to defendant."

If the fact of constructive notice to the defendant of the existence of this grant had any bearing on the case, the ruling of the Court refusing this charge is justified by the case of *Touchard v. Keyes*, 21 Cal. 202, and the statutes referred to therein.

The third requested instruction — "That, as the law stood and was construed by the Supreme Court of California in August, 1853, and prior thereto, D. C. Broderick had no title to Lot 1,090" — was irrelevant to any question before the jury, and the Court was right in refusing the request.

The fourth requested instruction — "That a man claiming to own land was bound to know the state of his own title" — was properly refused, because such is not in all cases the law. The case of *Storrs v. Barker*, cited in support of the doctrine of the instruction, goes no further than to hold that the presumption is that every one is acquainted with his own rights, provided he has had reasonable opportunity to know them.

The exceptions taken to the general charge of the Court have already been disposed of in the consideration of the several questions examined, and it is unnecessary to notice them in detail.

IV. The last point made on the part of the defendant is that the plaintiff's cause of action was barred by the Statute of Limitations.

The transcript of the record contains this statement: "Proceedings for confirmation of pueblo title considered in evidence, by which it appeared that the City of San Francisco had, under the Act of Congress on that subject, petitioned the United States Board of Land Commissioners, in the year 1853, by petition in due form, for a confirmation of the pueblo land, claiming the same under grant and the laws and proceedings of the Mexican Government, and which land embraced the land in controversy in this action, and that said claim is now, on due proceedings, prosecuted on appeal, pending and yet

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undetermined in the District Court of the United States for the Northern District of California, and that no final confirmation has yet been made therein."

By the sixth section of the Statute of Limitations (Wood's Digest, 46,) an action may be maintained by a party claiming real estate or the possession thereof under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the Government of the United States or its legally constituted authorities.

In *Johnson v. Van Dyck*, 20 Cal. 228, the Court held that the "final confirmation" to which the Act of Congress of 1851 refers is the final adjudication of the tribunals of the United States upon the validity of the title of the claimant under the Mexican grant; that until the survey which follows such adjudication is made and approved, the title is not definitely confirmed to any particular premises; that the confirmation to which the Act of this State refers is the definitive confirmation; and that the Statute of Limitations begins to run only from the time the patent may be issued. (*Richardson v. Williamson*, 24 Cal. 289.)

Thus the statute and the authorities cited and referred to settle this point.

We have noticed every question presented on the part of the appellant, and the conclusion to which we have arrived is that there is no cause for disturbing the judgment rendered.

Judgment affirmed.

WILLIAM GALLAND AND S. W. GALLAND v. E. J. LEWIS AND CHARLES HARVEY.

RETROSPECTIVE LAWS.—Where retrospective laws have been declared void, it has been upon the ground that they were in conflict with some vested right, secured either by some constitutional guarantee or protected by the principles of universal justice.

SPECIFIC CONTRACT ACT.—The Act of April 27th, 1863, commonly called the

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"Specific Contract Act," is not in conflict with the Constitution of this State, nor is it opposed to the principles of essential justice.

CONTRACT PAYABLE IN UNITED STATES COIN.—A contract for the payment of a sum of money in United States coin, entered into before the passage of the Act of April 27th, 1863, commonly called the "Specific Contract Act," can only be performed by a payment of the kind of money specified.

GOLD CONTRACT PRIOR TO APRIL 27, 1863.—A gold coin contract entered into before the passage of the Specific Contract Act will be enforced by the Courts in accordance with the provisions of said Act, in actions commenced after the passage of said Act, and a tender made in United States treasury notes on such contracts, before the passage of said Act, will not satisfy the same.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

The defendants plead the tender made before suit was commenced, and brought the United States treasury notes thus tendered into Court. Judgment was rendered in favor of plaintiffs for the money thus tendered in Court, and in favor of defendants for their costs. Plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Wm. H. Rhodes, for Appellants.

That the law of 1863 affects only the remedy, not the contract itself, would seem to be a self-evident proposition. But see *Parsons on Cont.* Vol. 2, pp. 531-534; *Hunsaker v. Borden*, 5 Cal. 289; *Thornton v. Hooper*, 14 Cal. 11. (See, also, a collection of cases in 1 *Labatt's Digest*, S. C. Dec. p. 271, Sec. 10; *Smith v. Morse*, 2 Cal. 552.)

Wm. S. Long, for Respondents.

By the Court, *SHAFTER, J.*

This is an action upon a promissory note for seven hundred and eighty-two dollars and ninety-two cents, executed September 1, 1862, and payable on the 15th of October of the same year, in United States coin. The defendant Lewis tendered the amount due upon the note February 1st, 1863, in United States notes. The action was brought May 13, 1863.

In *Lick v. Faulkner*, 25 Cal. 404, this Court decided that the

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Act of Congress passed on the 25th of February, 1862, entitled "An Act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," was constitutional.

In the case of *Carpentier v. Atherton*, 25 Cal. 564, we decided that the Act passed by the Legislature of this State April 27, 1863, commonly called the "Specific Contract Act," was purely remedial in its character, and conflicted neither with the Act of Congress nor with any known public policy. In the case of *Carpentier v. Atherton* the note upon which the action was brought was executed after the passage of the Act of April 27, 1863; but in the case at bar the note was executed about five months before, and it is now insisted that the plaintiff cannot claim the benefit of that Act, on the ground that it is not retroactive in effect.

In all the cases where laws confessedly retrospective have been declared void, it has been upon the ground that such laws were in conflict with some vested right, secured either by some constitutional guarantee or protected by the principles of universal justice. (*Terrett v. Taylor*, 9 Cranch, 43.) But when an Act like the one now in question takes a contract as it finds it, and simply enforces a performance of it according to its terms, it is not liable to objection because it may have a retroactive operation by way of relation to past events. The Constitution of this State does not prohibit retrospective legislation; and the Act of 1863, instead of being opposed to the principles of essential justice, is approved of them all. When we decided, in *Carpentier v. Atherton*, that the Act was purely remedial, we in effect disposed of the present objection.

But it is further insisted that, inasmuch as the tender was made before the Act of 1863 was passed, that the defendant had a vested interest in that defense, of which the Legislature could not deprive him.

The case of *Carpentier v. Atherton* disposes of this objection also. United States notes are lawful tender "in respect to debts that are payable in money generally, but as to the con-

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tract which is the foundation of the judgment in this case, it is more than a contract for the payment of money merely. It goes to the extent of defining by what specific act the contract shall be performed. By the admitted and settled rules of law such a contract can be performed, according to the agreement of parties, only by a payment of the kind of money specified." By the rule of the common law a tender must be of the thing or things called for by the contract. *Cole v. Ross et al.*, 9 B. Mon. 393, was an action brought upon a covenant in which the defendants stipulated to pay to the plaintiff or order three thousand three hundred and thirty-three dollars, payable in good merchantable pig metal, delivered on the bank in Greenupsbury, at twenty-nine dollars per ton. The obligors tendered money instead of iron. The Court say: "The expression 'payable in good merchantable pig metal' clearly points out the thing which is to be paid; it is not of the same import as the expression *may be paid* in pig metal. The latter, if used, would have implied an election to pay in the thing named or not, as it might suit the convenience of the obligors. The former, in direct and positive language, makes the amount payable in the thing specified, and shows that it was really a contract for pig metal, and not for money, which might be paid by the delivery of the article named; and that the sum mentioned was merely the medium by which the quality of the thing contracted for was to be ascertained according to its stipulated value per ton."

It was held in *Brewer v. Thorp*, 3 Ind. 262, that "where a contract for the future conveyance of land requires that the vendee shall labor for a specific period for the vendor, the vendee cannot entitle himself to the conveyance by tendering a sum of money as an equivalent for the non-performance of the labor." It was not, in our judgment, the intention of the Act of Congress to interfere with the obligations of contracts. A contract payable in coin is not prohibited, nor has there as yet been any legislation on the part of the General Government discountenancing contracts of that character as being detrimental to the public good. A promissory note

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payable in coin has no "obligation" independently of that provision; and so of contracts payable in currency specifically, or in bullion, or in wheat, or in iron, as in the case cited. The question of remedy upon contracts of that character is not to be confounded with this question of tender, for we consider that if the Act of 1863 had never been passed, however the debtor in a gold contract might have satisfied a general money judgment upon it in United States currency, still, under the common law controlling the question of tender, no tender could have been made in advance of action brought that did not match the terms of the "obligation."

The judgment is reversed, with directions to the Court below to enter a judgment upon the findings in conformity with the views expressed in this opinion.

M. M. TOMPKINS, ADMINISTRATOR OF THE ESTATE OF P. L. MINER, DECEASED, v. E. J. WEEKS, J. S. JOHNSTON, AND H. MORRISON.

CREDITOR MAY CONTEST ACCOUNT OF ADMINISTRATOR.—A creditor of a deceased person is interested in his estate, and is entitled to appear in the Probate Court and file objections in writing to the account of an administrator, and to contest the same.

CREDITORS CONTESTING ADMINISTRATOR'S ACCOUNT.—Where the contestants to an administrator's account stated in their exceptions that they were creditors of the deceased, and they were allowed to contest by the Probate Court, and the administrator appealed, but the transcript did not show that any proof was introduced on the subject of their being creditors, the presumption is that the Probate Court acted correctly.

ADMINISTRATOR—ADVANCES BY.—If an administrator advance money to pay off a mortgage debt upon land for which the estate is not liable, because the estate has a junior mortgage upon the same land, and in order to relieve the land from the older mortgage and let in the younger mortgage of the estate, and a loss thereby ensues, the Probate Court cannot allow him in his account for any portion of the loss sustained by the advancement thus made.

ACCOUNTS OF ADMINISTRATORS.—If there is a debt due the estate of a deceased person, secured by a mortgage on land, and another person has a prior mortgage on the same land, and the administrator, in good faith, and under the belief that the land is worth the amount due on both mortgages, forecloses the mortgage owned by the estate, and bids in the land for the amount due on both mortgages, and advances the money to pay the prior

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mortgage, or uses money of the estate for that purpose, the Probate Court cannot allow him, in his account, a credit for the money lost by the purchase if the land proves to be of less value than the amount paid to discharge the prior mortgage. If the lands thus purchased are regarded as assets of the estate, the loss cannot be determined until sold by order of the Probate Court. If, however, the creditors and heirs repudiate the purchase, and charge the administrator with the entire amount paid, the land will belong to the administrator.

ADMINISTRATOR AND SURVIVING PARTNER OF DECEASED.—The administrator has no authority nor has the Probate Court any power to authorize him to advance money, or use funds belonging to the estate for the purpose of carrying on business with the surviving partner of the intestate, and if he does so, and loss thereby accrues to the estate, he cannot be allowed for the same in his account. The administrator has no authority to intermeddle with partnership affairs, except to call upon the surviving partner to close up the same and account to him.

SAME.—Neither the administrator nor the Probate Court have any power to change the order in which the debts of the estate are directed to be paid by the Act relating to the estates of deceased persons, and an order of the Probate Court, made with the consent of the administrator, directing him to pay partnership debts, before the debts of the estate are paid, is void, and if he obey the same he cannot be allowed in his account the money used until all the debts of the estate are paid.

APPEAL from the Probate Court, Tehama County.

Weeks, Johnston, and Morrison stated in their written exceptions to the account of the administrator that they were creditors of the deceased. The contestants appealed from the order of the Probate Court allowing the items objected to.

The other facts are stated in the opinion of the Court.

W. H. Rhodes, for Appellants.

Eugene Casserly, also for Appellants.

The order of August 5th purports to authorize the administrator to pay "out of the private funds" of the estate of Miner, deceased, five thousand dollars to the surviving partner, for the purpose of "liquidating certain obligations of the firm," made before Miner's decease, "and to increase the capital stock of said firm," etc.

Such an order was not within the jurisdiction of the Probate Court, on several grounds.

If the purpose was (as is held out by the language employed) to pay off certain debts of the firm of Miner & Waynes, growing out of contracts of the firm before Miner's decease, such

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debts could only become a charge against the estate in the event of the insolvency of the surviving partner, who, having the assets, was of course alone liable for them in the first place. (*Lawrence v. Trustees, etc.*, 2 Denio, 577; S. C. [below] 11 Paige, 80; *Bloodgood v. Bruen*, 4 Seld. 362, 369, 371; *Voorhies v. Childs*, 17 N. Y. 354, 355-7, examining all the authorities.) With the debts due by the firm, the executor has no concern and no right to intermeddle in the matter. (4 Seld. 369, 370.)

In that event, (the surviving partner's insolvency,) the Probate Act has prescribed a mode of payment by special provisions, under which all creditors of an estate are required to make presentation and proof of their claims, whether contingent or absolute, for allowance by the administrator and Probate Judge, and upon rejection to prosecute the same in a District Court. (Prob. Act, Secs. 130, 132, 134, 244.)

It is not "within the jurisdiction" of a Probate Court or Judge to act upon a claim or debt against an estate, or allow or authorize the payment of it by an administrator, in any other manner. Consequently, in this aspect, the order of August 5th was a mere nullity.

The purchase of the land at the mortgage sale, and all the transactions connected with it, the loan, the allowance of the credits in the accounts, etc., were illegal and unauthorized, and beyond the power of the Court, or of the administrator.

There is probably no case in which an executor can lawfully make a purchase of property, except where the transaction is necessary for the protection of the estate, and at the same time involves it in no expenditure or liability; as where, upon a foreclosure sale, the executor holding the first or only mortgage, and the property being probably about to sell for a sum far below its value, and below the amount due on the mortgage, he bids it in for the benefit of the estate, and holds it precisely as he had held the mortgage. That was the case in *Clark v. Clark*, 8 Pai. 152, 157-8, relied on by respondent's counsel.

That, however, was very far from being the case in hand.

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Here the administrator held the second mortgage, and undertook to buy in the property and pay off a prior mortgage for two thousand nine hundred and thirty dollars and ninety-four cents, part of which he had to borrow; while it does not appear that such a step was necessary for the protection of the estate, or has been of any benefit to it, or that the property sold below its value. But, on the contrary, it appears from the administrator's own testimony, that it brought more than it was worth. (*Wilcox v. Smith*, 20 Barb. 340, 341.)

Jennison v. Hapgood, 10 Pick. 77, is also relied upon by respondent's counsel. In that case it was held that where an executor, not having assets, advances his own money to redeem land of his testator mortgaged for less than its value, and to prevent a foreclosure, he is entitled to interest on his advances. But the material facts in that case which distinguishes it from this is, that the executor had paid out his own money and taken the title to himself and another as his agent, who afterwards conveyed to him, and the only question was whether the sale should be vacated for the benefit of the testator's heirs, upon refunding to the executor his advances with interest. (Ib. 91, 92, 101.)

The very most that can be claimed in favor of the administrator is, that in a proper proceeding had either in the Probate Court, or more probably in chancery, as indicated in *Knight's Estate*, 12 Cal. 208, he should be allowed to sell the property thus purchased by him without authority, and apply the proceeds, less the amount of the Toomes' mortgage, as assets of the estate; leaving the question of protection to him in case of loss upon such sale to be then settled upon a proper showing between him and all the parties in interest. (8 Pai. 157-8; *Rosseter v. Cossit*, 15 N. H. 38, 42-45; *Wilcox v. Smith*, 26 Barb. 316, 340, 341, 354, 355.)

George Cadwalader, for Respondent.

In the consideration of the question now under examination, it will be seen that the purchase of the mortgaged property, and the payment of the Toomes' mortgage, was one of those

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common transactions illustrated every day in business communities, that as yet no loss has accrued to the estate therefrom, and that the property purchased is now part of the assets of the estate, and as such, liable to the jurisdiction of the Probate Court as any other property belonging to said estate. (4 Edwards' Ch. 718.)

While it is true that the act of purchase was without antecedent authority from the Probate Court, and the administrator acted at his peril in making the purchase, still, the subsequent ratification of the Probate Court was equivalent to previous authority vested in the administrator to make the purchase.

The "Estate Act" does not pretend to define the powers and duties of administrators or executors in all cases, nor of the Probate Court. The "control and preservation of estates," is given to the former, subject to the supervision of the latter.

In *Dayton on Surrogates*, page 483, it is remarked that: "An executor, however, is only required to manage the estate in his charge as a prudent man would his own; and in case of loss, the question of liability depends upon the particular circumstances of the case. He is not chargeable with the consequences of a disastrous exercise of his discretion, unless accompanied with such negligence as raises a presumption of wilful misconduct."

In *Jennison v. Hapgood*, 10 Pickering, 78, it was decided: "That if an executor not having assets advances his own money to redeem land of the testator, mortgaged for less than its value, and to prevent a foreclosure, he is entitled to interest on the money advanced."

Our statute does not contain a prohibition against the exercise of power not granted. Nor are the powers of the Probate Judge defined with any precision, while the majority of acts which every administrator is called upon to perform are not expressly warranted by the statute.

At his peril he pays taxes, insurance, and the costs of repairs, assessments on stock belonging to the estate, invests the surplus money thereof, and does a hundred other things necessary to preserve the estate, without being able to point to the sec-

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tion of the statute which gives him express authority so to do. The Probate Court, reviewing these and kindred acts of the administrator, considers not the question of power, or want of power, but satisfies itself whether the payments were necessary to preserve the estate, and whether the administrator, in making them, acted in good faith. Satisfied on these points, the payments will be allowed. (3 Bradford, 13.)

Executors are not liable for the loss of funds of the estate, if they act with ordinary diligence; nor for the mismanagement or insolvency of their agents which they could not foresee or control. (6 Watts, 485.)

Payments made by executors or administrators in good faith, will be allowed. (6 Greenleaf, 127; 10 Pickering, 77; 2 Ashmead, 437; 11 Harris, 95.)

"Executors will be justified in pursuing a course which a judicious man would do under the same circumstances, looking alone to his worldly interests." (*Kee v. Kee*, 2 Grattan, 116.)

Guided by principle or authority, the Court will declare that the administrator was justifiable in making the purchase, and paying off the Toomes mortgage, and that the order of the Probate Court was correct affirming the act of the administrator.

We now propose to consider the question whether the Probate Court had the power to make the order of May 5th, 1861, directing the administrator to pay the surviving partner the sum of five thousand dollars.

The appellants make it a question of a naked want of power; not contending that the advance was injurious to the estate or the creditors thereof.

Indifferent observation will detect a great difference between this power and one which orders a payment that directly diminishes the assets of an estate. Here the power invoked was one that tended to preserve and increase the value of the estate, to the manifest advantage of both heirs and creditors, while the argument of appellants' counsel assimilates it to a power that would authorize the Probate Court to direct the

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payment to persons having no claims upon the estate of large sums of money, to the direct detriment of both heirs and creditors — and in this lies the vice of appellants' argument — most fully proved by the objects of and the consequences which result from the exercise of these widely variant powers.

Executors and administrators are charged with the value of all property embraced in the inventory, and by the one hundred and ninety-eighth section of the Estate Act, the interest of a decedent in a firm is required to be "appraised and inventoried as other property," but to the surviving partner is given the right to continue in possession of the effects of the copartnership, and to settle its business, subject to the surveillance of the Probate Judge, and to the administrator is given authority to maintain any action against him that his intestate could.

The administrator is therefore to see that the surviving partner does not abuse his trust by sacrificing or squandering the property of the firm, in which case it is the duty of the administrator to interfere and apply for a receiver to take charge of the assets and settle the business of the firm. Thus, Story on Partnerships, section three hundred and forty-eight, says: "The survivors are entitled to close up the affairs of the firm, to collect and adjust the debts due to it, and to pay its debts and discharge its liabilities. They are also bound to apply the partnership property to the like purposes with reasonable diligence. If they are negligent in the discharge of their duties in these particulars, Courts of equity will interfere, and upon the application of the representatives of the deceased partner, appoint a receiver, and order a sale of the partnership property, and wind up the affairs of the firm. (*Evans v. Evans*, 9 Paige, 178.)

Notice of an application for an order to heirs and creditors is only necessary when required by the Estate Act — in other cases it may be omitted. The Probate Judge makes numberless orders affecting the estate, without notice being given thereof.

Thus, under section one hundred and twenty-one, he sets

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apart property exempt from execution; under section one hundred and twenty-two, makes the allowance for the family of the deceased; under section one hundred and thirty-two, he approves of claims against the estate; under section one hundred and fifty-two, he approves the sale of the personal property of the estate; under section two hundred and one, he orders a debt due the estate to be compounded. (Dayton, 283.)

By the Court, SAWYER, J.

On the 9th of October, 1862, the respondent, Tompkins, as administrator of P. L. Miner, deceased, filed his first annual account, and asked that a day for the settlement be appointed and his account allowed. A day having been appointed for the purpose, the appellants, Weeks, Johnston and Morrison, appeared and filed exceptions to certain items charged by the administrator in his account, alleging themselves to be creditors of the estate. The administrator objected to the filing of their exceptions, and moved to strike them out, on the ground "that it does not appear from said exceptions that said contestants, or either of them, is interested in the said estate;" which objection and motion was overruled. After an adjournment, the administrator again objected to "the contestants appearing, for the reason that neither of them come within the provisions of the statute authorizing persons to appear and contest administrator's accounts;" which objection was also overruled, and the respondents now insist upon these objections. Under sections two hundred and twenty-six and two hundred and thirty-four of the Probate Act, "any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same." A creditor is interested in the estate within the meaning of these provisions. But it is insisted, that there was no proof that contestants were creditors—that it is not sufficient to allege in the exceptions, that they are creditors without proving the allegation. The point of the objection taken in the Court below, was not that there

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was a defect of proof, or no proof. If that was the objection it should have been specified. The objection was, that "it does not appear from the exceptions," that contestants are interested—not from the proofs—and, that "neither of them come within the provisions of the statute," etc. The point of the objection evidently was, that a creditor is not entitled to contest. If it referred to proof, it does not appear whether any proof was introduced or not, or if so, what proof. If it related to a question of fact dependent on proof, the Court determined the fact against the respondent, and we cannot review its action without knowing whether it acted upon evidence or not, and if so, upon what evidence. There is nothing to show that the allegation of the interest of the contestants was controverted, and the presumption is, that the fact was correctly determined by the Court.

One A. G. Toomes held a mortgage on a rancho, executed by Alpaugh and Salisbury, for a part of the purchase money. The amount due on the mortgage July 26, 1862, including interest, etc., was two thousand nine hundred and thirty dollars and ninety-four cents. Alpaugh and Salisbury, in the lifetime of deceased, executed in his favor a second mortgage on said rancho to secure the payment of one thousand dollars borrowed money, and interest at three per cent per month, which sum, including interest, etc., on the said 26th day of July, amounted to two thousand two hundred and thirteen dollars and forty-four cents. One Hollister held a third mortgage. The administrator brought suit to foreclose the second mortgage, making the holders of the other mortgages parties. A judgment of foreclosure was entered, and the several sums above mentioned were directed by the judgment to be paid, in the order named. At the sale under the judgment, the administrator, with a view of protecting the estate, and on the supposition that the property was worth more than the amount due on the first mortgage, in good faith, but acting upon his own judgment, without any application to, or direction from the Probate Court, bid off the rancho at five thousand dollars. Not having cash in hand sufficient for the purpose, he borrowed a

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considerable portion of the money at three per cent per month interest, with which to pay the amount due on the first mortgage. He paid the full amount, viz: two thousand nine hundred and thirty dollars and ninety-four cents. This item, thus paid upon his own responsibility, without any authority from the Probate Court, and the items of interest on the money borrowed to enable him to make the payment, are objected to by the contestants. The items were allowed, and the allowance is assigned as error. Alpaugh and Salisbury were insolvent at the time, and there was no prospect of making the money, unless it could be made out of the mortgaged property. The Court found as a fact, that the transaction was made by the administrator in good faith, believing it to be for the advantage of the estate; that the rancho, at the time of the purchase, was worth five thousand dollars, although the only witness (Toomes) who testified on this point stated, on cross-examination, that he did "not think the land would have sold for five thousand dollars." And it is pretty evident from the testimony, that it was not a very safe purchase at that amount.

It is insisted that an administrator is only required to manage the estate in his charge as a prudent man would his own; that in case of loss the question of liability depends upon the particular circumstances of the case; that he is not chargeable with the consequences of a disastrous exercise of his discretion, unless accompanied with such negligence as raises a presumption of wilful misconduct; that in this case no such negligence exists; that the administrator acted in good faith, and as a prudent man would have done in the management of his own affairs, and that he ought to be exonerated from the consequence of his error in judgment, if there be any; and upon this principle the Court below appears to have determined the question. But conceding, for the purposes of the argument, the principle to be correct, to render it applicable, the action of the administrator must be in a matter where the discretion exists. It must be an act which the law authorizes him to perform—one within the general scope of his powers as

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administrator. An administrator has no right to speculate with the moneys belonging to the estate with the idea that he can make large profits, and greatly enhance its value. If he sees an opportunity where he can purchase a farm for five thousand dollars, which he is confident he can sell within a few days for ten thousand dollars, and makes the purchase with the funds of the estate, and it turns out to be a losing operation, he will be chargeable with the loss, no matter how pure his motives or how enticing the prospect may have been. He would urge in vain as a defense, that the property was well worth ten thousand dollars at the time; that careful business men regarded it as an excellent operation; that he acted in good faith with the confident and reasonable expectation that he should double the assets of the estate. Such an operation is not one intrusted by the law to his discretion. It is not within the general scope of his powers as administrator. And yet in what respect would such a transaction differ in principle from the one under consideration? *The prior mortgage of Toomes was not a charge against the estate. No part of it could ever have been paid out of the assets of the estate.* It is true, the estate held a subsequent mortgage, which might be utterly lost unless the mortgaged property could be made to pay it. But substantially, when reduced to its elements, the real, and only question with the administrator was, will it be a good speculation for the estate to buy the rancho at two thousand nine hundred and thirty dollars and ninety-four cents? Can I make for the estate by the speculation the sum of two thousand two hundred and thirteen dollars and forty-four cents, more or less? For it does not affect the principle in the least, whether he saves that amount of indebtedness which he would otherwise lose, or makes the same amount as an original speculation, pure and simple, by the use of the funds of the estate in the purchase of lands, where no indebtedness against, or charge upon the estate existed.

We have been referred to no case by the respondent — and we have been unable to find one — where an administrator has been exonerated from loss under similar circumstances, or upon

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similar principles; on the contrary, the case of *Knight's Estate*, 12 Cal. 208, is directly in point the other way.

The fact disclosed by the record in that case are very nearly analogous to the facts in the case under consideration. As they are imperfectly stated in the report of the case, we state them very fully, as they appear in the record. They are as follows:

Knight in his lifetime purchased one undivided fifth of the Suscol Rancho. At the time of the purchase and of Knight's death, there was a mortgage upon the rancho for twenty-five thousand dollars. But Knight was not personally liable for the money secured. The interest of Knight's estate in the rancho was appraised at twenty-four thousand dollars. The mortgagee was threatening to foreclose, and the administrator, in good faith, thinking to promote and protect the interest of the estate, entered into an arrangement with the mortgagee, by which he was to pay in cash two thousand five hundred dollars, and interest on two thousand five hundred dollars more, making in all five thousand dollars, or one fifth of the whole, corresponding to the interest in the land held by the estate. The mortgagee, on his part, in consideration of the arrangement, agreed in writing not to foreclose as against the estate, until after the title should be confirmed by the Land Commissioners, before whom the claim was pending; and after such confirmation, upon the payment of the remaining two thousand five hundred dollars and interest, to release and discharge the entire mortgage as to the undivided fifth held by the estate. At the time of this arrangement the value of the interest of the estate had depreciated to twenty thousand dollars, but in the opinion of competent judges of real estate there was a prospect, and it was confidently expected, that it would soon largely appreciate again. The administrator paid the two thousand five hundred dollars, and continued thereafter to pay interest on the remaining sum due in pursuance of the arrangement. The title was at length confirmed, but still the land continued to depreciate in value. The mortgagee, after the confirmation, again threatened to foreclose and sell,

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to prevent which the administrator, by order of the Probate Court, sold the said property for three thousand five hundred dollars, that being the highest amount that could then be obtained. The sale was confirmed, and a portion of the proceeds sufficient for the purpose, by order of the Court, applied to the satisfaction of said remaining sum of two thousand five hundred dollars, due on the mortgage. The result was a loss of two thousand four hundred and sixteen dollars and sixty-seven cents, which sum the administrator claimed to have allowed, on the grounds that he had acted in good faith and as a prudent man would have done under the circumstances, and that the approval of the sale and application of the proceeds by the Probate Court was a ratification of his acts. On exception to this item the Probate Court refused to allow it, and the administrator appealed.

The principles applicable to such cases are so clearly and forcibly stated by Mr. Justice Baldwin in deciding the case that we quote his language at length. At page two hundred and seven he says: "This is unquestionably a hard case on the administrator, for he seems to have acted in good faith. But we cannot relax or set aside the rules of law to suit the exigencies of particular cases or relieve individual instances of hardship.

"The statutes of this State do not allow an administrator to pay even the debts due by an intestate, except in a particular way. Certainly they do not allow him to pay money not due by an intestate, upon an idea that the payment might be beneficial to the estate. He is to take care of, manage and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all incumbrances resting on the property, upon the notion that the property may increase in value, and thereby a speculation may be made for the estate. If this were so, an administrator might consume all the assets of the estate in clearing the title to a portion of the property, and then the property might turn out to be valueless or worth but little. If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an incum-

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brance, it is not impossible that a Court of chancery might order the expenditure of the money needed to remove such incumbrance. The rule of equity is that a trustee has a right, in questions of responsibility and difficulty, to seek the direction of a Court of chancery, touching his conduct in the trust, and that the decree of the Court is a protection to him. But if he undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment he must bear the loss of a failure. It would be a most dangerous precedent to hold that an administrator may speculate with the funds of the estate, or pay charges not allowed by law, though solely with a view of benefiting the estate, and then throw the loss upon the estate, and assign his good intentions as a defense to the injurious consequences of his acts.

"The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he cannot advance money to remove incumbrances, unless his intestate was bound to pay the money. If he takes the responsibility of improving the estate or bettering the title in this way, it must be at his own risk. The loss cannot be visited upon the heirs who gave him no authority to cause it. Nor can he ask legal protection when he has himself, though with the best motives, gone beyond the provisions of the law."

The principles thus laid down are decisive of the question under consideration. This record certainly does not present a more meritorious case, than that in the matter of *Knight's Estate*. If there is a loss, then, it must fall upon the administrator.

But the lands purchased still remain in the hands of the administrator unsold, and are classed by him as a portion of the assets of the estate. If the creditors repudiate the purchase, and charge the administrator with the entire amount paid, the property purchased will belong to him. They can-

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not compel him to sustain the loss of the entire amount paid, including interest, and also avail themselves of the lands purchased as assets of the estate. But if the lands are to be regarded and administered as assets, the condition of the estate is not yet such as to enable the Probate Court to pass upon this item. It will be necessary to reserve the question till the lands are sold, and the amount of the actual loss ascertained.

At the time of Miner's decease, he was a partner with one Jaynes in the erection of a flouring mill. It does not appear what progress had been made in the enterprise at the time of intestate's death. On the fifth of August, several months after his decease, Jaynes, the surviving partner, presented to the Probate Judge of Tehama County a petition stating the partnership; that previous to Miner's decease the firm were engaged in erecting the flouring mill mentioned, and had entered into contracts for the construction thereof, which were still in force and binding upon the firm; and since the decease of Miner, petitioner had been engaged in erecting said mill and carrying out the contracts made by the firm in the lifetime of decedent; that the assets of the firm at the time of filing petition, including cost of mill thus far (forty thousand six hundred and four dollars) were sixty-two thousand two hundred and twenty-nine dollars and twenty-eight cents; that in erecting the mill and carrying out the contracts a larger amount of money had been required than he could realize from the sale of property of and collection of the debts due the firm; that to meet the obligations of the firm arising out of said contracts it was necessary to have immediately ten thousand dollars; that he could not collect the money, or borrow it except at high rates of interest; and that it was necessary to have this amount of money to protect the interest of the estate of decedent in the property of the firm. The amount of indebtedness of the firm is not stated. Upon these representations, he asks an order authorizing and directing the administrator to advance five thousand dollars out of funds of the estate to offset a like amount to be advanced by himself for the purpose specified. The administrator appends

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an admission in writing that the matters stated in the petition are true, and consents that the order asked may be made. On the same day, without any citation to, or appearance by other parties interested in the estate, the Probate Judge, after reciting the matters set out in the petition, and the necessity of an appropriation, "ordered that said administrator of said estate be and he is hereby authorized to pay and advance to said Samuel Jaynes, surviving partner, out of the private funds of said estate the sum of five thousand dollars, for the purpose of liquidating obligations existing against said firm, growing out of contracts made by said firm before the decease of decedent. * * * The above sum of five thousand dollars is to offset against a like sum of five thousand dollars to be advanced by said surviving partner, and to increase the capital stock of said firm by the gross amount of said sums."

The administrator not having ready money of the estate in his hands, borrowed for the purpose a large amount on interest at three per cent. per month, and paid over to Jaynes four thousand seven hundred and six dollars and fifty-three cents. Of this sum four thousand dollars were borrowed of one Hort, and a note for ten thousand dollars, secured by a mortgage on real estate was assigned as security, with the approval of the Probate Judge. The sums thus borrowed and paid over to Jaynes, and interest paid on the money so borrowed, are items charged in the account of the administrator, and excepted to by the contestants. At the hearing the Probate Judge found that the borrowing of the money, payment of interest, etc., were necessary for carrying out the aforesaid order of the Probate Court in paying the sum of four thousand seven hundred and six dollars and fifty-three cents to Samuel Jaynes, surviving partner, and that the transactions were made by the administrator in good faith, and with a view of furthering the best interests of the estate. These items were allowed, and contestants excepted. The allowance is relied on as error.

If there are degrees in error, in our opinion these transactions of the administrator and Probate Court are less defensible than those already discussed. Upon a very imperfect and

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unsatisfactory showing, without notice to any of the parties interested in the estate, upon the request of the surviving partner and the consent of the administrator, upon the same day the petition was presented the Court authorized and directed the administrator to pay to said surviving partner five thousand dollars out of the assets of the estate; and to enable him to carry out this order, authorized the administrator to borrow the money on interest at three per cent. per month. The Court had no jurisdiction to make the order, and the administrator no authority to execute it. The partnership was dissolved by the decease of Miner. The partnership property was assets of the firm, and subject to the exclusive management and control of the surviving partner. It was not assets of the estate in the hands of the administrator. Only the share of the deceased in the residuum of the partnership assets, after the affairs of the partnership should be wound up and the debts paid, would be assets of the estate in the hands of the administrator.

The administrator had no authority to intermeddle at all with the partnership affairs, except so far as he was entitled to call upon the surviving partner to proceed and close up the partnership affairs and account to him for the share of the surplus belonging to the estate. The authority of the administrator only extended to settling up the affairs of the estate, paying the debts and distributing the remainder, under the direction of the Probate Court, to the parties interested.

Section two hundred and thirty-nine of the Act relating to the "estates of deceased persons" prescribes the order in which the debts of the estate shall be paid; and, in case of a deficiency of assets, section two hundred and forty-one provides that, "no creditor of any one class shall receive any payment until all those of a preceding class shall be fully paid." Neither the administrator nor the Probate Court has any authority to change the order of payments. But the direct effect of the payment of five thousand dollars by the administrator to Jaynes, in pursuance of the order in this case, was to transfer that amount of money from the assets of the estate

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of the deceased to the assets of a dissolved, and, perhaps, insolvent partnership. And the result would be to give to the creditors of the partnership a preference to that extent over the creditors of the estate, whereas the law gives the preference, as to that fund, to the creditors of the estate. It would be taking five thousand dollars from the creditors of the estate, and giving it to those who have no claim against the estate unless the surviving partner is insolvent. (*Lawrence v. Trustees, etc.*, 2 Denio, 577; 11 Paige, 80; *Bloodgood v. Bruen*, 4 Seld. 362, 369, 371; *Voorhis v. Childs*, 17 N. Y. 354-357.)

The transfer was made according to the express terms of the order, "for the purpose of liquidating obligations existing against the firm," etc.; that is to say, to pay the debts of the firm in preference to the debts of the estate, in case the estate should turn out to be insolvent, a contingency which seems to be by no means improbable; and "to offset against a like sum of five thousand dollars to be advanced by said surviving partner and to increase the capital stock of said firm by the gross amount of said sums." Such, at all events, is the result. Whatever powers a Court of equity may or may not have upon a proper showing, with the proper parties all before it, to authorize the administrator to use the funds of the estate in an extraordinary manner for the purpose of subserving the interests of the estate, we are clear that such a diversion and misapplication of the assets of the estate as was made in this case, is beyond the powers of the administrator and the jurisdiction of the Probate Court; and if any loss results it must fall upon the administrator. If the principal sum cannot be allowed, it of course follows that the items of interest paid for the moneys borrowed and improperly appropriated cannot be allowed. We cannot tell from the state of the record the amount of loss, if any, sustained by the transactions considered.

The fact does not distinctly appear in the record, but we infer from some facts incidentally stated in the report of the administrator, that the partnership assets have all been absorbed, and that a considerable amount of partnership debts

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are still unsatisfied. It seems probable also, but it does not appear otherwise than by inference, that the demands of the contestants are against the firm. If so, and the contestants have availed themselves of the money paid over to the surviving partner under the order of the Probate Court to increase the amount received out of the partnership assets, it would seem to be inequitable that they should also insist upon charging the administrator, and compelling him to pay the sum a second time to enable them to take a second dividend out of the assets of the estate. In this way the contestants would have the benefit of ten thousand dollars when there was really but five thousand dollars belonging to the estate—the administrator, in consequence of his mistake, being chargeable with the other five thousand dollars. Whether the contestants have received any portion of the money thus paid over the record does not disclose.

This case, like that of *Knight's Estate*, is a hard one for the administrator, and it is greatly to be regretted that one who has assumed what is usually a thankless trust, and who seems to have acted in good faith, and in part at least under the sanction of the Probate Court, should, through a mistake as to the extent of his authority and of the powers of the Probate Court, be visited with consequences so severe as seem likely to result to the administrator in this case. But we must administer the law as we find it, irrespective of the hardship of particular cases.

The item of five hundred and thirty-two dollars and three cents, for sundry items paid on account of the estate, was properly allowed.

The record does not disclose facts sufficient to enable us to determine whether the item of eight hundred dollars paid to Hickox was properly allowed or not.

The order appealed from is reversed, and the cause remanded for further proceedings.

Points decided.

E. L. BRADLEY AND M. S. GARDNER v. O. HARKNESS.

COPARTNERSHIP.—A copartnership is the result of agreement between the parties and one of the firm cannot sell out his interest in the same, nor can a stranger buy in the same at pleasure. Where such purchase or sale is made *with* the consent of the firm, it works a dissolution of the partnership, and necessitates the final closing out and settlement of the old firm.

TENANCY IN COMMON.—A tenancy in common results from a rule of law, by which it is controlled and governed, and each cotenant sells out or incumbers his interest at pleasure, regardless of the knowledge, or consent, or wishes of copartners, without affecting the legal relation existing between them, beyond the going out of one and coming in of another.

DISSOLUTION OF TENANCY IN COMMON.—A mere desire of one of the tenants in common is sufficient to authorize the Courts to dissolve the relations existing between them.

DISSOLUTION OF COPARTNERSHIP.—A mere desire of one of the copartners is not sufficient to authorize the Courts to decree a dissolution of the same, and a settlement of its affairs, but cause must be shown.

COMPLAINT IN AN ACTION FOR PARTITION.—A complaint in an action for partition must aver that the cotenants hold and are in possession of real property as joint tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action.

COMPLAINT BY ONE JOINT OWNER FOR AN ACCOUNTING AND SALE OF WATER DITCH.—A complaint in an action for an accounting touching the affairs, rents, and proceeds of a water ditch, and for a sale of the property and a division of the proceeds, which first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of the affairs of a partnership or for a partition.

RELATIONS OF OWNERS OF WATER DITCHES TO EACH OTHER.—The joint proprietors of water ditches in the mining districts, in the absence of any special facts constituting them something else, are tenants in common of real estate, and their rights in the ditches and sales of water are governed by the law of tenancy in common.

PARTITION OF WATER DITCHES, AND TAKING ACCOUNT.—In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interest of his cotenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same.

FORECLOSURE OF MORTGAGE IN ACTION FOR PARTITION.—In an action for partition, the plaintiff cannot foreclose a mortgage which he holds on defendant's interest in the property, and cut off defendant's equity of redemption by an absolute sale as in partition.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

Statement of Facts.

The following is the complaint in this action:

"E. L. Bradley and M. S. Gardner v. Osmyn Harkness and James Armstrong.

"The above named plaintiffs, by their attorneys, complain of the above named defendants, and for cause of action aver, that on the 12th day of April, A. D. 1858, they, together with one Robert M. Trim, since deceased, under the name and style of the Dutch Flat Water Company, became the copartners of the defendant Harkness, in a certain water ditch situate in Township Number Four, county and State aforesaid, the same being constructed to convey water for mining purposes, commencing at a point on Cañon Creek, and conveying water therefrom to Gold Run, Indiana Hill, Gophertown, and Buckhorn Hill, being from five to six miles in length, and generally known by the name of the Indiana Ditch.

"That at the date aforesaid, they and the said Trim, since deceased, became and were the owners of seven nineteenths of the said Indiana Ditch, and in proportion as seven is to eleven, were copartners of the said Harkness therein. That on the 13th day of June, 1859, they, together with said Trim, since deceased, acquired one additional nineteenth interest in said ditch; since which last mentioned date they and the said Trim, until his death, as hereinafter stated, under the name and style of the Dutch Flat Water Company, were copartners of the said Harkness in said ditch in the following proportions: the Dutch Flat Water Company had and owned eight nineteenths and the said Harkness had and owned eleven nineteenths thereof. And plaintiffs further show that the eight nineteenths of said ditch so held by the Dutch Flat Water Company as aforesaid, was the partnership property of said firm; and that on or about the 16th day of June, A. D. 1861, the said Robert M. Trim departed this life intestate, in the county aforesaid, since which time plaintiffs have been and are still the surviving partners of said firm, and have transacted their business under the same common name.

"And plaintiffs further show that from the date of owner-

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ship and copartnership with the said defendant, as hereinbefore stated, until the death of the said Trim, they and the said Trim, under the name and style aforesaid, were the owners of the said eight nineteenths, and copartners with the said Harkness in proportion to their said ownership; and that since the death of the said Trim they have continued as surviving partners to own the said eight nineteenths of said ditch, and in that proportion copartners with the said Harkness.

" And plaintiffs aver that said Harkness, on the 12th day of April, A. D. 1858, became a copartner with the said Dutch Flat Water Company in the ownership affairs and business of the Indiana Ditch aforesaid; that his interest was then and ever since has been eleven nineteenths thereof, and his copartnership interest therein proportionate to his ownership as aforesaid.

" And plaintiffs further show that the said Harkness has during the whole period of the copartnership aforesaid, managed and controlled its business and affairs, has had the same under his sole supervision, and has collected and received all the rents and profits arising from the sales of water from said ditch, which sales have amounted, exclusive of expenses, to the net aggregate of about the sum of nine thousand five hundred and fifty dollars, all of which he has retained and converted to his own use, except the sum of two hundred and sixty dollars paid over to plaintiffs during the year A. D. 1858. And the said plaintiffs, upon their information and belief, aver that the said Harkness is indebted to them in about the sum of four thousand dollars for money had and received by him as their proportion of the proceeds from said ditch, and they aver that they have oftentimes, prior to the commencement of this suit, demanded of the said defendant to pay over to them their proportion of the said proceeds, and to render an account of the business and affairs of said copartnership, and that the said defendant has hitherto and still does obstinately and without any just ground refuse to settle with plaintiffs or to render an account, or to pay over plaintiffs' portion of the said proceeds, or any part thereof, except the said sum of two

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hundred and sixty dollars before mentioned; and plaintiffs represent that their copartnership interest in said ditch, so long as it shall remain in the possession and under the control and management of the said Harkness, will be utterly worthless to them, and yield no income, and they say and aver that said ditch property cannot be divided or partitioned without serious damage to the whole property.

"And plaintiffs further show that defendant Harkness on the 7th day of July, A. D. 1860, executed, acknowledged, [and] delivered to the defendant Armstrong a mortgage on his undivided interest in said copartnership property, to wit: The ditch aforesaid, purporting to be given to secure a debt for two thousand one hundred dollars, bearing interest at the rate of two per cent. per month from date until paid, which mortgage was recorded in the Recorder's office of Placer County, on the 10th July, A. D. 1860, and remains unsatisfied upon the record. And plaintiffs say that said mortgage was given to secure the individual indebtedness of the said Harkness to said Armstrong, and that the same and the demand therein mentioned are subject and subordinate to the rights of the plaintiffs as copartners of the said Harkness.

"Plaintiffs claim that the amount which may be found due them on a settlement of the said copartnership takes precedence and has priority over the said mortgage.

"Wherefore, the premises considered, plaintiffs pray the decree of the honorable Court for a dissolution of the copartnership existing between them and the defendant Harkness. They ask that an account be taken between them and the said Harkness, touching the affairs, rents, and property of said ditch, and for judgment against said Harkness for the sum which may be found due upon the taking of said account; that the sum so found due be decreed to have priority over the mortgage lien of said Armstrong; that said ditch be sold to the highest bidder for cash, after giving due notice of the time and place of sale, and the proceeds arising from such sale be applied as follows, to wit:

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"*First* — To the costs of this action and the expenses of making said sale.

"*Second* — That eight ninetenths of said proceeds, after deducting said costs and expenses, be paid over to plaintiffs.

"*Third* — To the payment of the Armstrong mortgage.

"*Fourth* — The surplus, if any, to be paid to defendant Harkness. And plaintiffs further ask that they may be purchasers at said sale, and that after the application of the proceeds as may be directed by the Court, that the said Armstrong be decreed to satisfy his said mortgage.

"And plaintiffs pray for such other and further relief as equity sanctions, and for general relief.

"HALL & SMITH,

"Attorneys for Plaintiffs."

The defendant demurred to the complaint. The demurrer was overruled, and defendant answered. On the trial plaintiffs recovered judgment, and defendant appealed both from the judgment and from an order denying a new trial.

Charles A. Tuttle, for Appellant.

Tweed & Craig, for Respondents.

The learned counsel for appellants objects that the record here embraces two theories, and that both cannot be right; that under the theory upon which this case was tried and judgment rendered, the judgment is erroneous, and must be reversed. We answer that if it were true that two theories are presented, yet if one of them will support the judgment, we may rely upon it — though the other may have been assigned as the ground of judgment; for a right judgment will not be reversed, because a wrong reason has been assigned for it. (*Helm v. Dumas*, 3 Cal. 454; *Mills v. Barney*, 22 Cal. 240.)

All the facts necessary to support the judgment are pleaded and found. Appellant objects that the proceedings do not purport to be under the statute authorizing the partition of real estate. We are not aware of any rule of law which

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requires that statute to be specially pleaded. All that our system of pleadings require is a concise statement of the facts constituting the cause of action.

If the complaint shows a partnership at all, it shows it in both the ditch and its proceeds; and will it be contended that in an action to dissolve a partnership, there cannot be an accounting of profits already received, and also a distribution of the remaining assets of the partnership?

Suppose, however, that we are wrong in this view — what follows? That simply a tenancy in common is shown with a right to partition, and that the averments touching the partnership and prayer for distribution were mere surplusage, which might, upon motion, have been stricken out.

The fact that there was a partnership relation between the parties is the *ultimate, issuable* fact, which is to be proved by the evidence, if denied, and is, therefore, the only fact necessary to be averred in the pleadings. The way or manner in which this relation was created or existed, whether by a special agreement between the parties, or whether it arose by implication of law from the manner in which they conducted their business, or the acts, conduct, or speeches of the parties, it is unnecessary to aver, because they are but *matters of evidence*, constituting not the *ultimate* fact, *but only the prior or probative facts*, the former of which it is alone necessary to aver, and where the latter are averred, it is bad pleading.

"It is the ultimate fact, and not the prior or probative facts, which should be set forth." (*Green v. Palmer*, 15 Cal. 416, where this subject of pleading is fully considered.)

The fact of a partnership is to be proved like any other fact, by evidence pertinent to the case. (*Hudson v. Swain*, 6 Cal. 455.)

It would be sufficient to show that the real estate was purchased with partnership funds for partnership purposes. (*Dupuy v. Leavenworth*, 17 Cal. 262.)

The business of selling water from a ditch owned by the

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parties, and the profits arising therefrom, may properly be regarded as partnership operations. (*Abel v. Love*, 17 Cal. 233.)

Partnerships are usually proved by the oral testimony of persons who know that the alleged partners have actually carried on business in partnership, and it is unnecessary to produce any deed or other agreement by which the copartnership has been constituted. (Collyer Part., Sec. 686, and note; 2 Greenleaf Ev. Sec. 479.)

It may exist in relation to interests in real estate, such as the working of a mine, and "when persons having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, *it may fairly be contended that they have entered into an agreement which gives to that interest the nature and subjects it to the doctrine of a partnership in trade.*" (Story Part., Sec. 82.)

At the common law, no particular forms or solemnities are required to constitute a partnership between the parties. It is sufficient that it is formed by the voluntary consent of the parties.

The members of a joint stock company, the interest in which is generally represented by shares, can buy, sell, and incumber their interest at pleasure, and yet a joint stock company is but one form or kind of partnership. All the property of a joint stock company may consist of a mine, or a ditch, or other real estate, and yet it is still a partnership, and their property is still partnership property. (Story on Partnership, Sec. 164, 213; Collyer on Partnership, Secs. 1,078-1,098.)

The averment in this complaint "*that said ditch property cannot be divided or partitioned without serious damage to the whole property,*" was evidently inserted by the pleader to show that a division of the property in this way would not be for the best interest of the parties, and that therefore it should be sold. It is true that the word "partitioned" is used in connection with the word "divided;" but it is evident that it was not used in any such technical sense as that the pleader intended thereby to base his course of action upon a tenancy in common.

The whole complaint, from beginning to end, avers that the

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parties held and owned the property as partners, and not as tenants in common, and there is therefore no just foundation for saying that the pleader rests his case upon these double relations of ownership.

By the Court, SANDERSON, C. J.

The demurrer to the complaint ought to have been sustained. It proceeds upon two legal theories which are wholly inconsistent. It first alleges a copartnership in general terms in the ditch, which is followed by allegations respecting the management thereof and its rents and profits. It then drops the copartnership theory and adopts that of a tenancy in common in real estate, and avers that the ditch cannot be divided or partitioned without serious injury, and asks that an account of the rents and profits may be taken and the ditch sold, etc. The pleader seems to have been unable to determine which was the true theory, and in his doubt and uncertainty concluded to partially incorporate both in his complaint, being satisfied that one or the other must suit the facts to be developed by the evidence. In addition, and apparently for the purpose of completing his salmagundi, the pleader throws in a note and mortgage of the defendant upon his interests in the ditch, and asks that it may be foreclosed and defendant's equity of redemption cut off by an absolute sale, as in partition, of the ditch. This style of pleading, if allowed, would lead to most pernicious results. All correspondence between matters of allegation and matters of proof would be dispensed with and the judgment or decree allowed to proceed upon a theory of its own and not *secundum allegata*, but regardless of the pleadings.

We cannot, if so disposed, discard any part of the complaint as surplusage, for the complaint does not state facts sufficient to constitute a cause of action under either theory. In the absence of any special facts constituting them something else, the proprietors of ditches in the mining districts are tenants in common of real estate, and their rights in the ditch and in the

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profits arising from the sales of water, although in the latter respect analagous to those of copartners, are governed by the law of tenancy in common. The ditch is real estate, and each proprietor buys in, or sells out, or incumbers his interest at pleasure, regardless of the knowledge, or consent, or wishes of his coproprietors, and without affecting the legal relation existing between them beyond the going out of one and the coming in of another. This cannot be done where a copartnership exists. One cannot buy in or sell out of a partnership at pleasure. Such an act would of itself work a dissolution of the partnership and necessitate its final settlement and closing out. A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of agreement between parties, which also supplies the rules for its government. The former relation is undisturbed by a change of tenants, but the latter admits of no change as to its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created. Thus the incidents annexed to each have a different origin and are diverse. Also, the proceedings for a dissolution of these relations are different and are grounded upon entirely different facts. As to the first, the mere desire of one of the tenants is sufficient to set the Courts in motion; but as to the latter cause must be shown.

The complaint in this case does not aver a contract of copartnership between the plaintiffs and defendant; on the contrary, it is apparent from the facts, so far as they appear, that there was no partnership between them. The averment is that the plaintiffs, on the 12th of April, 1858, under the style of the Dutch Flat Water Company, became the copartners of the defendant Harkness in a certain water ditch, describing it. In the next paragraph it is shown how they became copartners by the averment that at the date aforesaid they became the owners of seven nineteenths of said ditch, and thus as seven is to eleven, became the copartners of the defendant. The two allegations must be read together. So

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the idea of a copartnership is grounded entirely upon the fact of a purchase by the plaintiffs of an interest in the ditch in which the defendant was and had been a part owner with plaintiffs' grantors, and not upon any contract of copartnership between them and the defendant. After what has been said it is hardly necessary to add that a partnership with defendant was not the result of the plaintiffs' purchase. Upon the partnership theory, therefore, the complaint fails for the want of facts to uphold it. Upon the theory that the action is brought for a partition of real estate, the complaint is equally defective, because the primary facts upon which a right to a partition is founded (section two hundred and sixty-four of the Practice Act) are nowhere averred.

So far as the real facts of the case can be surmised by the dim light afforded by the record, the plaintiffs' remedy is by suit for partition. In such an action the mortgage claim of the plaintiffs can be settled and adjusted, and, as collateral to the main question, an account of the water rates can be taken and the rights of the parties therein respectively ascertained.

The judgment is reversed and the plaintiffs allowed to amend their complaint upon the payment of the costs on this appeal and the costs of the former trial in the Court below.

THE PEOPLE v. ANTONIO CHARES.

INSTRUCTIONS TO JURY IN CRIMINAL CASES.—The giving of an oral instruction to the jury in a criminal case is error, unless the defendant consents. The consent of the defendant cannot be presumed from his presence and failure to make objection when the oral instruction is given.

APPEAL from the County Court, Santa Clara County.

The facts are stated in the opinion of the Court.

B. B. Kingsbury, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

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By the Court, RHODES, J.

The defendant was indicted for an assault with the intent to commit murder. After the jury had retired to consider of their verdict, they were returned into Court, at their request, for further instructions and the Court gave them oral instructions in explanation of the instructions previously given. The defendant was present, but neither consented nor objected thereto. The District Attorney was not present. The defendant now assigns for error the giving of the instructions orally.

It is provided in section three hundred and sixty-two of the Criminal Practice Act that the charge to the jury "shall be reduced to writing before it is given; and in no case shall any charge or instruction be given to the jury otherwise than in writing, unless by mutual consent of the parties." This provision has been repeatedly held to be mandatory. The cases are numerous and uniform to the point that the giving of an oral charge or instruction to the jury, in a criminal case, without the consent of the defendant, is error, and that his consent cannot be presumed from his presence and failure to make the objection, when the oral instruction is given. (*People v. Payne*, 8 Cal. 341-344; *People v. Demint*, 8 Cal. 428; *People v. Ah Fong*, 12 Cal. 345; *People v. Woppner*, 14 Cal. 437.)

Judgment reversed and the cause remanded for a new trial.

S. W. GALLAND AND W. GALLAND v. J. L. JACKMAN.

ALTERATION APPEARING ON THE FACE OF A DEED.—Where a deed is produced in evidence by a party claiming under it, and it appears upon its face to have been altered in a particular material to his interest, and to the prejudice of the other party, it is incumbent on him to establish by satisfactory evidence that the alteration was made by the grantor, or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made.

RECITAL IN DEED AS EVIDENCE.—The recital in a deed of a valuable consideration paid by the grantee for the property thereby conveyed, is not evidence of the payment of a valuable consideration, as against strangers, or against one claiming under the grantor by a conveyance prior to the deed in which the recitals are made, or against one claiming adversely to the

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grantor, but such recital is evidence of the payment of a valuable consideration only against those claiming under the grantor by conveyance subsequent to the same.

KNOWLEDGE OF PRIOR UNRECORDED DEED.—One who buys real estate from another, with the actual knowledge at the time of his purchase that his grantor had before that time made some kind of a conveyance of the same property to another person whose deed has not been recorded, is not a purchaser in good faith, although he did not know the kind of a conveyance which had been made. This rule is the same in an action at law as in a suit in equity.

APPEAL from the District Court, Fifteenth Judicial District, Tehama County.

The facts are stated in the opinion of the Court.

W. H. Rhodes, for Appellant.

George Cadwalader, also for Appellant.

In the absence of proof to the contrary, the date of the deed is the date of its delivery. (12 Mass. 445; 4 John. 230; 4 Yeates, 278; 6 Munford, 515; Little's Select Cases, 462; 18 Metcalf, 323.)

The Court, in its findings, speaking of the conveyance from Betts to Depuy of the second story of the hotel, says of plaintiffs that "they had knowledge that Betts executed a conveyance of some kind to Depuy for the second story of the house."

This, we claim, was of itself sufficient notice to put the plaintiffs on inquiry, which, in contemplation of law, is actual notice. (*Pitney v. Leonard*, 1 Paige, 46; *Peters v. Goodrich*, 3 Conn. 146; *Booth v. Barnum*, 9 Conn. 286; *Hawly v. Cromer*, 4 Conn. 717; *Brush v. Ware*, 15 Pet. 112; *Jackson v. Cadwell*, 1 Cow. 622; *Tuttle v. Jackson*, 6 Wend. 212.)

By giving full effect to one of the material facts found—that is, that it was all "but one transaction in fact," it relieves the case of all difficulty, and the clear intention of the parties is carried into effect. The rule upon this subject is clearly laid down in 2 Parsons on Contracts, 15: "The contract may be contained in several instruments, which if made at the same time between the same parties, and in relation to the same subject, will be held to constitute but one contract, and the Court will read them in such order of time and priority as

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will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together."

In no sense were the plaintiffs *bona fide* purchasers.

W. S. Long, for Respondents.

P. L. Edwards, also for Respondents.

Grant that the date of the deed is *prima facie* evidence of the actual time of its execution, still the Court found the fact adversely to the appellant, and this must be held to have been from the evidence. Though it was competent for him to prove a time of execution different from that expressed, yet there is no semblance of the production of any evidence to that effect, and the actual findings are antagonistic to the appellant's theory.

It is said that the Court finds that the respondents "had knowledge that Betts had executed a conveyance of some kind to Dupuy for the second story of the house,"—and this is claimed to be "sufficient notice to put the respondents on inquiry"—and that this, in the law, is equivalent to actual notice. Notice of what? Of a legal or an equitable title? The legal results would be very different according to the hypothesis indulged.

In this case there is neither findings nor evidence as to how the supposed notice came to the respondents. If there was any notice at all, it was actual, and mere vague reports from strangers, or mere general assertions that some other persons claim a title is not sufficient to fix a purchaser with actual notice. The findings as they are, can, therefore, in no *phase* of the case, prejudice the respondents. (2 Leading Cases in Equity, 69, note.)

Such notice in a case of this character cannot be binding, unless it proceed from a person interested in the property and in course of a treaty for its purchase. (*Kerns v. Swope*, 2 Watts, 78; *Epley v. Witterow*, 7 Watts, 163-7; 2 Sugden on Vendors, 481, 482.)

The deed from Betts to the respondents expressed a value-

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ble consideration, and was evidence of such, until the legal presumption was rebutted.

We admit that the payment of the consideration acknowledged in the deed from Betts to the respondents is only *prima facie* evidence of the fact. This presumption might have been attacked in the pleadings or proofs; but no attempt was made to do so, thus leaving the natural and legal conclusion in full force.

Hereford & Williams, also for Respondents.

This is an action of ejectment; and the *legal* title or right of possession only is in controversy. No *equitable* defense is set up, and consequently there is none to consider.

Then the inquiry to be made is: Where did the legal title rest at the date of this action? That query is easily answered.

Betts, prior to November 27th, 1859, being then the owner, conveyed the entire property to Depuy. On the 27th November, 1859, he executed a deed to Depuy for the upper story of the building upon the land previously conveyed by him to Depuy.

But this last deed passed nothing to Depuy; it merely attempted to vest in him that which he already had. On the 28th day of November, 1859, the *title* to the *whole* of the property, and no less, was in Depuy, and the public records so showed. On that day Depuy reconveyed the whole property, land, and house, to Betts. No other conveyance was made thereafter between Betts and Depuy, and hence the *title* to the whole rested in Betts down to the date of his deed to the plaintiff on the 1st of February, A. D. 1862, at which time, by virtue of the conveyance to plaintiff, the title to the whole property vested in him.

In our judgment the only defense which could have been attempted with the slightest hope of success, was an equitable defense with a prayer of affirmative relief to compel the execution of a deed to the defendant or his grantor (who might have defended for that purpose) by the plaintiff for the upper

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story of the building. But no such defense was made, and, we presume, properly the question will not be considered in this Court.

By the Court, CURREY, J.

This action was brought to recover the possession of the second story of a brick house in the Town of Tehama, in the County of Tehama, and was tried by the Court without a jury. Both parties claimed the demanded premises from one J. M. Betts as the common source of title. The facts as they are found by the Court are in substance as follows, viz: J. M. Betts was the owner of a lot of land in the Town of Tehama, and sold a portion of it to S. H. Depuy. By mistake the whole lot was described in the deed of conveyance instead of only the portion intended to be conveyed. This deed was recorded. Depuy and Betts then entered into a contract, by which Depuy undertook to erect, upon the land sold and intended to be conveyed to him, a hotel, and upon the other portion of the lot a store. By this contract Depuy was to have the second story of the store building, to be used as a part of the hotel. The contract was performed by Depuy. The hotel proper and the store were divided by a party wall, the centre of which was understood to be the dividing line between the store and hotel. The entrance to the second story of the store was through the hotel.

After the store had been erected and the hotel was in process of erection, the mistake in the conveyance was discovered. Depuy then conveyed by deed to Betts the land on which the store had been erected, making the centre of the division wall between the store and hotel the line of boundary between the two parcels of land, and Betts, in pursuance and fulfilment of his contract with Depuy, conveyed by deed to Depuy the second story of the store. This deed bears date November 27, 1859, and it was first recorded in April, 1862. The deed from Depuy to Betts was originally dated the "twenty-seventh" day of November, 1859, but it appeared

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at the trial that the word "seventh" had been partially erased and the word "eighth" written over it, followed by the figures 28 inclosed in a parenthesis. This deed was acknowledged on the 3d day of December following, and was recorded on the 8th of the same month. As recorded, the date of the deed appeared to be of the 28th of November. After the hotel was completed Depuy leased it, except for about a month he occupied it himself, and from that time until the trial it was used as a hotel. The defendant was occupying it when this action was commenced. On the 1st of February, 1862, Betts conveyed by deed to the plaintiffs the land upon which the store was erected with the appurtenances. In this connection the Court finds that the plaintiffs had knowledge that Betts executed a conveyance of some kind to Depuy for the second story of the store, and it is also stated to be clear from the evidence that the two deeds of November, 1859, were intended, as a matter of fact, to be but one transaction; that is to say, that Depuy should reconvey to Betts that portion of the land which he had conveyed by mistake to Depuy, and Betts should convey to Depuy the second story of the store in pursuance of his contract to do so.

The statement in the case shows that the plaintiffs' deed was recorded on the 10th of February, 1862, and the deed to Depuy, under which the defendant claimed, was recorded on the 14th of April of the same year.

Before judgment was entered the defendant moved for judgment in his favor, on the finding of facts, but the Court refused to grant the motion, and gave judgment for the plaintiffs, and from this judgment this appeal is taken.

The plaintiffs based their rights to recover: *first*, on the ground that they had the only title to the demanded premises, for the reason that the defendant's lessor conveyed the same to Betts, the grantor of the plaintiffs, by the deed of November, 1859, which they contended was executed and delivered on the twenty-eighth of that month; and *second*, that if that deed was executed and delivered on the 27th of November, and the defendant's lessor, Depuy, thereby acquired title to

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the premises in controversy, it was void as against the plaintiffs, who claim they were subsequent purchasers in good faith and for a valuable consideration, from the common grantor of the same land, and that the conveyance to them was first duly recorded.

The defendant, on his part, claims that the two conveyances executed in November, 1859, were part and parcel of the same transaction, and that by the deed from Betts to Depuy the latter acquired the title of the former to the demanded premises, and that such title is still subsisting and paramount.

1. The Court finds that the two deeds were intended by the parties to be but one transaction, and we are satisfied that this finding was justified by the facts disclosed. The deed from Depuy to Betts seems to have been dated originally on the 27th of November, which was the date of the deed from Betts to Depuy. Whether these deeds were dated on the same day, is a matter of some importance, as disclosing the intention of the parties thereto. The date of the deed from Depuy to Betts appears to have been changed to one day subsequent to its original date, but by whom or when does not appear. This deed was a muniment of the plaintiffs' title, and they must be presumed to have been aware of what appeared upon its face when they purchased of Betts, and we think this presumption must be regarded as conclusive. They produced it in evidence bearing the appearance upon its face of having been altered in a particular material to their interest and to the prejudice of the defendant. It was therefore incumbent on them to establish by satisfactory evidence that the alteration was made by the grantor or by his authority before the date could properly be deemed as of the 28th instead of the 27th of the month. (1 Greenleaf's Evidence, Section 564; Practice Act, Section 448.) If the execution of the deed by Betts was on the 27th, and that executed by Depuy was on the 28th of the month, and could be deemed transactions distinct and independent of each other, what motive had Betts to execute the deed of the 27th? He had long before then conveyed to Depuy, by mistake, it is true,

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the portion of the lot on which the store was erected. Why should he perform the idle ceremony of executing a deed of the second story of the store to Depuy, when in fact Depuy owned it at the time! This circumstance is one of persuasive force in ascertaining the intention of the parties and a strong argument in support of the date of the deed as originally written. We are therefore led to the conclusion that by this deed of conveyance Depuy acquired the title and interest therein described.

2. Assuming that Depuy owned the second story of the store, and that he or his tenant under him had the right to its enjoyment at the time of plaintiffs' purchase, it remains to inquire whether the facts found authorize the conclusion that the plaintiffs stand in the position of subsequent purchasers in good faith for a valuable consideration, and that by force of the statute the deed of Depuy must be regarded void as against the plaintiffs as such purchasers. (Laws 1850, p. 252, Sec. 26.)

The Court fails to find that the plaintiffs paid any valuable consideration for the premises described in their deed.

The recital in the deed from Betts to plaintiffs of the receipt of a valuable consideration, does not prove it as between the plaintiffs and defendant. Such recitals are not evidence against strangers, nor against one claiming under the party executing the reciting deed by title prior thereto or adversely to him, but only against those claiming under him by title subsequent. (*Long v. Dollarhide*, 24 Cal. 218.)

The admissibility of a recital depends upon the same principle as the admissibility of a declaration of the person executing the reciting deed. Hence, in general, in order to determine whether a recital is evidence in a given case against a party, it is only necessary to ascertain whether an acknowledgment or confession of the person who executed the deed would be competent.

In *Jackson v. McChesney*, 7 Cow. 361, Mr. Justice Sutherland, in an action of ejectment, held otherwise, saying that the acknowledgment in a deed of the receipt of the consideration

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is *prima facie* evidence of its payment until impeached, and that its operation is not confined to the immediate parties to the deed, but extends to any person who may seek collaterally to impeach it. But the rule, we may safely say, is otherwise in an action at law where the question is material, as well as in a suit in equity. In *Nolen and Thompson v. Gwyn*, 16 Ala. 725, the Court held that this rule was the same in a Court of law as in a Court of equity. After a grantor has once parted with all his interest in land by deed to one, he can make no admission by deed or otherwise that would be binding on his first grantee or those who claim under him. (10 Ala. 137; 4 Ala. 264; 5 Ala. 12; 15 Ala. 9; 4 Watts, 359; 12 N. Hamp. 248; *Jewett v. Palmer*, 7 John. Ch. R. 65; *Storey v. Windsor*, 2 Atkyns, 630; *Colton v. Seavey*, 22 Cal. 496; Willard's Eq. Jur. 253.)

It is found by the Court that the plaintiffs knew that Betts executed a conveyance of some kind for the second story of the store of Depuy. This being so, they cannot justly claim that they stand protected by the statute, because their case does not come within its letter nor its spirit. It matters not that they did not know the kind of conveyance which Depuy had received from Betts — whether it was for an estate for years or in fee simple absolute

In *Jackson v. Burgott*, 10 John. 460, Mr. Chief Justice Kent said: "It may be assumed as a settled principle in the English law, that when a subsequent purchaser, whose deed is registered, had notice, at the time of his purchase, of a prior unregistered deed, the prior deed shall have the preference, for the object of the register is to give notice to subsequent purchasers; and in the case stated the object of the Act is answered, and his purchase under such circumstances is a fraud. It is considered as done *mala fide*, by assisting the original vendor to defraud the prior vendee, and the Courts will not suffer a statute made to prevent fraud to be a protection to fraud." Other authorities of like import might be cited in support of the same doctrine, but the principle on which it is founded is

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too reasonable and obvious to require for its support additional authorities.

The plaintiffs were not entitled to judgment upon the facts found by the Court, and judgment ought to have been rendered for the defendant. As the case stands we think the ends of justice would be best subserved by allowing the parties to try the cause *de novo*.

The judgment is therefore reversed and a new trial ordered.

THOMAS W. MULFORD, THEODORE B. CUNNINGHAM AND ALVINO C. CAMPBELL v. CHARLES LE FRANC ET ALS.

"ENAGENASION," IN MEXICAN CONVEYANCES, CONSTRUED.—The words "Enagenasion * * del terreno," without any other limiting term, in a conveyance under the Mexican law, indicates an intent on the part of those executing the instrument to convey the fee, and not an intent to create a mere servitude upon the land, as a use or usufruct.

ADVERSE POSSESSION, STATUTE OF LIMITATIONS.—Garcia and Nye, in 1840, while the Mexican law was in force in California, executed before the Alcalde of San Francisco an instrument in writing manifesting upon its face an intent to "alienate" by the former in favor of the latter the land therein described, but without expressing or indicating whether for a consideration or as a donation. Nye immediately entered possession under said instrument in writing, and he and his grantors, down to and including defendants, have ever since continued in possession claiming title in fee. *Held*, that the possession under said instrument by Nye and his grantees was adverse from the beginning, even conceding the said instrument to be insufficient under the Mexican law to pass title by reason of a failure to express therein a consideration, or to indicate that the conveyance was intended as a donation, as the case might be. *Held, further*, that said possession having been continued by Nye and his grantees, including the defendants, for a period of more than five years since the passage of the Statute of Limitations, and before the commencement of this suit, all right of action in favor of plaintiffs derived from said Garcia is barred.

ACTS OF PARTIES UNDER CONVEYANCE SHOW THEIR INTENTION IN MAKING IT.—If the meaning of the language of an instrument in writing relating to a transfer of land is doubtful or ambiguous, the Court will consider the surrounding circumstances and call to its aid the acts of the parties done under it as a clue to their intention.

CONSTRUCTION OF LANGUAGE OF A DEED.—If a question of law arises upon the construction of a deed, it is the province of the Supreme Court to construe it and determine from the language used in it what was the intention of the parties to the same.

Argument for Appellants.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. B. Crocket, for Appellants.

The paper from Garcia to Nye is the foundation of the plaintiffs' claim. If that paper is a valid conveyance of the title, transferring the absolute dominion of the property from the former to the latter, it is conceded the plaintiffs have no case. For the plaintiffs it is claimed that this paper, on its face, purports to be only a lease or license, and not a conveyance in fee; and it is further claimed, that even though it purport to be a conveyance, it is void under the Mexican law, because no price is named. For defendants we insist the paper is, in terms, an absolute conveyance, and that it is not void because no price is named in it. The paper being in a foreign language, its true meaning is to be arrived at only by means of the testimony of experts in that language, and the definitions of the terms employed, as found in approved standard works. Tested by the first method, we may confidently claim that our construction is the proper one. On the face of the paper there is nothing to indicate that it was intended as a lease. No term is specified and no rent reserved, nor is there any stipulation to restore the possession, nor any provision against waste. In short, it lacks every element of a lease. It is equally obvious that it is not simply a license to enter and occupy. Terms are employed which plainly indicate that *some* estate or interest passed. Apt phrases are *not* employed to indicate a license. The concluding sentence empowers Nye to use the property when or as he pleases; and Garcia, in order to obviate any doubt as to his intention, puts over his signature the word "Ce-lo," "I grant," "I convey," and there is no provision that Nye is at any time to surrender the possession or to hold on sufferance.

But if the instrument is so doubtful that no certain interpretation can be given to it, the doubt must be solved in favor

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of the grantee. Doubtful phrases are construed most strongly against the grantor, and construing the instrument by this rule, there can be no doubt that it should be held to be an absolute conveyance.

The argument for the respondents is, that this paper is a lease or license, and that Nye and his vendees having entered under it, they are estopped by it from denying Garcia's title. But if by straining the sense of certain words and phrases in the instrument it can, by any ingenuity, be tortured into a lease or license, no one, I apprehend, will venture to claim that it is clear, precise, and definite in its terms, and free from ambiguity. On the contrary, it is not only extremely vague, but employs words admitting of several significations, which would vary the sense as you attach to these words the one or the other meaning. If this instrument be valid as an estoppel, it would be difficult to conceive of one too obscure to accomplish the same result.

If the paper created a tenancy at will, or on sufferance, or was a mere license to enter, Nye had no assignable interest, and his vendees were disseizors; and if they entered as purchasers, claiming the fee, and held adversely, the Statute of Limitations commenced to run from the time the landlord had notice of these facts. (4 Kent, 114; Taylor's Landlord and Tenant, Sec. 112; 14 Pet. 162; 1 Greenleaf's Cruise, 266; 6 Greenleaf, 12.)

Patterson, *Wallace & Stow*, also for Appellants.

The Statute of Limitations was a bar to plaintiffs' action. (Wood's Dig. p. 46, Sec. 6.)

Nye did not enter as *tenant* of Garcia; he claimed to have a deed of sale from *José Manuel Garcia*, and entered claiming the *title*. He purported to convey the title in fee simple absolute, and his several conveyances were by deed of grant, bargain, and sale. The grantees assumed to and believed they were purchasing the fee. The deeds purport to convey the fee. Nye never paid any rent, nor did any of his grantees. Garcia

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never demanded any rent, nor did his widow. The defendants and their landlords, *Pierce and Nichols*, have always claimed to own in fee.

The plaintiffs did not show, nor attempt to show, *any recognition* by the possessors of a tenancy *at any time*. They claim the tenancy existed only by construction of the instrument, Garcia to Nye, *which Nye and we always claimed to be a conveyance of the fee*.

No proof other than that instrument was given showing or tending to show a tenancy.

It appears from the record that the defendants and their grantors have, since the year 1848, continuously, openly, and notoriously possessed the premises in dispute, holding them adversely, in good faith, under claim and color of title. *Such holding makes out the defense of the Statute of Limitations*.

That defense could only be overcome by the plaintiffs "by showing that their title was derived from the Mexican Government, and that five years had not elapsed since the final confirmation of that title by the United States. The defendants under this view of the case alone were entitled to judgment." (*Richardson v. Williamson*, 24 Cal. 289.)

When the persons deraigning title from Nye purchased and took a conveyance, they acquired, or at least believed they did, the property for themselves, and their faith was not pledged to maintain the title of one. (*Blight's Lessee v. Rochester*, 7 Wheaton, 548; *Willison v. Watkins*, 3 Peter's U. S. S. C. R. p. 48.) From the date of each of those deeds they claimed to hold adversely, and such claim, accompanied by their continuous possession from 1848 to November, 1861, bars the plaintiffs' action.

Shafter & Gould, for Respondents.

The document upon which appellant relies was made under the Mexican law. By the provisions of that law its force and effect must be determined. We will strive to establish—1st, That it is no sale; and, 2d, That whatever contract it might

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have been under the system in force here, it was not a contract translativo of the title to property; 3d, That it was nothing more than what in our system is equivalent to a tenancy at will.

The operative word in this document is *enagenacion*. Garcia, who owned the premises, and Nye, who was about to receive possession of them, went before Guerrero, the Alcalde, in reference to an *enagenacion*. They went for nothing else. If we can find out what *enagenacion* means we will know the object of their visit so as to tell it in the English language; and knowing that the task of deciding this case is easy, what is the meaning in the Spanish language of the verb *ENAGENAR*?

Escriche's Dictionary of Legislation and Jurisprudence is a work of approved authority. That author gives an excellent definition of the word in controversy.

Enagenacion, he tells us, signifies no less than nine different things. It means: 1. A sale; 2. A donation; 3. A mortgage; 4. An exchange or barter; 5. A lease for rent money; 6. A pledge; A servitude, which is divided into: 7. A use; 8. A usufruct; 9. Habitation.

Here are no less than nine different contracts, either one of which may be meant by the word! Therefore it is the duty of the appellant who relies upon it to explain which of these contracts it is that is embodied in the instrument in question. It must be one of them. Which is it?

1. *The instrument is not a sale.*

In the Mexican system, as in that in which it has its origin, there are three things essential in every contract of sale. Indeed, three, in the absence of any one of which, there can be no such thing as a sale. They are: 1. A price in money; 2. A thing sold; 3. Consent of the parties.

When, therefore, an instrument is presented as embodying a contract of sale, if it be discovered in looking over it, that there is wanting an expression of the consent of the parties, or a description of the thing sold, or the naming of a price agreed on, the paper, no matter whatever else it may be called, is at once pronounced no sale. This rule is fundamental. In

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its application, it has always been held inexorable. There never has been a deviation from or relaxation of it in any instance whatever.

A price is one of the legal requisites of the contract of sale. (*Gorham v. Hayden*, 6 Rob. 450; *Conway v. Bordier*, 6 Lou. 346.)

2. *The instrument is not a donation.*

A document, said to be a donation under the system we are considering, was obliged to contain certain features not found in this one.

"A donation is void when one makes it of all his property, although it be of his present property, according to the law 69th of Toro, because he has not retained for himself the means of subsistence during his life." (*Escriba, Donacion Entre Vivos*, 650.)

And in order to carry out this public policy the donor was reminded of his obligation to refrain from stripping himself of all his possessions, and so become a burden to the State. He was compelled to declare in the act of donation that he had no need of the property for himself, and that he had enough, otherwise, for his decent maintenance.

The document in question has none of the features of a donation. There is no renunciation to the heirs or successors of Nye. There is no mention of any value, so that it might be determined whether or not the approbation of the Judge should be obtained. There is no clause touching the surrender in favor of Nye of the title papers to Garcia, and no declaration.

3. *The instrument is not a mortgage.*

It is obvious that the purpose of such a contract is the security of a debt, present, or to be created. As between Nye and Garcia there was no debt to be secured.

4. *The instrument is not an exchange or barter.*

The very idea of a contract of barter suggests the parting with property on both sides. Nye surrendered nothing — gave nothing.

The instrument is not a lease for rent money, nor is it a pledge.

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There remains but one of the agreements known to the Mexican system, and which is comprehended within the term *enagenacion*, and that is *an agreement for the use of the property in question*.

A contract, then, for the use of a lot of ground is a contract known to the law. And thus we have an explanation of the sort of *enagenacion* that took place when Nye and Garcia went to the Alcalde's office.

They went to place in the archives some written memorial of their understanding that one should confer upon the other the right to use this lot. The use, says the law, is to be enjoyed according to the party's necessities. *Segun sus necesidades*.

Nye was empowered to make use of the lot whenever it should be convenient for him to do so; *i. e.*, whenever his necessities should require. If Garcia had thought he was conveying to Nye the lot in full ownership, it would not have occurred to him to add any words conferring upon Nye the right to use the property—for that, of necessity, would have followed.

It will be remarked that the only purpose mentioned in the paper is that of bestowing upon Nye the *uso*, the use of the lot. Enabling him to make use of it was all they seemed to have had in contemplation: they succeeded; the document was recorded, and their purpose, as we have abundantly shown, was just what they called it—an *enagenacion*; for it would have been impossible to make an agreement for the *use* of real property without making an *enagenacion* of it. This being the nature of the agreement, we have only to inquire how long the right acquired by it was to endure. At a glance, we see that no time was mentioned. Therefore its duration must have depended upon the will of Garcia, the owner of the premises. And this brings us to the definition of the agreement told in the English language, to wit: *a tenancy at will*.

.. John B. Felton, for Appellants in reply.

Argument for Appellants in reply.

With all deference to the learned counsel, we submit that all through their argument they have confounded the real question in this case, which is: "To what extent did Garcia intend to alienate this lot to Nye, whether in fee, or by way of lease, or by way of use?" with another question of no importance to the case, which is: *What was the consideration which induced the alienation?*

It is evident that on the question of extent of alienation, the price or motive which induced the alienation has no bearing.

Thus, counsel say: 1st. This instrument has no price contained in it: therefore it is not a sale. 2d. It does not state that the land was alienated for something else than money: therefore it was not an exchange. 3d. It does not contain words indicating the intention to make a present: therefore it was not a donation.

That is, counsel say in substance: "*Garcia did not intend to alienate this land in fee to Nye, because in the instrument Garcia did not name a price or a consideration, or say that it was without a consideration.*"

Now, we submit that all this matter of price, or want of price, has nothing to do with the real question in this case, which is, "*To what extent did Garcia, whether gratuitously or not, intend to alienate the land?*"

Now, we deny that an instrument under the Mexican law, in order to be a good conveyance, must contain the price or the consideration on which it was made. If the intention to make an absolute conveyance is apparent on its face, then that intention will be carried into effect.

The absence of a price in the instrument does not show that it was not a sale or a barter. The absence of words indicating a benevolent intention does not show that it was not a donation. But *the presence of words showing an intention to convey in fee simple does demonstrate that the contract is either a sale, or a barter, or a donation, it is immaterial which, since all of these contracts are valid.*

Counsel seem to find something in the expression in this

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instrument, "por lo que dicho Capitan hace uso quando se convenga," "Wherefore said Captain makes use whenever he may see fit," indicative of an intention to create a use only.

But this expression, "hace uso," is exactly equivalent to the English phrase, "to his use and behoof." It is found in almost all Spanish conveyances.

"Enagenacion — The act by which the property in a thing by lucrative title is transferred as a donation, or by onerous title, as by sale or barter.

"This word, taken in a more extended sense, *comprises*, also, the lease, the pledge, the mortgage, *and even* the creation of a servitude on an estate. It follows herefrom that a person who cannot alienate a thing can neither pledge, hypothecate, nor incumber with servitudes. The person who is disabled from alienating a thing, says the law, can neither sell, nor barter, nor hypothecate the same, nor create any servitude thereon, nor have the same assessed to any persons who are disabled from alienating the same."

Now this definition does not say nor imply that the word *alienation*, by itself, ever means a lease, or a mortgage, or a pledge. It only says that, taken in a sense wider than its ordinary sense, it *embraces* or *comprehends* all these smaller interests; so that a person who by law is disabled from alienating his property, is disabled also from alienating any interest therein.

In other words, the word *alienation* is a broad word of transfer, embracing all transfers, qualified or absolute, by which property can be affected.

The same is true of the English word *alienation*; though the word used without restriction means the complete and full transfer of the thing alienated, yet, in a broader sense, it embraces all the modes by which property is transferred for a time, or to an extent less than the entire ownership.

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By the Court, SAWYER, J.

This is an action to recover the hundred vara lot fronting on Washington, Montgomery and Jackson streets, in San Francisco. It was tried by the Court without a jury, and the following are substantially the facts as found by the Court:

On the 30th day of August, 1840, one José Manuel Garcia was seized in fee of the said lands, by virtue of a grant previously made by authority of the Mexican Government. The whole lot, except a small strip along Montgomery street, was then below the line of ordinary high tide. Said Garcia on that day made with one Gorham H. Nye an instrument in writing, touching the same, in the form, words, and figures following, viz:

"SAN FRANCISCO, August 30, 1840.

"En virtud de habero presentado en este juzgado de mi cargo Don José Manuel Garcia y el Capitan D. Geronimo H. Nye, Méjicano natur^{do} sobre la enagenasion que hace el prim^o al segundo del terreno que este concedio de cein varas cuadradas al E. de la laguna entre el mar y la plaza del punto de Yerba Buena, por lo que dh^o Capⁿ hace uso cuando se convenga.

"Sedo:

"JOSE MANUEL GARCIA.

F. GUERRERO.

G. H. NYE."

[Translated thus:]

"SAN FRANCISCO, August 30, 1840.

"Whereas, Mr. José Manuel Garcia and Gorham H. Nye, a Mexican by naturalization, have appeared before this tribunal under my charge in reference to the alienation which the former makes to the latter of the land which this [functionary] granted of one hundred varas square at the east of the laguna between the sea and the beach, at the point of Yerba Buena, by which the said Captain makes use when it may be convenient.

"I yield:

"JOSE MANUEL GARCIA.

F. GUERRERO.

G. H. NYE."

Under this instrument Nye entered into possession of said

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lands, used and occupied the same, and in the year 1843 conveyed the south half to one E. P. Jones; a portion of the north half to W. C. Parker, and the remainder to W. C. Parker and G. McDougall; and the said several grantees went into possession under their respective deeds, of the portions so conveyed. Prior to the 10th of September, 1853, these several grantees conveyed the said lands to certain of these defendants, named in the finding, who went into possession; and they and their tenants continued in possession from that time till the commencement of this suit

On said 10th day of September, 1853, Abel Guy and others — a portion of said defendants — and the grantors of the others, prosecuted a suit in the Superior Court of the City of San Francisco against the Commissioners appointed under the Act of 1853 to provide for the sale of the interest of the State within the water line front of the City of San Francisco, wherein said Guy and others claimed title in fee to said one hundred vara lot, through and under said Garcia, and denied any title in the State of California. In said suit a final decree was rendered perpetually restraining said Commissioners, their successors, etc., from selling said lands, which decree is still in force. Afterwards the successors of said Commissioners, notwithstanding said decree, did sell the State's interest in said land, and said defendants, by mesne conveyances, have acquired the interest so sold.

Said Garcia died in November, 1846, leaving surviving Estefana Feliz de Garcia, his wife and only lawful heir at law. After Garcia's death the said Estefana married Antonio M. Villa, and on the 10th of November, 1856, by a deed executed by herself and said Villa, her husband, conveyed all her right, title, and interest in said lands to Manuel Castro, who, afterwards, in 1861, and before the commencement of this suit, conveyed to plaintiffs. Plaintiffs immediately afterwards, on the 22d of November, 1861, notified defendants of their acquisition of title from the heir of José Manuel Garcia, deceased, and required said defendants to remove from the premises on or before the 30th of November, 1861. Said defendants did

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not remove from said lands, nor have they or any of their grantors from whom they obtained possession, including said Nye, ever surrendered to said Garcia, or his successors in interest, said land or any part thereof.

The Court then finds, as a conclusion of law, that by the aforesaid instrument in writing, between said Garcia and Nye, dated the 30th day of August, 1840, and the entry into possession thereunder by said Nye, the relation of landlord and tenant was created between them, and that said Nye then and there became tenant at will of the said Garcia; that on said Garcia's death, his wife, Estefana, succeeded to his estate as sole heir at law, and became vested with the fee of the land; that the relation of landlord and tenant so existing between the said Garcia and Nye attached to all who succeeded to the estate of Garcia, including plaintiffs; that said defendants were tenants, or *quasi* tenants of the plaintiffs until December 30, 1861 — until which time the Statute of Limitations did not commence to run against said plaintiffs, and that plaintiffs were entitled to recover. Judgment was entered accordingly. A motion for new trial was made and denied, and defendants appeal from the order denying a new trial, and from the judgment.

Numerous questions of more or less gravity are made by the appellants on the motion for new trial; but the great question in the case, upon which the entire merits of the controversy hinge, arises upon the construction of the instrument executed between Garcia and Nye; and this question has been argued with great ingenuity and ability by the counsel on both sides.

On the part of the appellants it is contended, that this instrument was intended by the parties to be a conveyance of the fee from Garcia to Nye; while the respondents deny this proposition, and insist that it was only intended as a license or permission granted to Nye by Garcia to use the premises during the pleasure of Garcia, and that the position of Nye was something analogous to a tenant at will at common law. The latter construction was adopted by the learned Judge who tried the case, and it is the only theory upon which this action

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can be maintained. If, therefore, the Court erred in its construction of this instrument, the judgment must be reversed on this ground, and it will be unnecessary to examine the other questions discussed in the briefs of counsel.

The main difficulty in arriving at the intention of the parties arises from the fact, that the laws under which the instrument is to be construed, and the instrument itself, are written in a foreign language, and it is not easy to translate from one language into another in such a manner as to convey to one familiar with the latter only, precisely the same idea that it conveyed to the original parties, one of whom at least, was probably familiar with the language only in which the instrument and the laws by which it is to be interpreted, were written. Different translators, equally competent, will use different language, and give a different gloss, or shade to the meaning in transferring the idea intended to be conveyed from one language to another, as is done in this case. There are three translations of the instrument in the record, made by parties well known to be competent Spanish and English scholars, and testified to by them as being correct, yet each differing from the other in some particulars, and these all differing from the one adopted by the learned Judge who tried the case. But, as the latter is the most favorable one for the respondents we shall regard it, for the purposes of this discussion, as being in the main correct. Notwithstanding the different habits of thought, and we may say, the different ideas of those using different languages, and the almost impossibility of transferring the precise idea from one language to another by words even apparently of equivalent import, we think, upon general principles of construction common to all languages, there will be little difficulty in arriving at the intent of the parties to this instrument; and if we can ascertain the intent of the parties themselves, it does not matter — so far as the decision of this case is concerned — whether they succeeded in making an instrument sufficient in law to effectuate that intent or not. If the parties intended by this instrument to convey the fee, and that intent is manifest from the language of the instrument, even though the

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instrument be void for want of pursuing the forms prescribed by law, or for a failure to enumerate all of the essential elements of a valid deed of conveyance under the Mexican law, the consequence will be the same to the respondents. For if Garcia intended to convey, and Nye intended to purchase, and the instrument was executed, and Nye entered under it with that understanding, claiming the fee, his holding was adverse from the beginning. There was in such case no entry in subordination to title in Garcia — no acknowledgment by Nye of Garcia's title, and whether the instrument was sufficient to pass the title or any interest whatever or not, the entry and subsequent occupation were adverse, and the relation contended for by the respondents never existed. In that event the right of action, if any ever existed in the respondents and their grantors, is barred by the Statute of Limitations, which commenced to run, at least, as early as the date of the conveyance to Castro, in 1856; for there is nothing in the record, either in the pleadings, the facts found by the Court, or the evidence, which brings the case within the exceptions of the proviso of the sixth section of the Act. If, then, we find upon a fair construction of the instrument that Garcia intended to convey the land to Nye, it will be unnecessary to inquire whether or not the instrument was sufficient under the law in force at the time to transfer the title.

The very ingenious and able argument of the respondents' counsel is mainly addressed to the elucidation of the meaning of the word, "enagenasion," as the one upon which the case is to turn. It is claimed that this word signifies no less than nine different things: 1, a sale; 2, a donation; 3, a mortgage; 4, an exchange or barter; 5, a lease for rent money; 6, a pledge; and a servitude, which is divided into: 7, a use; 8, a usufruct; 9, habitation. It is argued that, under the Mexican system under which this contract was made, three things are essential to constitute a contract of sale: 1. A price in money; 2. a thing sold; 3. Consent of parties; and that, in the absence of any one of these elements, there is no sale; and, as no price is named in the instrument under consideration, that it cannot

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be a contract of sale. Concede, for the purpose of argument (in regard to which, however, the decisions, or rather the dicta, in this State do not appear to be uniform), that a price must be specified in the instrument evidencing the contract in order to render the contract valid, still this does not seem to afford any aid in the solution of the question, What was the intent of the parties? It seems to go only to the question of the validity of the contract, rather than to indicate the intent of the parties. Under our Statute of Frauds, certain contracts are not only required to be in writing, but the consideration is required to be expressed. Such contracts are sometimes held to be void because no consideration has been expressed, but we are not aware, that the absence of an expression of the consideration has been looked upon as evidence that the parties did not intend to make the contract expressed in the instrument. It may be evidence of ignorance or carelessness, but not of a want of intent to make the contract indicated by the language used. And no authority from the Mexican law is produced to show, that the omission to specify the price tends to show that a party did not intend to convey, if the instrument in other respects manifested such intention. By the same mode of reasoning as that applied to the contract of sale, the respondents endeavor to show that the instrument under consideration cannot be any one of the first six contracts embraced in the definition of the word "enagenacion." It is not even claimed to be the fifth, "a lease for rent money," for the argument which proves it not to be a "sale," equally demonstrates it not to be a "lease." It is therefore said to be one of the servitudes, and as it cannot be a "habitation," it must be either "a use," or "a usufruct." And on the hypothesis that it is one of these two the case is rested.

"A use," as defined by Escriche—and in this opinion we adopt the translation furnished by the respondents—is, "the right which a person has to use or enjoy the property of another according to his necessities. It is one of the three personal servitudes, which are, use, usufruct, and habitation. It is established by contract, by last will, and by prescription,

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etc." "Usufruct—the right to use and enjoy the property of others; that is, to appropriate its fruits without impairing the substance." We accept these definitions of a sale, a use, and a usufruct; but the question still remains, which of these contracts, or of the six others enunciated, was intended to be expressed by the word, "enagenasion," or the word "enagenacion"—as it is conceded by all parties the word should be spelled—in connection with the other language of the instrument under consideration? According to Escriche—and we again adopt the translation furnished by the respondents—"enagenacion" means, "the act by which the property in a thing, by lucrative title, is transferred, as a donation; or by onerous title, as by sale or barter."

"This word, taken in a more extended sense, comprises also the enfiteusis (lease), the pledge, the mortgage, and even the creation of a *servidumbre* (servitude), on an estate. It follows, herefrom, that a person who cannot alienate (enagenar) a thing, can neither pledge, hypothecate nor incumber the same with *servitudes* (*servidumbres*)."

Now, what is the plain sense of this definition of the word "enagenacion?" Obviously that in its ordinary use it means a transfer of the title, the fee, but taken in a more comprehensive and enlarged sense, it may mean something more than is usually understood by it, and include the six other contracts mentioned. The word, as used in the instrument under consideration, has been rendered in all the translations in the record by the English word, "alienation," and it is manifest from the definition given by Escriche in its most comprehensive sense, that the meaning of the two words, "enagenacion," and, "alienation," are as nearly identical as the signification of any two words in different languages are ordinarily found to be. Blackstone, Book 2, p. 287, says: "The most usual and universal method of acquiring title to real estate is that of alienation; conveyance or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage settlement,

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devise or other transmission of property by the mutual consent of the parties;" and (ib. p. 103), he says: "An estate in lands, tenements and hereditaments signifies such interest as the tenant has therein." And on the same page, estates are divided "into such as are freehold, and such as are less than freehold," and, "estates of freehold are estates of inheritance, or estates not of inheritance"—the various estates of freehold being enumerated (ib. 104, *et seq.*); and "of estates less than freehold there are three sorts: 1. Estates for years; 2. Estates at will; 3. Estates by sufferance."

Thus it will be seen that the word, "alienation," in English, like the word, "enagenacion," in Spanish, embraces in its most comprehensive sense the transfer of every estate known to the law, from a fee simple to an estate at will or sufferance.

"But," says the respondents' counsel, "no man who speaks in English, and means, for example, to convey the idea that his friend Smith has leased his fifty-vara lot to Jones, would say Smith had alienated the lot to Jones. Until the idea of parting with the ownership had occurred to the speaker, he would not think of the word alienation. We never speak of aliening our possessions without affixing to the expression the thought of a change of ownership of the property itself. We write 'grant,' 'bargain,' 'sell,' 'alien,' and 'convey,' but we never write those words when we make a lease. The word alienation with us is not used to picture the creation of an inferior estate. It comes in vogue only when summoned to serve the purpose of the higher estate—the fee simple absolute—the estate of inheritance." This is very forcibly expressed, and we therefore adopt the language. For the same reason, so far as we are able to discover, the Mexican did not use the word, "enagenacion," in connection with the word, "terreno" without any limiting or qualifying term to convey the idea that he had granted a leasehold interest, or a mere "use," or "usu-fruct" on the land, and not the land itself.

According to the translation adopted by the Judge below, and which is substantially sustained by all the other translations in the record, the parties appeared before Guerrero "in

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reference to the alienation (enagenacion) which the former makes to the latter of the land"—not of a use or usufruct in or upon the land, but "of the land" itself. It seems to us that it would be just as absurd to suppose that a Mexican would use the word "enagenacion," followed by a word signifying land, without any qualifying term, to express the idea that he had created "a use," or "usufruct" on the land, either for a limited or an indefinite period of time, as for an Englishman to say he had alienated the land, when he intended to convey the idea that he had created a tenancy at will only in the land. But suppose we are wrong in this, and that in the Spanish language "enagenacion" may mean more than "alienation" in English, and that it is admissible to use the phrase "enagenacion del terreno" to convey the idea that a party had only created a servitude—a mere use "on an estate" in the land; still, it is also, and much more frequently used to express the idea, that the title to the land itself—the fee—has been conveyed, and it is only necessary to ascertain in which sense the phrase was intended to be used by the parties. If we were called upon to construe a word which had no limiting or qualifying term, the rule of construction at common law would be to give it its ordinary signification—the sense in which it is generally and by far the most frequently used; and as this rule is based upon common sense, we have no reason to suppose the rule was otherwise under the Mexican law. What is the obvious ordinary signification of "enagenacion" in the Mexican law? Clearly, if Escriche is to be relied on, "the act by which the property in a thing, by lucrative title, is transferred, as a donation; or by onerous title, as by sale or barter." In Seoane's Neuman & Baretti's Dictionary, by Velazquez, the word "enagenar" is defined as follows: "To alienate, to transfer or to give away property;" and the word, "enagenacion:" "Alienation, the act of transferring property;" and these are the only definitions of those words relating to property given in this dictionary. Unquestionably the word is ordinarily and generally used to express the idea of a transfer of title, either as a gift, for a money

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consideration, or by way of barter; at all events a transfer of the fee, and not a base or qualified estate; but the word itself does not determine whether as a gift; for a price; or by way of barter. If either of these ideas is to be added, other words must be used.

True, Escriche, after giving this principal definition, adds substantially that it may be used in a more comprehensive sense. "This word, taken in a more extended *sense*," says he, "comprises also the *enfiteusis* (lease) the pledge, the mortgage, and," he adds, as though it lay on the very outermost borders of the territory of this far-reaching term, "even the creation of a *servidumbre* (servitude) *on an estate*." Now, in which of these senses, in the nature of things, must the term be ordinarily used and uniformly understood, unless there is some other term used to qualify it? Obviously in the sense of a transfer of the title. The alienation of the land, the transfer of the fee, was a common everyday transaction on this continent, whether in Anglo-American countries, or in California, or probably in other Spanish-American countries. It is undoubtedly, in this age and in these countries, the most frequent of all transactions in relation to lands. But the creation of a servitude on an estate, and for an indefinite period of time, must necessarily be a comparatively rare transaction, so rare that it is hardly conceivable that parties intending to create such an estate would use the term which ordinarily signifies, and which unlearned persons would naturally understand to signify an absolute transfer of title, without the use of some other term clearly limiting the meaning to the particular inferior estate intended to be created. In the nature of things the occasion to use the word "enagenacion" to express the creation of a use "on an estate" in lands must have been seldom — so seldom, that, when so extraordinary an occasion occurred, the necessity of qualifying it by some words expressing the exact interest intended to be transferred, in order to guard against misapprehension, would almost inevitably have suggested itself. But when used in its ordinary signification — the transfer of the fee — as everybody would naturally understand it in that sense,

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no such necessity would exist. Nor does the fact that the parties through ignorance, inadvertence, or even design, have omitted to state whether the transfer was made for a consideration in money, or by way of barter, or was intended as a gift, militate against this construction. If it were intended to create a use simply, the parties, whether required by some rule of law to do so or not, would be just as likely, as in the case of a sale, to state whether it was for a consideration or intended as a gift. In our judgment the expression or omission to express the consideration or motive of the transfer does not aid or obstruct the mind in its efforts to solve the question of the intent of the parties.

It is argued by the respondents' counsel that the closing words of the instrument translated in the finding, "by which the said Captain makes use when it may be convenient;" also by one of the witnesses, "wherefore said Captain makes use when he sees fit;" and by another, "wherefore said Captain makes use of it whenever it may suit him;" indicate a purpose of bestowing upon Nye only the use of the lot, and that these words thus limit and qualify the meaning of the word "enagenacion," already discussed. It is insisted that if Garcia had thought he was conveying to Nye the full ownership, it would not have occurred to him to add any words conferring upon Nye the right to use the property, for that, of necessity, would follow. But these, or similar words are found in many Mexican grants, both from the Government and from individuals. They seem to be merely formal words like the words, "to his use and behoof," in the ordinary conveyance in the United States. Thus the original grant of this very lot from Alcalde Guerrero to Garcia concludes with words of similar import—"making use afterwards of said lot." So also the original grant of Sanchez to Guerrero in the record in this suit contains a similar formal phrase: "In order that he may possess the same legally and pacifically and make the use that suits him." The phrase, then, is undoubtedly a mere formal one, common in Mexican conveyances and not intended as a limitation of the meaning of the language previously used.

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The word "sedo," or "cedo,"—as it is conceded by both appellants and respondents the word should be spelled—to which the signature of Garcia is appended, should manifestly be translated "I grant." It is the ordinary word used in Mexican conveyances to pass title to lands. The witnesses all translate it "I grant," and the same word in composition, "consedo," in the same instrument, is rendered by the word, "granted," in the translation adopted in the finding. But whether translated "I yield," or, "I grant," in the connection in which it stands, it must be regarded as expressing the assent of Garcia to the transfer of the land. This instrument was drawn up by the Alcalde, and expresses the object for which the parties came before the officer—that is, "in reference to the alienation which the former (Garcia) makes to the latter (Nye) of the lands," etc.—and when it is drawn out Garcia expresses his assent by writing his name at the bottom, after the word "sedo," "I grant," or, "I yield," "I resign," "I deliver up," "make over." We are satisfied from a careful examination of the instrument by the light of the able argument of the counsel on both sides that the parties intended to transfer the fee. Whether the instrument was sufficient in law to effectuate that intention, as we have before remarked, it is not necessary to decide.

But if the meaning of the language of the instrument can be considered doubtful, "another rule of construction is, that when the words of a grant are ambiguous the Court will call in the aid of the acts done under it as a clue to the intention of the parties. Upon this principle we are permitted also to look at the undisturbed use of the right contested on the one side and the unqualified acquiescence on the other, down to the time of the plaintiff's purchase of the premises in 1857." (*French v. Cathcart*, 1 Comst. 102.) In this case, down to the time of the notice to quit, given by plaintiff, December 2, 1861, more than twenty-one years after the execution of the instrument and entry under it.

"In the construction of grants the Court ought to take into consideration the circumstances attendant upon the transac-

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tion, the particular situation of the parties, the state of the country and the state of the thing granted, for the purpose of ascertaining the intention of the parties." (*United States v. Appleton*, 1 Sum. 502.) Apply these rules to the construction of the instrument under consideration, and every shadow of doubt as to the intent of the parties, if any there be, must be at once dispelled. The instrument was executed in 1840—twenty-four years ago. Lots of this kind could then be had almost for the asking. But a small strip of it was above the line of ordinary high tide. It is hardly to be supposed that a party would put improvements upon land thus situated and in as little demand as such lands were at that time, when he only expected to occupy at the will of another. Still less probable is it, that, at a time when conveyances, even of the fee, were made with great carelessness parties would take the trouble to go before the Alcalde and make a formal contract for one to occupy land gratuitously at the will of the other. What object could there be in such formal proceedings, since the grantees could be turned out on the next day at the will of the grantor, and the grantee's condition could be no worse without such formality? But Garcia lived till 1846, six years afterwards, and, so far as anything to the contrary appears, acquiesced in the enjoyment of the estate by Nye. He left a widow, who is claimed to be his sole heir. If her husband owned the lot, and Nye was supposed to have only a use in it, terminable at the will of Garcia, it is highly probable she must have known it. As early at least as 1848 the property began to be valuable, and Nye, claiming to be the owner in fee, sold and transferred it to various parties, by deeds purporting to convey his title. His grantees immediately occupied and improved it, and they and their grantees have openly occupied it, claiming to own the fee down to the present time. Garcia's widow, who is claimed to be his sole heir, does not appear to have set up any claim to the land down to 1856—ten years after the death of her husband—at which time she conveyed her interest to one Manuel Castro for the paltry consideration, compared with the value of the land, of one hundred and fifty

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dollars. Yet from 1850 to 1856, the date of her conveyance to Castro, the ground rent alone must have been worth a thousand if not several thousand dollars, per month. Ross testified that he received from sales of portions of the lot held by him over one hundred thousand dollars, nearly all of which sales were made prior to 1850. It is inconceivable that Garcia and his wife should have acquiesced so long, under such circumstances, in the occupation of the defendants and their grantors, openly claiming to own the land, if they had not supposed the land had been conveyed in fee.

So long acquiescence under the circumstances of the case, upon the hypothesis that the parties only intended to convey a use to Nye, to be enjoyed without consideration, at the will of Garcia, is utterly irreconcilable with the ordinary known principles that govern human action.

In the meantime the occupants maintained an action against the State on this instrument, which seems to have then passed unchallenged, as a grant in fee. Castro subsequently, in 1861, conveyed to the plaintiffs, who, for the first time, so far as anything to the contrary appears in the record, set up their claim as against defendants by giving them notice to quit on the 22d of November of that year.

In the language of Mr. Justice Story, "if there had been any doubt upon the conveyance, which we think there is not, the subsequent usage would, in our judgment, be conclusive as to the construction put upon the conveyance by all the parties in interest." (1 Sum. 503.) In view of the language of the instrument and all the circumstances that surround the case, to hold that the parties, Garcia and Nye, did not intend a transfer of the fee, would be, in our judgment, to violate the well settled rules of construction, and to run counter to all the intrinsic probabilities arising out of the transaction, and the subsequent acts of the parties as presented in the record. If these views are correct, the learned Judge who tried the case gave a wrong construction to the instrument under consideration, and the conclusion of law drawn by him from the facts found was erroneous.

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It follows that the judgment must be reversed and the Court below directed upon the facts found to enter judgment for the defendants. And it is so ordered.

By the Court, SAWYER, J., on petition for rehearing.

* After a careful reconsideration of our former opinion, with the aid of the elaborate argument in the petition for rehearing, we are fully satisfied with the conclusions before attained. We are satisfied that the instrument upon which the controversy arises did not create a use, or any other inferior estate in the land. If a valid instrument, it transferred the fee. That Garcia intended to alienate the land—to transfer the fee—we have no doubt. And this intention is manifest from the instrument in the record. But whether the transfer was for a money consideration, by way of barter or exchange, or as a donation, neither the instrument nor the record afford the means for determining. Nor do we deem it necessary to the decision that we should determine that question. Nye went into possession under the instrument, and he and his grantees have held under it, claiming title ever since. This makes their possession adverse. And such adverse possession was held for more than five years after the Statute of Limitations was in force, and before the commencement of this suit. The bar arises under the statute, and not under the Mexican law relating to prescription.

Only one point more in the petition for rehearing requires notice. It is said that this Court assumed the functions of the District Court, and found a fact in determining the intent with which the instrument between Garcia and Nye was executed. The Court below found as a fact that the instrument was executed, and that Nye entered into possession under it. The very purpose of construing an instrument is to ascertain the intent of the parties—the object to be accomplished by it. “When it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, What was the intention of the parties?” (*Brannan v. Mesick*,

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10 Cal. 105; Willes, 322.) The real question in this case was whether this instrument manifested an intent to convey the land or only to create a use—an easement or servitude on the land. It was clearly within the province of this Court to construe the language of the instrument and from its language determine that question. And this was precisely what we did. Nor did the Court go outside of the instrument to ascertain the intent. It did, however, after an examination and determination of the meaning of the instrument from its language, for the purpose of verifying and confirming its own conclusions, consider the acts of the parties, and the circumstances surrounding them at the time of its execution, and subsequent thereto, and from those acts and circumstances concluded that the parties put the same construction upon it as that adopted by the Court. But were the meaning doubtful, it is well settled that such acts of the parties may be looked at to aid the construction, as is shown by the authorities cited, and many others might be cited to the same effect.

Rehearing denied.

Mr. Justice SHAFER, having been of counsel, did not participate in the decision of this case.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE v. SIMON LOPEZ.

NAMES OF WITNESSES ON INDICTMENT.—If the names of the witnesses who are examined before the Grand Jury are not inserted at the foot of the indictment or indorsed thereon before it is presented to the Court, the defendant must take advantage of the omission by a motion to set aside the indictment when he is arraigned, or he is precluded from afterwards taking the objection.

WITNESSES IN CRIMINAL CASES.—In a criminal case, the facts that a witness was examined before the Grand Jury, and that his name is not inserted at the foot of nor indorsed on the indictment, do not preclude him from being examined as a witness by the prosecution on the trial.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

Argument for Appellant.

The defendant was indicted for the crime of murder.

William Slater and Ellen Slater were examined as witnesses before the Grand Jury, but their names were not inserted at the foot of nor indorsed on the indictment.

During the trial they were introduced as witnesses by the District Attorney on behalf of the People. Defendant, by his attorneys, objected to their being allowed to testify, because their names were not on the indictment. The Court overruled the objection. Defendant, by his attorneys, afterwards moved to strike out their testimony for the same reason. The Court denied the motion.

Defendant was convicted of the crime of manslaughter and appealed.

The other facts are stated in the opinion of the Court.

J. W. Coffroth, and N. Greene Curtis, for Appellant.

When an indictment is found, the names of the witnesses examined before the Grand Jury shall be inserted as the part of the indictment, or indorsed thereon, before it is presented to the Court. (Criminal Code, Sec. 232; Wood's Digest, 288.)

This requirement is not an idle suggestion to prosecuting officers. It is a mandatory order, and potential in its character. It should be obeyed, or otherwise defendants would not be informed of their accusers. Its object is twofold: 1st, to inform the party who are his accusers; 2d, to inform the prosecution who are the witnesses. (6 Cal. 98.)

An indictment *should be* set aside "when the name of the witnesses examined before the Grand Jury * * * * are not inserted at the foot of the indictment, or indorsed thereon." (Criminal Code, Sec. 278; Wood's Digest, 291.)

But it may be said the motion in this case came too late. We answer that the defendant cannot tell who were examined against him until he receives a copy of the indictment, and until the trial is proceeded with. The secrets of the Grand Jury room are a sealed book to him. Neither himself nor his counsel can unlock the doors. The jurors and the District At-

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torney alone can tell what parties have been examined. They are deprived by their oath from disclosing their proceedings. Hence, we contend that the only opportunity the prisoner has to ascertain his accusers is upon cross-examination at the trial. In this case the discovery was made at the trial, and a proper motion made to exclude the evidence.

J. G. McCullough, Attorney-General, for Respondent.

Defendant should have moved to quash the indictment. Objection came too late. (Crim. Prac. Act, Secs. 278, 280; *People v. Freeland*, 6 Cal. 98; *People v. Lawrence*, 21 Cal. 372; *People v. Symonds*, 22 Cal. 348; 1 Whar. Crim. Law, Sec. 480; *Commonwealth v. Jillard*, 2 Casey, Penn. 169.)

By the Court, SANDERSON, C. J.

The refusal of the Court to strike out the testimony of William and Ellen Slater was not error. The two hundred and thirty-second section of the Criminal Practice Act, (Wood's Digest, p. 288) requires the names of the witnesses who are examined before the Grand Jury to be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the Court; but the only consequence of a noncompliance therewith is prescribed in the two hundred and seventy-eighth section of the same Act, which provides that the indictment may be set aside by the Court where the names of the witnesses who were examined before the Grand Jury are not inserted at the foot of the indictment, or indorsed thereon. This has to be done on motion at the time defendant answers to the arraignment, as provided in section two hundred and seventy-seven. That such shall be the only consequence of a failure to insert the names of the witnesses at the foot of the indictment, or indorse them thereon, is expressly declared in the two hundred and eightieth section, which provides that if the motion to set aside the indictment be not made, the defendant shall be precluded from afterwards taking the objection.

Argument for Appellant.

In the present case no motion to set aside the indictment was made. (*People v. Freeland*, 6 Cal. 96.)

The objection to a part of the instructions, upon the ground that the hypothesis upon which the instruction proceeds is not warranted by the evidence, is not well taken; but if it was, we are unable to perceive how the defendant was prejudiced by the instruction, or how the jury could have been thereby misled.

Judgment affirmed.

G. R. MINER v. SOLANO COUNTY.

COMPLAINT IN ACTION AGAINST COUNTY.—A complaint in an action brought by a Justice of the Peace against a county for services rendered as Justice for the county, which merely alleges that the plaintiff, as Justice of the Peace, performed services at the request of the District Attorney for the county in cases wherein the People of the State were plaintiffs to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sum," does not state facts sufficient to constitute a cause of action.

JUSTICES' FEES IN TAX CASES.—Justices of the Peace are not entitled to any fees for services rendered by them as such, in actions brought by the People before them to recover judgment for delinquent taxes, unless such fees are collected by the defendants.

FEES OF JUSTICES OF THE PEACE.—A Justice of the Peace has no vested right to collect fees according to the fee bill in force at the time of his election or induction into office, but the Legislature may change his fees at any time during his continuance in office.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Judgment was rendered for the defendant in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Whitman & Wells, and *E. A. Lawrence*, for Appellant.

Justices of the Peace are constitutional officers. They are not the creatures of statute. (Wood's Dig. 33, Sec. 1.)

They are the only judicial officers allowed to receive fees as a compensation for their services.

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The Legislature is required to determine the number of Justices, "and fix by law their powers, duties, and responsibilities."

In pursuance of this command, the Legislature did prescribe the fees to be allowed to a Justice of the Peace, (Sec. 1, 1850, p. 416,) which from time to time have been varied; but in no instance before these Acts were repealed.

We submit that it is incompetent for the Legislature to repeal this Act, and take away from Justices *all* compensation for their services. It can only change or alter the amount of the fees to be received by him, and has no more power to abolish the fees of the office than it has to abolish the office itself.

Again: The law is objectionable because it makes the Justice interested in the case, and thereby disqualifies him from trying it.

Section eighty-seven of the Judiciary Act provides that a Judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; and this provision applies to Justices. (*Edwards v. Russell*, 21 Wood, 63; *Baldwin v. McArthur*, 17 Bart. 414; *Bellows v. Pearson*, 19 Johns. 172.)

Swan & Hays, for Respondent.

By the Court, RHODES, J.

The respondent urges that the complaint does not state facts sufficient to constitute a cause of action. The point is well taken. The allegation is that the plaintiff, as a Justice of the Peace, performed services, at the request of the District Attorney for that county, in cases wherein the people of the State were plaintiffs, to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sum." There is no allegation of the means by which the county became liable. It is not alleged that the services were rendered for or were procured by the county, or

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that the county received any benefit from their performance, nor is it stated that judgments were rendered in those cases, nor that the defendants in those actions have not paid or were unable to pay for the services.

This, in effect, disposes of the appeal; but as the defect might be remedied, if an amendment to the complaint should be permitted, it is proper to notice the point upon which the case would turn, upon the amendment being made.

The findings show that the services of the appellant were rendered in suits for the collection of delinquent State and county taxes, brought under the Revenue Act of 1861, and the Acts amendatory thereof, and the Act of 1861, to legalize and provide for the collection of delinquent taxes; also the Act of 1862, in relation to suits brought for the collection of delinquent taxes.

It is provided by section forty-six of the Revenue Act of 1861 that: "All officers shall perform such services as might be required of them under this Act, without the payment of fees in advance, * * * provided that no fees or costs shall be paid to any officer or District Attorney, unless the same be collected from the defendants." This provision is evidently inconsistent with the general law (Act of April 12, 1859, p. 223,) which provides that in actions brought by the State or county, etc., fees shall not be required to be paid in advance, but shall become a charge, to be audited and allowed as other demands against the State or county, and therefore the provision in the Revenue Act must govern in the cases provided for in that Act.

The appellant contends that the provisions of the Revenue Act prohibiting the payment of fees unless collected from the defendants is unconstitutional on several grounds, and among others that it impairs the obligation of the contract between the Government and the Justice. A Justice of the Peace is the only judicial officer who is permitted by the Constitution to receive fees of office to his own use. Fees are not regulated by the Constitution, but the whole subject is left to the control of the Legislature, and they may in their discretion

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establish the rate of fees, and prescribe who shall be liable for their payment, together with the time and manner of payment. A person elected as a Justice of the Peace has no vested right to collect fees according to the fee bill in force at the time of his election or induction into office; but he accepts the office with the distinct understanding that during his term of office the Legislature may modify or amend the Acts concerning fees of office, without impairing any legal right acquired by him by virtue of his election and entry upon the duties of his office. (*Attorney-General v. Squires*, 14 Cal. 12.)

It is urged that the provision under consideration is objectionable, because by giving the Justice fees only in case of judgment against the defendant, it thereby makes him interested in the result of the case and disqualifies him from trying it. If that result is worked out by those means it does not follow that the Justice may collect fees from the plaintiff contrary to the Act, for the purpose of balancing his interest between the parties, so that he may be qualified to try the cause. If he is disqualified from acting on those grounds he may remove the bar by releasing fees to which he is entitled, but he cannot accomplish that result by demanding fees which he is forbidden to receive. If the statute has in fact disqualified him from acting, by reason of his interest in the result of the action, that fact would, upon objection being made on that ground, deprive him of all jurisdiction, rather than enlarge his power in the trial of the action.

We do not think the section under consideration is in conflict with the clause of the Constitution requiring that taxation shall be equal and uniform throughout the State; for that clause has no relation to the section. If the Justice's services can be demanded without compensation, those services are not rendered in discharge of a tax.

Laws of the character of the one before us are found upon the statute books of most of the States. In some instances, no fees are paid in cases where the State is a party, if judgment is not rendered against the defendant; in others the fees are payable to certain of the officers and not to others, and yet

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those laws have been steadily maintained. The principles upon which they have been upheld are that the whole subject matter of fees rests in the discretion of the Legislature, and that in a matter where the statute has not provided any compensation for a specified service of an office, "the statute seems to have referred his compensation to perquisites for other services." (*Ex parte Miner*, 2 Hill, 411.) The Legislature seem to have considered the fees payable to the Justice in other cases than those in which the State failed to recover a judgment for delinquent taxes, as sufficient compensation for his services in all cases brought before him. If that compensation is, in fact, inadequate for the services performed by the Justice the remedy is with the Legislature, for the Courts cannot award compensation for official services where none is provided by law.

Judgment affirmed.

JOSEPH EMERIC, ADMINISTRATOR v. H. P. PENNIMAN
AND GEORGE S. POTWIN.

ADMINISTRATOR CANNOT MAINTAIN EJECTMENT UNLESS HE REPRESENTS THE LEGAL TITLE.—The Mexican Nation made a grant of land to P. which, after the cession of California to the United States, was confirmed by decree of the Board of Land Commissioners, from which an appeal was taken to the United States District Court. Pending the appeal P. died, leaving a will. An order was made in the United States Court, on petition of the heirs of P. and the executors of the estate, substituting the heirs in the proceedings in place of P., and the Court then confirmed the land to the heirs, and it was surveyed, and the survey approved. Subsequently E. was appointed administrator with the will annexed; *Held*, that the legal title was in the heirs, and that the administrator could not maintain an action to recover possession of the same.

PLAINTIFF IN EJECTMENT MUST HAVE OR REPRESENT THE LEGAL TITLE.—A person having an equitable title to land cannot maintain an action to recover possession of the same, but such action must be brought in the name of the person in whom the legal title is vested.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Argument for Appellant.

Pratt & Clarke, for Appellant.

We insist that on the happening of the death of Juana Sanchez de Pacheco, the title to her estate did not remain in abeyance, but at once passed by her will to and vested in the devisees named, *subject, however, to the administrator's or executor's right of possession until the estate should be settled or distributed.* (Sec. 114, Probate Practice Act; Wood's Digest, p. 402; *Meek v. Hahn*, 20 Cal. 620; *Beckett v. Selover*, 7 Cal. 238.) These adjudications are *explicit on the point*, and are *conclusive* of the question.

It is material to understand *what was* Pacheco's title at the time of her death. This is determined by the case of *Clark v. Lockwood*, 21 Cal. 221. The Court therein declaring the effect of a final decree of the United States District Court in land claims, say that "the decree is an adjudication binding upon the Government and parties claiming under the Government; that the title to the premises claimed was in the claimant at the *presentation of his petition to the Land Commission, at which date the decree took effect by relation.*" Nothing in *Estrada v. Murphy*, or *Clark v. Lockwood* is repugnant to the principle adjudged in *Beckett v. Selover*, and *Meek v. Hahn*, *that the right of possession of unsettled and undistributed estates is in the administrator.* They determine, it is true, that the fee is in the claimant, and confirmed as against persons whose claims were not considered; but in no respect contravene the settled doctrine in this State, that the right of possession of lands is in the administrators of estates, regardless of where the fee is until the estate is settled and distributed. So far from being against appellant in this case, as before observed, *Clark v. Lockwood*, on the contrary, expressly determines that the effect of the decrees of the United States District Court in these land cases is, that if the fee was not in the claimant and petitioner at the date of the filing of the petition *it becomes so by virtue of the decree itself.*

Who was the petitioner and claimant before the Land Commissioners? Why, Juana Sanchez de Pacheco. What tri-

Argument for Respondents.

bunal, under the laws of Congress, had jurisdiction in land claim cases? Why the Board of Land Commissioners. Has the U. S. District Court any other than *appellate* jurisdiction? Certainly not. The proceedings in the District Court could not be conducted *de novo* as to parties, but only in the name of the original parties before the Board from which the appeal came; or, in case of death, then on suggestion in the name of representatives of such original parties. Then, and in such case, as we have seen, the effect of the decree of District Court would be not to vest the fee in the substituted parties, but in the original petitioner. That petitioner and claimant was Juana Sanchez de Pacheco, of whose lands and estate, at the time of her death, the plaintiff below and appellant here, is and was, at the institution of the suit, the administrator. In the District Court on appeal no new claimants and parties could be suggested and legally substituted; those only could be substituted who were the legal representatives of the claimant before the Board, and *that only* for the purpose of continuing and conducting the proceedings.

This is too obvious for discussion. No fee to the land claimed could, by the decree of District Court, go into such substituted and representative parties.

Thomas A. Brown, for Respondents.

The executors, Lighston and Castro, should have prosecuted the claim, and secured a confirmation to themselves as the personal representatives of the deceased, and thus they would have held the legal title, and would have been entitled to the possession of the property until they were discharged and a legal distribution of the property made to the devisees. But the decree in this case established the legal title to the rancho to be in the confirmees and not in the executors; and this legal title carries with it the right of possession, and the confirmees hold the ranch as confirmed and surveyed to them, not as heirs or devisees of Juana Sanchez, but by virtue of and according to the terms of the decree of confirmation of them.

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This decree divested the estate of Juana Sanchez and her executors or administrators, of all interest in the land as completely as if the claim had been rejected by the United States Courts, or sold to a stranger under execution, foreclosure, or for taxes.

The one hundred and fourteenth, one hundred and ninety-fourth, and one hundred and ninety-fifth sections of the statute regulating the settlement of the estates of deceased persons, which authorizes executors and administrators to take possession of all property of their testators or intestates, relates only to such property as may belong to the estate, and which the heir takes either by devise or inheritance — in which case the title of the heir is traced from the ancestor; and before the heir is entitled to the possession of the property it must appear that administration is closed, or that the property has been distributed to the heir.

By the Court, CURREY, J.

This is an action of ejectment brought by the plaintiff, as administrator of the estate of Juana Sanchez de Pacheco, deceased, with the will of the deceased annexed, against the defendants for the recovery of the possession of a portion of the tract of land in Contra Costa County, called the "San Miguel Rancho." From the evidence in the case introduced by the plaintiff it appears that this tract of land was granted, on the part of the Mexican Nation, to the deceased in 1834, and that in 1852 her claim to it was presented to the Land Commissioners appointed under the Act of Congress of 1851, to ascertain and settle the private land claims in the State of California, and that the same was confirmed by such Commissioners; that after such confirmation appeals were taken both by the claimant and the United States to the District Court of the United States for the Northern District of California, soon after which Mrs. Pacheco died, leaving her surviving a number of children and grandchildren, to whom by her last will and testament she devised the said tract of land. After

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her death these children and grandchildren — upon their own petition, in which the executors of the testatrix's last will and testament joined — were substituted upon the record in the District Court as the claimants of said tract of land, and afterwards such proceedings were had in the case that the claim of the children and grandchildren to the land was finally confirmed to them, and the same was laid off by a survey duly approved.

When the plaintiff had closed his evidence the defendants moved the Court to nonsuit the plaintiff. The motion was granted, and the ruling in this particular is the ground on which a reversal of the judgment is sought.

In addition to the facts already stated, it appears that the claim of Mrs. Pacheco to the San Miguel Rancho was an inchoate and incomplete grant; which it was necessary to submit to the Board of Land Commissioners before the title to the land could become perfect and vested in any private claimant or claimants. Until a confirmation and segregation of the quantity designated by the grant the legal title to the land remained in the Government, charged with the equity and interest of the grantee of the Mexican Government and her assigns. (*Henderson v. Pointdexter*, 12 Wheat. 543; *Hall v. Doe*, 19 Ala. 386; *Minturn v. Brower*, 24 Cal. 644.)

By the Probate Act it is provided that the executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased (Section 114), and he may maintain an action for the recovery of any property, real or personal, or for the possession thereof, in all cases in which the same might have been maintained by the testator or intestate. (Section 195.)

Upon the event of the death of the testatrix, and the proof of the will, and the qualification of the executors, they became entitled to the possession of the rancho, and might have maintained an action for the recovery of its possession in the same manner as she might have done had she continued to live. But it appears that the devisees, to whom the right and interest of the testatrix was transferred by will, with

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the consent of the executors, became substituted upon the record in the United States District Court, to the place of their ancestor and devisor, as claimants of the property, and that the legal title thereto has become vested in them by a final confirmation of their claim and the segregation of the quantity of land granted. By the petition of the executors and devisees and the subsequent proceedings had relating to the subject matter, the executors became divested of the right which they otherwise would have had under the statute to the possession of the premises. (*Pell v. Farquar*, 3 Blackford, 331.)

In *Estrada v. Murphy*, 19 Cal. 272, in which the effect of a confirmation of a California land claim under the Act of Congress of 1851 was considered, the Court said: "The confirmation under the Act operates to the benefit of the confirmer, and parties claiming under him, so far as the legal title to the premises is concerned. It establishes the legal title in the confirmer, and this must control in the action of ejectment."

If the confirmer in this case hold the legal title for the use and benefit, or subject to the claims of any other persons than themselves, a Court of equity is competent to control it in their hands so as to protect the just rights of others. But in ejectment the legal title must prevail; and as the evidence produced by the plaintiff showed the title to the premises to be in the confirmer, he was not entitled to maintain an action to recover its possession. (*Clark v. Lockwood*, 21 Cal. 222.)

We are of the opinion the nonsuit was properly granted.

Judgment affirmed.

JOHN V. WATTSON v. THOMAS H. DOWLING AND
P. G. PELTRET.

WHO BOUND BY JUDGMENT IN EJECTMENT.—If a defendant in ejectment conveys the land pending the litigation, and the grantee enters upon the land with or without notice of the pending suit, he is not only liable to be dispossessed by the writ of restitution, if the plaintiff obtains judgment, but is

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also bound by the judgment, as an instrument of evidence, to the same extent as it would have been binding upon his grantor had no conveyance been made.

WHO CANNOT BE DISPOSSESSED BY WRIT OF RESTITUTION.—Where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone, and recovers judgment, neither the other tenants in common nor their grantees who purchase and enter upon the land pending the suit, can be dispossessed by the Sheriff by virtue of the writ of restitution.

NOTICE OF PENDING OF SUIT.—The twenty-seventh section of the Practice Act, relating to the filing of a *lis pendens*, does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco. .

The facts are stated in the opinion of the Court.

H. S. Love, for Appellant.

In ejectment against the occupant of premises, a judgment of recovery binds not only the defendant, but all persons who received the possession of the premises with *actual* notice of the pending of the action. (*Sampson et al. v. Ohleyer*, 22 Cal. 200, and cases there cited.)

A. & H. O. Campbell, for Respondent Peltret.

If Peltret, no party to the suit, claiming the land in good faith as his own, was turned out of possession without color of law, the Court could and ought to restore him. (*Jackson v. Rathbone*, 3 Cowen, 293; 3 Wilson, 49; *Jackson v. Van Bergen*, 1 Johnson's Cases, 101; 5 Cowen, 418; *Adams on Ejectment*, 341.)

The Court will interfere in a summary manner to restore.

By the Court, **SHAFTER, J.**

This was an action of ejectment brought in the Twelfth District Court against Dowling alone. The plaintiff recovered a verdict on the 28th of March, 1863, and judgment was duly entered thereon August 27, 1863. On the 8th of September,

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1863, the Sheriff of the City and County of San Francisco executed a writ of restitution duly issued in the action, and not only evicted Dowling but the respondent Peltret also. On the 14th of September, 1863, Peltret moved the Court to set aside "the service of the writ upon him," and to restore him to the possession of the premises. The motion was founded upon the affidavit of Peltret and the records and files in the action. The motion was opposed on the records and files referred to and the affidavits of H. S. Love and F. D. Kohler. The motion was granted, and the appeal is from the order. From the affidavits and papers referred to we find the following facts:

1. That the plaintiff's title to the premises is derived from the defendant, Dowling, by virtue of a purchase made by him at a sale on execution issued upon a judgment in *Kohler v. Dowling*, and that the Sheriff's deed passed to the plaintiff an undivided third interest in the premises.

2. That Dowling, a long time prior to the suit of *Kohler v. Dowling*, viz: on the 24th day of August, 1850, conveyed two undivided thirds of the property to Scott and Vandewater.

3. That Vandewater quitclaimed to King, April 20, 1861.

4. That King quitclaimed to Robertson, May 17, 1862.

5. And that Robertson quitclaimed to Peltret, October 23, 1862.

6. That Peltret, from the said 23d of October, 1862, to the 8th of September, 1863, when he was turned out by the Sheriff, was in possession of the premises under his said title, and that he had notice in fact of the pendency of said action at the time when he took his deed.

If a defendant in an action of ejectment conveys the land pending the litigation, and the grantee enters upon the land under the title so acquired, he is not only liable to be dispossessed on the writ of restitution if the plaintiff obtains judgment, but is also, on the principles of the common law, bound by the judgment, as an instrument of evidence, to the same extent as it would have been binding upon his grantor had no such conveyance been made. Whether the purchase was

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made with notice or without notice of the pending suit, would be a matter of indifference. The twenty-seventh section of the Practice Act has no relation to proceedings in ejectment, but to proceedings in chancery, the purpose of which is to "affect titles" by turning equitable estates into legal ones, or to dispose of legal estates by vendition for the purpose of satisfying liens upon them, etc. In this case, though it appears that Peltret bought pending the action of *Watson v. Dowling*, still he did not buy of Dowling but of Robertson, Dowling's tenant in common. At the commencement of the action the third interest so conveyed was in King, and he therefore had then a right of entry. In a month from that time King conveyed to Robertson, and after an interval of five months Robertson conveyed to Peltret, and Peltret entered under the deed. Peltret had a right of entry the moment the deed was delivered. The fact that an ejectment was then pending could not interfere with Robertson's right to convey, nor with Peltret's rights after he had bought and taken his deed. When he entered he but took possession of his own, and he could not be dispossessed of his property by proceedings to which he was neither party nor privy. However convenient it might be to plaintiffs in ejectments were they allowed to oust all persons from the premises, the possession of which they had recovered, who had come in *pendente lite* without collusion with defendants and without their license, but by title derived from other sources, still we cannot, on the ground of such convenience, adjudge that a citizen can be deprived of his property or of the enjoyment of it, without due process of law. (*Tavis v. Ellis et al.*, 25 Cal. 515.)

The order is affirmed.

THE PEOPLE v. C. L. WILSON.

JUDGMENT FOR TAXES ON REAL ESTATE.—Where an action is commenced against a person alleged to be the owner of real estate, and the real estate, to recover judgment for taxes assessed on the same, and the Court finds as a fact that the person sued is not the owner of the real estate, and renders

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judgment in his favor, but against the real estate, and an appeal is taken by the person made defendant from the judgment in his favor, but not from the judgment against the real estate, he cannot assign as error any proceedings which affect the real estate, and as the judgment does not injuriously affect him, it will be affirmed.

APPEAL from the District Court, Eleventh Judicial District, Placer County.

The facts are stated in the opinion of the Court.

A. S. Higgins, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, RHODES, J.

This action was brought under sections thirty-nine and forty of the General Revenue Act of 1861, to recover the delinquent taxes assessed upon a portion of the California Central Railroad for the year 1861. The railroad was treated as real estate, and it, with its improvements, was made a co-defendant with Wilson. The Court adjudged that Wilson was not the owner of the real estate at the time it was assessed to him, and rendered judgment in his favor, but without costs. No personal judgment was rendered against any one, but judgment was entered against the real estate for the delinquent taxes and costs. Notice of motion for a new trial was given by the defendants—meaning probably said Wilson and the real estate—which was denied, and subsequently Wilson alone gave notice of appeal, and filed the undertaking on appeal—no notice or undertaking being given on behalf of the real estate. Wilson is therefore the only appellant before the Court.

He is entitled to assign for error only such proceedings in the Court below as injuriously affect him, without regard to errors of which others might complain. He alleged that he did not own the real estate at the time it was assessed, and the Court found that issue for him, and he not claiming any relief in respect to the subject of the action, the Court very properly ordered that the suit be dismissed, as to him, without costs, it being provided in section forty-four of the Act above

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mentioned, that in such case the judgment shall not carry costs. He has not complained, and we do not see how he could with propriety complain of the judgment or of the order denying a new trial. He is in no manner whatsoever, so far as appears from the record, affected by the judgment against the land. If he had been found to be the owner, or if the judgment had been given against the unknown owner of the real estate, and he had made it appear that he was in fact the owner, the case would be quite different from the one now presented.

Judgment affirmed.

THE PEOPLE v. CHARLES ANDERSON.

PROOF OF INCOMPETENCY OF WITNESS BY PARTY OBJECTING.—A party who objects to a witness called by the opposite party, on the ground of incompetency, may adopt either of two modes to show that incompetency. He may examine the witness upon his *voir dire* as to the alleged incompetency, or he may object to the witness on the ground of the alleged incompetency, and prove it by other witnesses.

EXAMINATION OF WITNESS ON HIS *Voir Dire*.—A party who questions a witness on his *voir dire* as to his competency is concluded by his testimony, and cannot then introduce other witnesses to show the alleged incompetency, unless the answers of the witness on his *voir dire* leave the question in doubt.

HOW INCOMPETENCY OF WITNESS PROVED.—If a party objects to a witness as incompetent, and then resorts to the testimony of other witnesses to prove the alleged incompetency, but fails because his testimony is rejected as inadmissible, he may still resort to an examination of the witness upon his *voir dire*.

SAME.—If a party has two grounds of objection to the competency of a witness, he may examine him on his *voir dire* as to one ground, and call other witnesses to prove the other ground of alleged incompetency.

PROOF THAT WITNESS IS WIFE OF OPPOSITE PARTY.—Where a witness is called and objected to by the opposite party on the ground that she is the wife of the party objecting, and he then proves by other witnesses that the two had cohabited together for a long time as husband and wife, had passed in society as such, and had represented each other as husband and wife, and the party calling the witness introduces no testimony to the contrary, the witness should be rejected by the Court.

PROOF OF MARRIAGE.—Proof that a man and woman had cohabited together for a long time as husband and wife, had mingled in society as such, and represented each other as such, is admissible for the purpose of proving a marriage, and in the absence of evidence to the contrary, conclusive as such.

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in all cases, except in actions of *crim. con.*, divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced.

How ERROR OF COURT IN ADMITTING EVIDENCE CURED.—If a witness is objected to on the ground that she is the wife of the party against whom she is called, and the party objecting proves by other witnesses facts sufficient to show that they are husband and wife, without proving an actual marriage, and the Court then erroneously allows the witness to testify, and on cross examination the party objecting draws out the fact that the witness is not the lawful wife of the party objecting, the party calling out this statement on cross examination is concluded by it, and the previous error of the Court is cured.

How ERROR IN RULING OF THE COURT CURED.—The general rule is, that, if error intervenes the judgment must be reversed; but, if during the subsequent proceedings of the trial the foundation of the error is overthrown, and facts are shown which support the ruling of the Court, the error is cured.

A PARTY INDORSES THE CREDIBILITY OF HIS WITNESS.—A party calling out a fact from a witness indorses his credibility, and is concluded by his statement.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendant was indicted for murder in the first degree. The District Attorney called as a witness for the People a woman under the name of Mary Jane Smith. When called, and before she was sworn to testify in the cause, the attorney for the defendant objected to her being sworn or examined as a witness on the ground that she was his wife. The Court directed her to stand aside, and other witnesses were sworn and examined on behalf of the defendant to prove that she was his wife. The defendant was convicted of murder in the second degree and appealed.

The other facts are stated in the opinion of the Court.

W. H. L. Barnes, for Appellant.

Cases might be indefinitely recited to show that in England, at all times, and in every form of action known to Courts of civil and criminal, legal and equitable jurisdiction, it has been held that marriage may be proved by cohabitation, reception, the admissions, declarations, and conduct of the parties. To this general rule there is but one exception made by the English authorities, to wit: that in actions of *crim. con.* or divorce, or in indictments for bigamy, an actual valid marriage must be proved; and this because the *marriage* is the

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foundation of the claim enforced or the crime to be punished. (*Evans v. Morgan*, 2 C. & L. 453; *Rex v. Allison*, R. & R. 109; *Birt v. Barlow*, Doug. 171; *St. Devereaux v. Murch Dew Church*, 1 W. Bl. 367; *Morris v. Miller*, Id. 632; s. c. 4 Burr, 205; *Rex v. Durnell*, cit. 2 C. & K. 450; *Doe v. Fleming*, 4 Bing. 266; *Read v. Passer*, Peake, 233; *Sayer v. Glossop*, 2 C. & K. 694; *Scrimshire v. Scrimshire*, 2 Hagg. Con. 395; *Reg v. Simmonsto*, 1 C. & K. 164; *Freeman's Case*, 1 East. P. C. 470; *Rigg v. Curvengen*, 2 Wils. 399; *Norwood's Case*, East. P. C. 470; *Hervey v. Hervey*, [sup.] 2 W. Bl. 877; *Leader v. Barry*, 1 Esp. 213; 3 Starkie's Evidence, 1,186; 1 Greenleaf's Evidence, § 107.)

In the United States the same rule of evidence has always obtained; and in several of the States the force of the exception which requires proof of an actual, valid marriage in actions of *crim. con.*, adultery, and in indictments for bigamy, etc., has been greatly weakened and modified. (*In the matter of Taylor*, 9th Paige, 611; *Martin's Heirs v. Martin*, 22 Ala. N. S. 202; *Forney v. Hallecker*, 8 Sergt. & Rawle, 158.)

In *Case v. Case*, 17 Cal. 598, it was admitted on the argument that in every case where the proof of marriage does not convict the party of bigamy or adultery, it may be proved by cohabitation, declarations, and general course of life and reputation. The Court expressed the same view; for, although it was decided that the proof of cohabitation, reputation, and acknowledgment given in this case were insufficient, the decision is put on the special ground that the inference of marriage, from the proof, would convict the defendant of bigamy; and that in such cases an actual valid marriage should be proved.

(See also, *Taylor v. Robinson*, 29 Maine, 323; *Fenton v. Read*, 4 Johns. 52-4; *Cayford's Case*, 7 Greenleaf, *57; *Warner v. Commonwealth*, 2 Virg. Cases, 95; Wharton's Am. Crim. Law, 756; Roscoe's Crim. Ev. 236; *State v. Britton*, 4 McCord, 256; 5 Penn. Law Journal, 1; *Wolverton v. State*, 6 Ohio, 173; *Kibby v. Rucker*, 1 Marsh, Ken. 290.)

J. G. McCullough, Attorney-General, for Respondent.

By the Court, SANDERSON, C. J.

The only question presented by the record in this case is as to the competency of Mary Jane Smith, called as a witness and allowed to testify against the objection of the defendant, on the part of the People. The defendant objected to her on the ground that she was his wife, and therefore incompetent to testify for or against him in a criminal action.

There are two modes by which the competency of a witness may be determined; and the party who objects to a witness may, of right, adopt either. He may examine the witness upon his *voir dire*, or he may prove the alleged incompetency by evidence *aliunde*. If he adopts the former mode he makes the witness his, so far as the question of competency is concerned, and is concluded by his testimony, unless that testimony, as not unfrequently happens, leaves the question in doubt, in which case he may resort to other evidence. If he thus makes the witness his, he thereby represents him to the Court as worthy of belief, and he cannot afterwards say that he is not; and if the testimony elicited on the direct examination establishes or tends to establish his incompetency, the opposite party is at liberty to cross examine for the purpose of rebuttal. If he adopts the latter mode and fails because his evidence is rejected as inadmissible, he may still resort to the former mode; and it seems, if he has two distinct grounds of objection, he may adopt one mode of proof as to one ground, and the other mode as to the other ground. But in no case is the witness allowed to testify as to his competency unless first called by the objecting party. (*Mott v. Hicks*, 1 Cowen, 513; *Evans v. Gray*, 1 Martin N. S. 709; *Vincent v. The Lessee of Huff*, 4 Sergeant & Rawle, 297.)

In the present case the mode by evidence *aliunde* was adopted. The ground of incompetency was proved by evidence of cohabitation as man and wife, reception in society, visiting and being visited by respectable people of their class,

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attending church together (of which the witness was a member under the name of Anderson), and publicly treating and representing each other as such for a long period prior to the occasion in question. But no evidence, by marriage certificate, or registry, or testimony of eye witnesses of the ceremony was offered by the defendant, nor was any evidence whatever offered on the part of the prosecution. That this character of evidence was admissible for the purpose of proving the marriage, and, in the absence of any evidence to the contrary, conclusive upon that question, is not denied by the Attorney-General, although a contrary doctrine seems to have prevailed in the Court below. The general rule is that this character of evidence is not only admissible, but, in the absence of evidence to the contrary, is sufficient proof of the marriage. (*Hervey v. Hervey*, 2 Wm. Blacks. 877; *Reed v. Passer*, 1 Espinasse, 213; *Wilkinson v. Payne*, 4 Term Rep. 468; *Campbell v. Twemlow*, 1 Price, 81; *In the matter of Taylor*, 9 Paige, 611; *Martin's Heirs v. Martin*, 22 Ala. N. S. 102; *Forney v. Hallacker*, 8 Sergt. & Rawle, 158; *Letters v. Cady*, 10 Cal. 535; *Case v. Case*, 17 Cal. 598.) Actions of *crim. con.*, divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced, or the crime to be punished, are exceptions to the rule.

Upon the testimony as it stood at the time the Court below ruled upon the question of competency the defendant was undoubtedly entitled to a ruling in his favor. But it appears from the transcript that the witness, after she had been allowed to testify by the Court, and while under cross examination, stated that she was not the "lawful wife of the defendant, although she had lived with him as such." And it is claimed by the Attorney-General that this statement made by her to whom the fact must have been positively known, overcomes the evidence of cohabitation, etc., and that her competency thus established cures the previous error of the Court.

It was stated on the argument by counsel for the appellant that this evidence was given by the witness upon her own sug-

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gestion, and not in response to any interrogatory put to her by him. If such be the case, it is to be regretted that the fact is not made to appear in the transcript. It appears in connection with her other evidence upon cross examination, and there is nothing in the record showing that it was volunteer testimony. We are confined to the record and must be governed by it. From the manner in which the record is made up, the legal intendment is that the statement in question was elicited from the witness by counsel for the defendant. If such was not the fact, the record should have been made to show it; and at the trial counsel should have moved to strike out the evidence and taken an exception if denied.

Where error has clearly intervened the general rule is that the judgment must be reversed and a new trial ordered; but such is not the case if, during the subsequent proceedings, the foundation of the error is overthrown and another substituted which supports the ruling of the Court, for the previous wrong, so to speak, is thereby made right, and the complaining party can no longer say that he has been injured. The record in this case places the defendant in the attitude of waiving his exception to the erroneous ruling of the Court and voluntarily reopening the question of competency. On this second investigation he examines the witness herself, and, as we have already seen, is concluded by her statement. By asking the question he indorsed the credibility of the witness, and cannot complain because he received an answer the opposite of what he expected. The mere presumption of marriage, created by the previous evidence of cohabitation, etc., was overthrown by the positive testimony of the witness to whom, of necessity, the whole truth was known, and her competency thereby fully established. We can only look to final results, and if they are found to be correct, justice has been done and the judgment must stand.

Judgment affirmed.

THE PEOPLE v. JOHN B. FRISBIE.

REOPENING JUDGMENTS.—The question of diligence in making an application to reopen a judgment under the Act of April 27th, 1862, is one for the Court below to pass upon, in the exercise of a sound discretion, and the Supreme Court will not reverse the action of the Court below except in case of an abuse of discretion.

JUDGMENT PENDING AN APPEAL.—An appeal suspends the operation of a judgment, and while pending, the party in whose favor it is rendered has no vested right in the judgment, but his right is limited to his cause of action.

CONSTRUCTION OF STATUTES.—If a statute is susceptible of two constructions, one of which is consistent, and the other inconsistent with the restrictions of the Constitution, it is the duty of the Court to give it that construction which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature.

LEGISLATIVE ASSUMPTION OF JUDICIAL POWER.—An Act of the Legislature granting a new trial, or reopening a judgment in an action litigated between individuals, would be an assumption of judicial powers by the legislative department, and unconstitutional.

JUDGMENTS IN FAVOR OF THE PEOPLE.—An Act of the Legislature granting a new trial, or reopening a judgment in favor of the People in a civil action in which the People are a party, is a mere consent on the part of the People, one of the parties to the judgment, that a new trial be granted, or the judgment be reopened, and is not unconstitutional.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

J. C. Hinckley, and Whitman & Wells, for Appellants.

The Act by which the forty-second section of the Act of 1861 was amended, was passed on the 27th day of April, 1863, after the judgment of the Court below had been finally affirmed in this Court, thereby becoming a full and final determination of the questions involved. That the remittitur had not been sent down does not, in the view we take, affect the question at bar. The case was, as we said above, fully and finally determined; but its further prosecution was suspended under the operation of a rule of this Court or its order staying the proceedings. That suspension was in obedience to the law and rules of Court as they existed when the judgment was pronounced; and we submit it cannot and does not affect the validity and force of the original judgment as pronounced any

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more than the delay of the Sheriff to levy final process during its life and before return day could invalidate or impair the judgment on which it issued. It presents a singular case when the Legislature reverses the judgments of the Courts and reopens a case upon its original issues.

The opinion already given has become the law of the case, and it is, under the rulings of this Court, decisive. (*Denny et al. v. Gray*, 3 Cal. 377; *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 592; *Cal. Steam Nav. Company v. Wright*, 8 Cal. 585; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 75; *Leese v. Clark*, 20 Cal. 387; *Soule v. Ritter*, 20 Cal. 522; *Table Mountain Company v. Stranahan*, 21 Cal. 548; *Phelan v. San Francisco*, 20 Cal. 39.)

Under the law of the land, therefore, the rights of the plaintiffs in this case had vested, and it was not in the power of the Legislature to interfere with them, if we may rely upon the principle announced in *McCauley v. Brooks*, 16 Cal. 39, 40, and reaffirmed in *Smith v. Judge of the Twelfth District*, 17 Cal. 547: "That there is no discretion when rights have vested under the Constitution or by existing laws;" and that, therefore, the judicial and legislative powers are in such cases absolutely independent of each other.

P. W. S. Rayle, for Respondents.

The Legislature of this State has on repeated occasions released judgment against sureties on official bonds, when the facts of the case warranted legislative interposition. And upon the same principle, when the State is party to the record, the Legislature representing the People has ample power to release, reopen, set aside, or discharge judgments, when the peculiar state of facts warrant it. It would be subversive of the spirit and theory of our Government if the Legislature cannot relieve a citizen in special cases from the oppressive effects of a general law. The citizen who offers to make proffer of his tax receipt to exempt him from liability to repay his taxes upon the same property for the same year, may not be able owing to the universality of the general law to plead

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payment as a defense, he will most assuredly be entitled to invoke the wisdom and justice of the lawmakers, who alone are vested with power to impart the relief the facts of the case require. (17 Cal. 548.)

Respondent admits that vested rights cannot be assailed by legislative enactments, but contends that the Act in this case in nowise assails vested rights or so operates upon the remedy as to impair the right; it is simply the consent of the People, plaintiffs in this case, through their representatives, that in a certain class of cases, of which this is one, judgments may be opened up to give defendants a right to answer. It certainly will not be contended that the plaintiffs had not even the right to set aside and cancel the judgment.

By the Court, RHODES, J.

Suit was brought against the defendant and certain real estate, to recover the delinquent taxes which had been assessed upon the real estate to said Frisbie, for the year 1861, in Solano County.

The action was commenced and prosecuted to judgment under the General Revenue Act of 1861. Frisbie answered the complaint, denying that the land was subject to taxation, or that he was indebted in any sum for State or county taxes, or that the land was in Solano County, and alleging that the lands were in Napa County, where they had been duly assessed for taxes for 1861, and that he had paid the taxes for that year in that county. The plaintiff demurred to the answer on the ground that it did not conform to the provisions of section forty-two of that Act, and the demurrer was sustained, and the defendant declining to answer, judgment was rendered for the plaintiff. The defendant appealed and the judgment was affirmed. The remittitur was filed in the Court below on the 7th day of July, 1863. On the 27th of April, 1863, an Act was passed, which took effect from its passage, amending section forty-two of the Revenue Act of 1861, by adding another defense, viz: "Fourth. That the land is situate in

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and has been duly assessed in another county and the taxes thereon paid," and providing that in pending suits the fourth ground of defense may be interposed, and that if the suit has proceeded to judgment, which remains wholly unsatisfied, the defendant may have the judgment reopened for the purpose of setting up the defense mentioned in the fourth subdivision, and he was then entitled by the Act, to avail himself of the defense, as fully as in cases thereafter to be commenced. The defendant on the 20th day of August, 1863, moved that the judgment be reopened as provided in said Act, and the Court having set the same for hearing on the first day of the ensuing term for Napa County, and the defendant having filed his petition, setting up that the land was situated in Napa County, that it had been duly assessed for taxation for the year 1861 in that county, and that he had paid the taxes thereon, the Court ordered the judgment to be reopened. From this order plaintiff appeals.

The only error assigned by appellants is that the Court erred in ordering the judgment to be opened, and allowing the respondent to interpose a further defense.

The appellants now raise the objection that the respondent did not pursue the remedy afforded by the amendatory Act of 1863 with due diligence. The statute does not prescribe the time within which the motion must be made; and if the respondent was governed in this respect by the provisions of the Practice Act, the question of diligence was for the Court below, in the exercise of a sound discretion, and we would not be justified in reversing its action except in case of an abuse of discretion. Besides this the appellants failed to make the objection in the Court below.

The most important point in the case urged by the appellants is that the Act of April 27th, 1863, is unconstitutional and void, so far as it is applicable, by its terms, to cases in the condition of this case; and in support of the proposition he says that by virtue of the judgment of the Court below, and its affirmance by the Supreme Court, the right of the appellants became vested, that the judgment was a final determina-

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tion of the controversy between the parties, and that the Act amounted in substance to the grant of a new trial to the respondent, and as such was void, because it was an usurpation by the Legislature of the functions of the judiciary.

It will be observed that the Act was passed and took effect twenty-two days previous to the entry of the judgment of the Supreme Court, and therefore the appellants, at the time the rights claimed under the statute accrued to the respondent, did not have a vested right in the judgment, but their rights were limited to their cause of action, the appeal having suspended the operation of the judgment. (*Thornton v. Mahoney*, 24 Cal. 569.)

The appellants have argued with much force and learning the proposition that the Act amounting simply to an order granting a new trial, is unconstitutional and void. If their construction of the Act is correct it would be difficult, if not impossible, to maintain the Act when applied to causes that have passed to judgment, and, perhaps, to pending causes in which the issues have been found, for it would be justly regarded as an assumption of judicial powers by the legislative department. But we think that construction is not correct, and that the Act may be upheld on other principles.

If a statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the Constitution, it is the plain duty of the Court to give it that construction which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature. A correct understanding of the results intended to be accomplished by the Act must be had before it can be determined whether the means employed are legitimate. Although the Act in question, if applied to a case which was in a condition similar to that of the present case at the time of the passage of the Act, and which was being litigated between individuals, would be declared by the Court to be unconstitutional, yet it does not follow that it would be so declared in a case to which the State is a party.

In this case the State is plaintiff, and during the progress of

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the litigation, and upon the rendition of the judgment she had the same rights and privileges in relation to the proceedings in the action, as those that pertain to any plaintiff in an action. It makes no difference in this respect that she assert her rights by means of an Act of the Legislature, or by any other means that a private person is not entitled to employ. Without doubt the State might remit the whole of the tax before or after bringing the suit, or enter satisfaction of the judgment for the tax without receiving payment, or upon any terms the defendant might assent to. A plaintiff may consent that the judgment in his favor be reopened, in order that the defendant may present a new issue for trial, without regard to the question whether the defendant had an opportunity to have presented that issue in the former trial; and if he does so consent, no one, and certainly not the plaintiff, can complain of the giving of the consent.

Was anything more or further intended to be accomplished by the Act, so far as it had relation to a suit that had passed to a judgment, than to declare that the plaintiff thereby consented that the judgment might be reopened, upon proceedings to be taken by the defendant, and that when it was reopened the defendant might set up in his answer the fourth ground of defense mentioned in the Act?

The Legislature seems to have considered that a defendant ought to be permitted to show that his real estate was not subject to taxation in the county where it was assessed, because it was not situate in that county, and to have been of the opinion that, under the Revenue Act of 1861, the defendant could not set up that fact as a defense to the action. It is unnecessary for us to determine whether or not the defendant was deprived by that Act, or could by any Act of the Legislature be precluded from showing that a parcel of his property was not subject to taxation in two or more counties at the same time; but the Legislature, holding the view that the defendant, by the words of that Act, had been deprived of the benefit of a defense that of right he should have possessed, resorted to the amendatory Act, to manifest the consent of

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the State, as the plaintiff in the action, that the defendant might move without objection by the plaintiff, that the judgment might be reopened so that the defendant could set up the defense of which he had previously been deprived. The object to be accomplished was unquestionably proper, and we think the means employed were within the powers of the Legislature, when acting for and on behalf of the plaintiffs in the actions that were the subject of the legislation.

The people cannot complain that they have been divested of their vested rights, for they have voluntarily consented to the reopening of the judgment. The Act is not liable to the objections that might be urged with great, if not conclusive, force against an Act that should attempt to reopen a judgment in a single specified action, or to prescribe the time, place or manner of its trial; for this Act is general in its application, and is essentially a law, and not merely a direction given to a Court.

The order appealed from is affirmed, and the cause is remanded for further proceedings.

CHARLES A. LOW v. PLINY C. ALLEN, ALEXANDER G. RAMSDELL, EUGENE H. THARP, AND GEORGE F. SHARP.

LIEN OF MORTGAGE — STATUTE OF LIMITATIONS.—Where three persons execute their joint mortgage on land to secure their joint and several promissory note to the mortgagee, and one of them leaves the State, and the note afterwards becomes barred by the Statute of Limitations as to the two who remain in the State, the lien of the mortgage is also barred as to the interest of the two in the land, and it can only be enforced against the interest of the one as to whom the note is not barred.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

William Barber, for Appellant.

Argument for Appellant.

The obligation entered into by each and all of these parties was of a twofold nature: *First*—A promise by each and all to pay the debt. *Second*—A pledge of their interest in the mortgaged property to secure its payment.

The first of these obligations can no longer be enforced as against two of the promisors, by reason of their plea of the Statute of Limitations; but their liability as mortgagors to secure a debt still outstanding and unpaid exists in full force. That they cannot be legally compelled to perform one promise is no reason for holding them discharged from the obligations of another.

The question is not whether they can be sued on their personal promise, but whether the debt exists for which they mortgaged their property. Have they paid this debt? No. Has it been in any manner paid? No. On the contrary, the decree below against Allen shows that it is still unpaid.

If the parties, Tharp and Ramsdell, (who have pleaded the statute) had never been in any way liable personally for the debt, still the mortgage which they gave to secure its payment would have been legally enforceable against their property. If I pledge my property as security for the debt of a third party, can I set up the plea that I am not personally liable for the debt in answer to a suit brought to enforce the pledge? If not, how can I plead that, although I was once personally liable for the debt, such liability can no longer be enforced, and therefore, the lien of the pledge no longer exists? Is the fact that I was never liable personally, a weaker plea than that my personal liability did once exist, but has ceased?

When three parties, A., B., and C., make a joint and several note, (say for one thousand dollars) what is the legal nature of their contract? It is as follows: A. promises to pay one thousand dollars; B. promises to pay one thousand dollars; C. promises to pay one thousand dollars; A., B., and C. promise to pay one thousand dollars, with the understanding that payment by one cancels the debt.

A., B., and C. execute a mortgage as security for the pay-

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ment of this note; that is, as security for the fulfillment of each of these promises.

The Statute of Limitations runs in favor of A. and B., and invalidates their promises. C.'s promise is outstanding, and can be and is sued on. What effect has this state of facts on the rights of the mortgagee? The liability of A. and B. for their joint and several promises is gone, and with it all recourse on the mortgage as security for their promises. But as security for C.'s promise, the mortgage is good and valid by its express terms.

As principals A. and B. are no longer liable; but their property, pledged as security for the fulfillment of C.'s promise, continues liable, notwithstanding their personal exemption from suit as principals on the original obligation.

George F. & Wm. H. Sharp, for Respondents.

The fact that defendants are jointly and severally bound, as the plaintiff avers in his brief is the fact here, does not prevent the statute from applying to one and not the other. (*Bogert v. Vermilyea*, cited in 1 Code R. 212; 6 Selden, 447.)

In *Robinson v. Smith* it was held that one defendant could avail himself of the statute, although the plea was held bad as to the other. (14 Cal. 254.)

By the Court, SHAFER, J.

The defendants, Allen, Ramsdell, and Tharp, executed two promissory notes, jointly and severally, to W. C. Jewett, in the sum of fifteen hundred dollars each, dated September 10, 1853, payable in one year from date; and at the same time executed a mortgage to the payee to secure said notes. Allen left the State in the year 1855, and this action to foreclose the mortgage was commenced July 3, 1860. On the 3d of January, 1856, Ramsdell and Tharp conveyed their interests in the land to Sharp, one of the defendants, subject to the mortgage. The securities came to the plaintiff by assign-

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ment on the 31st of October, 1853. No personal judgment is claimed against Ramsdell or Tharp. Sharp appeared and pleaded the Statute of Limitations, to which the plaintiff replied that Allen departed from this State in 1855, and that he had not returned to it since. The Court held that the action was barred as to defendant Sharp, and a foreclosure and sale were decreed as to the interest of Allen. The plaintiff appeals.

The question raised is, in effect, upon the sufficiency of the plaintiff's replication to Sharp's plea.

At common law a mortgage was regarded as a conveyance of a conditional estate which became absolute upon a breach of the conditions. It gave to the mortgagee—except as otherwise provided by stipulations inserted in the instrument—a right to immediate possession. He could peaceably enter upon the land, or support ejectment. The two hundred and sixth section of the Practice Act changes this character of the instrument, and takes from the mortgagee all right to the possession either before or after condition broken, and makes the mortgage a mere lien. (*Fogarty v. Sawyer*, 17 Cal. 589.) Following out this view of the nature of a mortgage security under our laws, the late Supreme Court further held in *Lord v. Morris*, 18 Cal. 482, that there could be no remedy upon the mortgage after the remedy was barred upon the mortgage note; and in *McCarthy v. White*, 21 Cal. 495, it was held that the grantee of the mortgagor could claim the benefit of this principle. These cases meet the argument submitted for the appellant, in so far as it may be considered to be founded upon the rule of the common law.

According to the analysis of the counsel of the appellant, there were four notes given, in effect—the joint note of the three signers, and the several notes of each of them. The joint obligation is at an end, for it is admitted that neither Tharp nor Ramsdell are personally liable upon the joint promise; and an action on the several promise of each of the two is also barred by lapse of time, and the several promise of Allen is the only one that survives. For all the purposes of argument

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the case is the same as though Allen had given his several note in the first instance, and Tharp and Ramsdell had mortgaged their lands to secure it. The point made for the appellant is, that Tharp and Ramsdell mortgaged their interest to secure the payment of Allen's several notes, and that by the very terms of the mortgage contract their interest in the lands is bound until Allen pays or is otherwise discharged. It will be seen that the whole reasoning is based upon the intention of parties as gathered from the terms of the written instrument. "It must be so, because the parties have so agreed." Generalize this reasoning, and all contracts, without distinction, would at once be withdrawn from the operation of the Statute of Limitations. The statute does not bar for the reason that parties have agreed that it shall bar, nor does it fail to bar because parties have failed to agree specifically that it shall not. The mortgage contract of Tharp and Ramsdell is distinct from the note it was given to secure, and is manifestly one of the "written contracts" on which the statute provides that no action shall be brought except within four years after the cause of action has accrued. Now a cause of action accrued against Tharp and Ramsdell on their mortgage contract, as collateral to Allen's several promises, as soon as those promises matured. Tharp and Ramsdell were both in the State at the time, and, for aught that appears to the contrary, they have been here ever since.

The case presented, then, is within the very language of the statute, and is, furthermore, within the mischiefs against which the Statute of Limitations was intended to guard.

Judgment affirmed.

SAMUEL BRODEK v. JOHN S. ELLIS.

WHEN ASSIGNOR OF AN ACCOUNT MAY BE A WITNESS.—A person who assigns a demand of his own to another for the purpose of enabling that other person to bring a joint action upon a demand of his own, and upon the one assigned, the assignor paying his proportion of the costs and sharing in the

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proceeds of the recovery, is a party in interest within the meaning of the four hundred and twenty-second section of the Practice Act as amended in 1861, and if an attachment is issued in said action, and the Sheriff seizes goods by virtue of the same, and a suit is brought against him for damages for the seizure, and the plaintiff offers himself as a witness on his own behalf, upon notice given, the person who made the assignment may offer himself as a witness on behalf of the Sheriff, upon the same points, without giving notice.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

September 6th, 1862, William Meyer and L. Wormser commenced an action in the District Court, Fourth Judicial District, City of San Francisco, against Brodek Brothers, to recover judgment for two thousand four hundred and eighty-four dollars and fifty-eight cents. This sum was made up of a demand due plaintiffs, and demands assigned to them by several mercantile firms, and among the number L. King & Co. An attachment was issued in the action, and by virtue of the same, the Sheriff levied on a quantity of boots, shoes, and clothing, as the property of Brodek Brothers.

Samuel Brodek claimed to own the goods, and on the 11th day of September, 1862, commenced an action against the Sheriff to recover judgment for a return of the property and damages. The Sheriff justified the taking under the writ, claiming that the goods were the property of Brodek Brothers, and that plaintiff was one of the firm.

On the trial plaintiff was called as a witness on his own behalf to prove that he owned the goods and that he was not a member of the firm of Brodek Brothers.

Plaintiff recovered judgment, and defendant appealed.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellant.

A. Campbell, for Respondent.

By the Court, SAWYER, J.

This was an action to recover certain personal property, which had been seized by the defendant, as Sheriff, under an

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attachment issued in the case of *Meyer and Wormser v. Brodek Brothers*. Plaintiff recovered, and defendant appealed. Defendant offered one Leopold King as a witness, to prove that plaintiff was one of the firm of Brodek Brothers, defendants in the attachment suit—one of the issues in the case. On *voir dire*, King testified that he was one of an association of merchants known in San Francisco as the "Combination;" that, according to their rules, when information was received by one of the association that a customer was about to fail, notice was immediately given to the other members, and such of them as had demands against the failing customer assigned them to some one or more of the members of the association, and an attachment suit was commenced in their names against the common debtor for the aggregate amounts due the parties interested—the members sharing the expense of the litigation which might follow, and dividing the amount realized in proportion to the amount of their respective claims; that the firm of which he was a member was a creditor of Brodek Brothers: that the firm had assigned to Meyer and Wormser their account against Brodek Brothers, and that this account thus assigned, in pursuance of the rules of the "Combination," formed a part of the demand claimed in the attachment suit in which the goods were seized. Plaintiff objected to the witness on the ground that the suit was defended for his benefit to the extent of his share in the amount claimed in the attachment suit prosecuted in the name of Meyer and Wormser, and he was therefore interested in the event of the suit. The Court sustained the objection; defendant excepted, and this ruling is relied on as error.

The plaintiff had before been examined upon the same point on his own behalf, upon notice in pursuance of section four hundred and twenty-two of the Practice Act, as amended in eighteen hundred and sixty-one. Section four hundred and twenty-two, as then in force, provides that "a person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of

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examination, as if he were named as a party;" and then provides that a party may be examined in his own behalf, upon giving ten days notice in writing to the adverse party of such intended examination, specifying the points upon which he intends to be examined; "and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received." Upon a careful examination of this section, in connection with the other provisions of the Practice Act relating to the subject, we are satisfied that King was a party in interest within the meaning of section four hundred and twenty-two; and the plaintiff having offered himself and been examined as a witness upon the same point on his own behalf, that King was also entitled to be examined on *his* own behalf without giving any notice.

It is insisted by respondent that King falls within the provisions of each of sections four, three hundred and ninety-two, three hundred and ninety-three and three hundred and ninety-four. Conceding this to be so, the plaintiff also falls within some of those provisions and would be incompetent under them. But section four hundred and twenty-two, subsequently passed, provides that upon certain prescribed conditions he may, at his election, testify on his own behalf, notwithstanding his interest; but the consequence imposed on him by the same section is that, if he does so, the opposite party or person in interest shall also be received as a witness on *his* own behalf. The plaintiff availed himself of the privilege and he must submit to the consequences.

The Court erred in excluding King's testimony. As the matters offered to be proved by him were material, the judgment must be reversed on this ground and a new trial had, and it is so ordered.

Statement of Facts.

BARTON RICKETSON v. WILLIAM A. RICHARDSON, SAMUEL R. THROCKMORTON, CHARLES S. COMPTON, DONALDO DAVIDSON, BENJ. DAVIDSON, WILLIAM HOOD, ROBERT WALKINSHAW, ET ALS.

SERVICE OF SUMMONS.—The sections of the Practice Act providing for the service of summons on a defendant by publication, being in derogation of the common law, must be strictly construed.

AFFIDAVIT FOR PUBLICATION OF SUMMONS.—An affidavit to obtain an order for the service of a summons by publication must show whether the residence of the person upon whom service is sought is known to the affiant, and if known, the residence must be stated. An affidavit which merely repeats the language or substance of the statute is insufficient. The ultimate facts of the statute must not be stated in the affidavit, but the probative facts, upon which the ultimate facts depend.

SAME.—It is not sufficient to state generally in such affidavit that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party, but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated.

ORDER FOR PUBLICATION OF SUMMONS.—On granting the order for the publication of summons, the Court acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit.

SAME.—An order for the service of summons by publication must state the facts proved by the affidavit upon which it is based. It is not sufficient for the order to state, generally, that the defendant resides out of the State, or cannot, after due diligence, be found within the State, or that a cause of action exists against the defendant.

REVERSAL OF JUDGMENT.—Where only one of several defendants against whom a judgment has been rendered, appeals to the Supreme Court, the appellate Court, if it reverse the judgment, may reverse or modify it as to any or all of the parties defendant. Where, in such case, the error assigned only affects the party appealing, the Court will not presume error as to the parties not appealing, and will reverse the judgment only as to the party appealing.

APPEAL from the District Court, Seventh Judicial District, Marin County.

This was a suit to foreclose a mortgage upon certain real estate situated in the County of Marin, and known as the "Rancho Saucelito," executed by William A. Richardson to Jeremiah Clarke, and of which the plaintiff was the assignee.

The following is the affidavit upon which the order of publication of summons was made:

"Charles S. Hathaway, of the City and County of San

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Francisco, being duly sworn, deposes and says that he is the attorney in fact of the plaintiff in the above entitled action, and that as such attorney in fact he is particularly acquainted with the facts connected with said action; that the above named defendants, Alexander Matthewson, David Jardine, Joseph Jardine, Alexander G. Dallas, Alexander C. Maclane, and Charles S. Compton, reside out of the State of California, and are not now within said State, but are, as deponent is informed and believes, residents of the Empire of China.

"Deponent further says that a good cause of action exists against all of said defendants, and that they are all, as deponent is informed and believes, necessary parties to said action.

"CHARLES S. HATHAWAY.

"Subscribed and sworn to this 16th day of February, A. D. 1856, before me,

"GILBERT GRANT, Notary Public."

The following is the order for publication of summons:

"Upon reading and filing the affidavit of Charles S. Hathaway, the attorney in fact of the plaintiff in the above entitled action, and it appearing satisfactorily to me that the defendants, Alexander Matthewson, David Jardine, Joseph Jardine, Alexander G. Dallas, Alexander C. Maclane, and Charles S. Compton, mentioned therein, reside out of the State of California, and are not now within said State; and that the defendants, Charles Meyer, William Bennett, and William Hood, mentioned therein, cannot, after the exercise of due diligence, be found within said State of California;

"And it also appearing that a cause of action, as described in the complaint, exists against said defendants, and that they are necessary parties hereto;

"It is ordered that service of process herein be made by publication of a summons, once a week for three months, in the *Alta California*, a newspaper printed and published in the City and County of San Francisco, in said State; and that a copy of said summons and complaint be deposited in the Post Office at San Francisco, postage paid, addressed to said Mat..

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thewson, at Hongkong, China; also, one to David Jardine, directed to Hongkong, aforesaid; also, one to Joseph Jardine, directed to Canton, China; also, one to Alexander G. Dallas, directed to Hongkong, China; also, one to Alexander C. Mac-lane, directed to Hongkong, China; also one directed to Charles S. Compton, postage paid, at London, England.

"Given under my hand at San Rafael, this 18th day of February, 1856.

"A. BARNEY,
"County Judge Marin County."

The other facts are stated in the opinion of the Court.

H. & C. McAlister, for Appellant.

Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction.

"We have already held, in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued," etc. (*Jordan v. Giblin et al.*, 12 Cal. 102.)

"If the Court has no jurisdiction in this case, such a decision is obviously wrong, because it is and ever has been the policy of this Court to allow the question of jurisdiction to be raised at any time. He ought to be allowed this privilege certainly the first time he can get into Court. Without jurisdiction, even in this Court the whole proceeding is *coram non judice*. * * * In this case claim is made of jurisdiction over the personal property of the defendant by a substitute provided by statute for personal service. In all such cases we are bound to see that the statute has been strictly pursued. The persons and estates of individuals would be subject to alarming hazards if jurisdiction could be obtained over them by anything less than the fullest compliance with all their requirements." (*Titus v. Relyea*, 16 How. Pr. 373.)

"The code requires that the order for the publication of the summons 'must direct a copy of the summons and complaint

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be *forthwith* deposited in the Post Office, directed to the person; to be served *at his place of residence*, unless it appear that *such residence* is neither *known* to the party making the application, nor can *with reasonable diligence be ascertained by him.*' (Sec. 135, sub. 5.) The affidavits in this case do not show the *residence* of the defendant, or that it is neither *known* to the plaintiff, nor can with reasonable diligence *be ascertained by him*, which facts they must show before I can grant the order applied for. The order presented is printed; but it is defective, as many that have been printed are. It states that a copy of the summons and complaint be deposited in the Post Office, addressed to the defendant, and that is all. It should read that a copy be *forthwith* deposited, etc., for that is the language of the code (Sec. 135, sub. 5); and it should also state that it be directed to the defendant, at his residence, *naming it* if it is known. For the foregoing reasons I must return the papers in this case to the plaintiff's attorney, without granting the order applied for." (*Hyatt v. Wagenright*, 18 How. Pr. 248.)

F. F. Fabens, for Respondent.

By the Court, SANDERSON, C. J.

The only question involved in the case which we deem it material to notice is one of jurisdiction. Service of summons upon Compton, the only defendant who appeals, was sought by publication, as provided in sections thirty and thirty-one of the Practice Act. Those sections are in derogation of the common law, and must be strictly pursued in order to give the Court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance.

Sections thirty and thirty-one treat of the same general subject, and they must be read together for the purpose of ascertaining what the affidavit and order should contain in order to satisfy the law and make the service complete. It must appear from the affidavit that the person upon whom service is to be

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made either resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State; or that he conceals himself to avoid service, and that the plaintiff has a cause of action against him; or that he has a cause of action to the complete determination of which he is a necessary or proper party; and also whether his residence is known, and if known it should be stated.

An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the Court or Judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the Court or Judge from the probatory facts, stated in the affidavit, before the order for publication can be legally entered.

The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant; and if known, the residence must be stated. It is true that this is

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not required in terms in the thirtieth section, which is more especially devoted to the affidavit; but, as we have already said, the whole statute upon the subject of service by publication is to be read together, and the thirty-first section requires that where the residence is known the order shall direct a copy of the summons and complaint to be forthwith deposited in the Post Office, directed to the person, to be served at his place of residence. In granting the order, the Court or Judge acts judicially and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant.

There is no other way of bringing the fact of residence to the judicial knowledge of the Court or Judge. That the fact of residence should appear in the affidavit is therefore necessarily implied from the whole tenor and scope of the statute.

Under this construction of the statute, of the soundness of which we have no doubt, it is clear, from an inspection of the affidavit and order of publication in this case, that neither satisfies its requirements. Under them the Court acquired no jurisdiction over the person of the appellant. Where this kind of service is sought the proceedings should be carefully scrutinized and strict compliance with every condition of the law exacted; otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the enlightened judgment of a Court or Judge.

Although none appeal except Compton, we are asked to reverse the judgment as to all the defendants. The action of this Court in cases brought here by appeal is prescribed by the three hundred and forty-fifth section of the Practice Act, which reads as follows: "Upon an appeal from a judgment or order, the appellate Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may set aside or confirm or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment

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or order is reversed or modified, the appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate Court that the appeal was made for delay, it may add to the costs such damages as may be just."

Under this section the appellate Court has full power to do or cause to be done what, according to the rules of law and equity, ought to have been done in the lower Court, as to any or all of the parties plaintiff or defendant. Under the old system of distinct law and equity Courts, the Court of Chancery always possessed this power, and in this instance, as well as many others, the new code of procedure has adopted the equity practice. (*Geraud v. Stagg*, 10 How. Prac. R. 369; *Story v. New York and Harlem Railroad Company*, 2 Selden, 85.)

The error assigned in the present case only affects the appellant Compton. We are bound to presume that as to the other defendants there was no error, for none of them have appealed. It is apparent that the Court below ought not to have rendered judgment against Compton, because the service was insufficient. But there was no valid reason why the Court should not have proceeded to final judgment as to the other defendants, if the plaintiff was satisfied to do so. Compton certainly has no right to insist that the judgment shall be reversed as to the other defendants. The judgment being reversed as to him leaves him wholly unaffected by any part thereof. What more can he ask, or what more is it possible for him to get?

As against the defendant Compton, only, the judgment is reversed.

Mr. Justice SHAFER, having been of counsel, did not sit on the trial of this case.

JOHN KERNS v. G. E. GRAVES AND E. D. SLOAT.

EXECUTION ON JUSTICE'S JUDGMENT.—The filing and docketing of a transcript of a judgment rendered by a Justice of the Peace in the office of the Clerk of the County, does not empower the Clerk of the Court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition.

APPEAL from the County Court of the City and County of San Francisco.

The facts are stated in the opinion of the Court.

Porter & Holladay, for Appellant.

James A. Johnson, for Respondents.

By the Court, RHODES, J.

The appellant obtained judgment against the respondents in a Justice's Court in San Francisco, on the 26th of October, 1857, and on the 29th of January, 1859, a transcript of the judgment was filed and docketed in the Clerk's office of that county. On the 23d of December, 1863, an execution was issued by the Clerk to the Sheriff of Sierra County, and this execution was quashed by order of the County Court of San Francisco. The appeal is taken from that order.

The only question presented by the appellant is whether the Clerk has power to issue an execution upon a judgment of a Justice of the Peace, after the expiration of five years from the rendition of the judgment.

To maintain that the Clerk possesses that power, the appellant relies mainly upon section five hundred and ninety-nine of the Practice Act; and particularly upon that portion of the section which, after providing that the County Clerk shall note the time of the receipt by him of the transcript, is in these words: "And from that time execution may be issued by the County Clerk, on such judgments, to the Sheriff of any other county of the State, in the same manner as upon judgments

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recovered in the higher Courts." Neither the clause cited nor any portion of the section prescribes the *time* within which the execution may be issued, but the object of the section is to define the manner of making the judgment a lien upon the real estate of the debtor, and to prescribe by whom executions in satisfaction of the judgment shall be issued. Before the filing and docketing of the transcript the Justice alone could issue executions, but after it was filed and docketed the Clerk must issue the execution that is to be executed in another county.

Section six hundred of the Practice Act provides that an execution may be issued upon a judgment rendered by a Justice of the Peace, within five years from the time of its entry, and this provision amounts to a limitation, and negatives, by implication, the right to issue the execution after that period. The limitation applies alike to all executions authorized by the Act to be issued upon those judgments. The appellant admits that the *Justice* cannot issue execution upon his judgment, after the expiration of five years from its entry. If that is true, and we think there can be no question on that point, then it follows that the same limitation applies to the Clerk, for the section is general and is as applicable to him as to the Justice.

It is said by Mr. Justice Burnett, in *White v. Clark*, 8 Cal. 512, "unless the execution be issued within that period (five years it is void. In contemplation of the statute, there is no judgment after that time," etc. The docketing of the judgment neither gives it new vitality, nor prolongs its existence. It simply enables an execution to be issued to another county. (*Young v. Remer*, 4 Barb. 442.)

Judgment affirmed.



OCTOBER TERM, 1864.

[100]

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OCTOBER TERM, 1864.

JOHN L. BOURLAND *v.* GEORGE A. HILDRETH;
R. E. GARDINER *v.* W. A. DAVIES;
THOMAS NORWOOD *v.* D. M. KENFIELD;
EDWARD SMYTH *v.* W. H. CUMMINGS;
CALEB DORSEY *v.* HUGH G. PLATT;
WILLIAM WEINBEER *v.* JOHN YORK;
P. C. BIRNEY *v.* J. H. HURD; AND
JAMES McCABE *v.* GEORGE B. KEYES.

PLACE OF VOTING.—The Constitution of this State prescribes not only what shall be the qualifications of electors, but also the place within which the act of voting shall be performed, which place is the county or district of which the elector offering his vote has been a legal resident for at least thirty days prior to the day of election.

ACT ALLOWING CALIFORNIA VOLUNTEERS TO VOTE.—The Act of April 25th, 1863, which provides for taking the votes of the electors of California who are in the military service of the United States, outside of the respective counties of their legal residence, to be returned to the Secretary of State, and counted in the counties of the legal residence of the electors, at the general election of 1863, is unconstitutional

Statement of Facts.

PLACE OF VOTING.—The Legislature of this State has no power to authorize electors to give their votes at any place outside of the county or district in which they have had a legal residence for thirty days previous to the election.

MALCONDUCT OF ELECTION OFFICERS.—Votes cast by duly qualified electors at the time and place appointed by law for holding an election, should not be rejected by reason of any malconduct on the part of the officers composing the Election Board.

CONSTRUCTION OF CONSTITUTION.—The rules which have been adopted to govern the interpretation of constitutions, statutes, and other written instruments have been framed to enable Courts to discern the true intentions of their authors, and when that intention has been ascertained, the Court should so construe them as to give it effect.

SAME.—When the language of the Constitution is unambiguous, no construction should be given to it which is opposed to the express words of the instrument.

STATE CONSTITUTION.—The Constitution of the State is not a grant of power, nor an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains the legislative department only so far as the restriction appears either by express terms or by necessary implication.

CONSTITUTIONALITY OF LEGISLATIVE ACTS.—An Act of the State Legislature should not be declared unconstitutional and void by the Courts unless there is a clear repugnance between the Act and the Constitution; and where there is a reasonable doubt whether the Act is repugnant to the Constitution, the Court should pronounce in favor of its constitutionality.

SANDERSON, C. J., dissenting:

PLACE OF VOTING.—There is a reasonable doubt whether the Constitution of this State prescribes the place within which the elector shall exercise the act of voting, and whether it prohibits the Legislature from making provision by law by which electors may vote outside of the county or district which has been their place of legal residence for thirty days immediately preceding an election.

ACT ALLOWING CALIFORNIA VOLUNTEERS TO VOTE.—The Act of April 25th, 1863, which provided for taking the votes of the electors of California who were in the military service of the United States, outside of the respective counties of their legal residence, to be returned to the Secretary of State, and counted in the counties of the legal residence of the electors at the general election in 1863, is valid and free from all constitutional objections.

At the general election held in September, 1863, in Tuolumne County, Bourland and Hildreth were voted for for Sheriff, Gardiner and Davis for Clerk, Dorsey and Platt for District Attorney, Smith and Cummings for Recorder, and Norwood and Kenfield for Treasurer, Weinbeer and York for Assessor in District Number One, Birney and Hurd for Assessor in District Number Two, and McCabe and Keyes for Assessor in District Number Four.

Statement of Facts.

The Board of Supervisors, in canvassing the votes, counted the votes of soldiers cast without the limits of the County of Tuolumne, but certified to that county by the Secretary of State, in accordance with the provisions of the Act of the Legislature passed in 1863.

The Board of Supervisors also, in counting the votes, threw out and rejected the votes cast at one precinct in the county, called Phoenix Reservoir Precinct, for the following reason: After the close of the polls the votes were counted and certified to by the Judges and Inspectors, which, with a duplicate of the same, were then delivered to the Inspector, who, the next morning, delivered the original to one Meadows, a person then unknown to him. Meadows did not deliver the returns to the County Clerk, or deposit the same in his office. Within the time allowed by law for forwarding the returns to the Clerk's office, application was made to the Inspector for the duplicate, but the Inspector replied that he had placed the duplicate under a book in his house, and that it had been stolen.

The two persons who had officiated as Judges of the Election at the Phoenix Reservoir Precinct on election day, then made out a list of the number of votes cast for each person for the respective offices voted for at the precinct on election day, and verified the same by affidavit, and forwarded it to the Clerk's office. The Phoenix Reservoir District was in Assessor District Number One, where defendant, York, and plaintiff, Weinbeer, were voted for for Assessor; and Weinbeer, according to the returns of the two Judges, received a majority of thirty-five votes over York.

By rejecting the votes cast by soldiers the plaintiffs had a majority for the respective offices for which they received votes, regardless of the Phoenix Reservoir Precinct, except plaintiff, Weinbeer; and by rejecting the soldier vote and counting the Phoenix Reservoir vote, Weinbeer had a majority.

The Board of Supervisors, by counting the votes of the soldiers and rejecting the Phoenix Reservoir vote, declared the

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defendants all elected, and they received their certificates to that effect.

The plaintiffs, respectively, then commenced proceedings in the County Court of Tuolumne County to contest the election. The cases were consolidated. The County Court excluded the votes cast by the soldiers, and counted the vote cast at Phoenix Reservoir; and annulled and set aside the result of the election as declared by the Board of Supervisors, and gave judgment that the plaintiffs were elected. From the judgment of the County Court defendants appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

The power of the Legislature being denied, the main question is where the supposed constitutional restriction is to be found which denies the right of suffrage to the soldier in the military service of the United States? Where is the article or section that compels such odious disfranchisement?

According to the approved rule of construction the burden is cast upon respondents to clearly point out the clause which has the effect claimed. For what the Legislature is not prohibited from doing, it may do; and where the power exists, the manner of its exercise by the competent body is not the subject of review by judicial authority, whose duty is confined to seeing that the legislative will is carried out according to its spirit and effect.

We believe, however, it is capable of very clear demonstration, that so far from the Constitution disfranchising soldiers, that in very clear terms it enjoins the Legislature not to abstract from them the right of suffrage; and for the purpose of voting, declares that they shall carry with them to such places as the exigencies of the military service shall require, a constructive State residence.

This occurs in Article II of the Constitution, entitled "Right of Suffrage."

Its first section confers the right of suffrage upon every white male citizen of the United States who shall have been

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a resident of the State six months preceding the election, and of the county or district thirty days in which he claims his vote. While section fourth declares, that *for the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States.*

Without the qualifying force of the fourth section the soldier by reason of his absence would lose his right of voting; but with it he retains the right — retains his political status — as an elector of the State of California.

Thus, in *Orman v. Riley*, 15 Cal. 48, it was said: "The rule as fixed by the Constitution is, that the fact of such sojourn or residence as a soldier, neither creates nor destroys citizenship — leaving the political status of the soldier where it was before."

And in the language of the first section he has the right to vote at any election and place designated by the Legislature. This is the plain reading of the two sections and their obvious meaning; a conclusion which gains force by reference to the debates in the Convention which formed the Constitution, to which we make the following allusion: The argument of counsel for respondents is chiefly directed to showing that the Constitution forbids a vote to be cast outside of the county of the elector, though he may be a resident therein, and in the military service of the United States. And in sustaining his line of argument he draws a distinction between the right of a soldier to vote and his power to cast the ballot. He admits the right of the soldier to vote, but denies the power of the Legislature to provide a ballot box for him to deposit his ballot, except within the limits of his county. We, however, submit that when the Constitution provided that for the purpose of voting the soldier by reason of his absence should not lose that right, that it intended that the Legislature should provide a practical way in which the right could be made effectual; that it did not intend to declare that the shadow should be given and the substance retained.

It will also be noted that counsel totally ignores the fact

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that the first and fourth sections are to be construed together, and that no construction of either can rightfully obtain which destroys one at the expense of the other, and that the true rule is to give effect to the object contemplated by each section; in other words, should the Court arrive at the conclusion that the first section fixed the place of the ballot box, yet as the fourth section contemplated that soldiers should vote wherever they were, that as to this class of voters the Constitution intended to exempt them from the operation of the first section as to the place of voting, otherwise the anomaly would exist of a constitutional right of suffrage given, attended by impassable barriers to its exercise.

It likewise cannot escape observation that the volunteer soldier carries with him his status as a resident and elector of the State of California, which prevents his voting elsewhere; and if his right to vote in California does not exist, he is totally disfranchised, as much so as if a subject of the Emperor of France. It is almost superfluous to say that before the judgment of disfranchisement is declared against the soldier citizen of California, a very clear warrant therefor should be found in the Constitution; and that such a result is impossible, because the Constitution in very express terms declares that for the purpose of voting the absence of the soldier shall not work a forfeiture of the right.

It is almost impossible to follow the narrow thread of the argument of opposite counsel in support of his views of the first section, as well as to appreciate his verbal criticisms on what he calls interchangeable words. Thus he contends that the words "*in which he claims his vote,*" mean "*in which he offers his vote,*" thus giving the same definition to "claims" and "offers."

Probably there are no two words in the English language so different in meaning. One is the demand of a right, privilege, or thing; the other is a proposal to give a thing, or recognize a right or privilege. A vote is offered at Fort Yuma, and a claim made that it be counted in Tuolumne County, according to the constitutional right of the voter. The offer

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of the vote being one thing, and the claim to have it counted at the residence of the voter, another.

The succeeding theory of respondent's counsel is that the ballot must be cast in the county of which the voter is a resident. This conclusion he arrives at by ignoring the word "district," which is used in the first section in the disjunctive with "county."

Thus, the second section says: "*The county or district in which he claims his vote thirty days.*" The alteration is of course material, for residence in the district for thirty days confers the electoral right as fully as a residence for that length of time in the county. The district, whether for election purposes or otherwise, is to be defined by the Legislature; and whatever may be called by the Legislature an election district, whether a military camp or otherwise, satisfies this requirement of the Constitution. And it will likewise be observed that counties exist solely through the action of the Legislature; that is, they do not exist by force of the Constitution, but their legal existence arises from legislative action, just as valid elections exist through legislative ordination.

Should the theory of respondent's counsel obtain, there could be no voting even at Presidential, Congressional, or State elections, by residents of disorganized or non-organized counties, and yet the statute as well as the practice has always been to consider the whole State as a common election precinct on such occasions. The fact is, that under the general power to order and regulate elections, the Legislature can designate the place of receiving the ballots. And the power is plenary and exclusive, there being no limitation upon this power in the Constitution.

The reception of votes out of the State is a question of convenience, of public policy, necessary in view of the fourth section, for without it the right of voting would be barren for want of opportunity of its exercise.

Concluding our remarks under this head we hold the following propositions to be true:

1. That the Constitution contains an affirmative grant of

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the elective franchise to the soldier, and that it was the positive duty of the Legislature to provide for its exercise.

2. That there is no prohibition against the Legislature authorizing the reception of votes out of the State.

3. That disfranchisement is in the nature of a punishment or a penalty, and before it can be imposed the warrant therefor in the Constitution must be clear.

4. That all doubts as to the true construction of the Constitution are to be solved in favor of legislative action.

5. That the ordering of elections, and the place and manner in which ballots shall be received for electors, is exclusively confided to the Legislature, and that therefore the Courts have no supervisory power. (*Franklin v. State Examiners*, 23 Cal. 173.)

6. That the Constitution, in granting the right of suffrage to soldiers absent from the State in the service of the United States cannot be so construed as to prevent the Legislature from providing for the exercise of that right in the only practicable manner.

7. That the Legislature may do that which is not expressly forbidden by the Constitution. (17 Cal. 23, 547; 13 Cal. 159; 12 Cal. 378; 6 Cranch, 128; Sedgwick, 592; *Cohen v. Wright*, 22 Cal. 293.)

In addition to the general authority of the Legislature over the right of suffrage, Section 18, of Article XI, declares that: "The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice." This section is a power given and an injunction to the Legislature to pass laws supporting free suffrage by elections.

The power to regulate elections implies the power to provide the necessary means by which all electors may vote.

The limitations upon this power, in Article II, designate merely the class of persons who may or may not vote—and does not limit the power of the Legislature to provide adequate methods by which all qualified electors may vote. The word

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"regulate" implies the right to adopt the necessary means to effect the given object—and what the necessary means are, the Legislature is the exclusive judge. (*McCulloch v. Maryland*, 4 Wheat. 316.)

It may be remarked in this case that as to voting, the Constitution is not "self executing," but requires legislative action, ordering elections and establishing precincts, before any elector under the Constitution can vote—and as a consequence the Legislature by its "non-action" can in effect destroy the elective franchise.

The right to vote is a franchise. It has a money value; that is, Courts, by compensation in the way of damages, protect it. (2 Mass. 236; 11 Mass. 350; 12 Pickering, 485.)

In the case of *Warren v. Mayor of Charleston*, 2 Gray, 98, an Act of the Legislature of Massachusetts establishing a Congressional District was held unconstitutional, because it failed to provide means whereby a part of the qualified voters of the district could vote for members for Congress.

While voting is a right of the elector which cannot be taken from him, except in punishment for a felony, for which he shall have been first duly convicted, it is also ranked among the high duties which the citizen owes to his Government, and the power exists in the Legislature to compel its exercise, and to punish its refusal or neglect.

Where is the restriction upon the legislative power that compels them, in ordinary elections, to provide no way in which the "soldier electors" may vote—may perform the *rite* which is inestimable to them, and the duty which all republican States impose upon their citizens? The lawmaking power, embracing the regulation of "free suffrage," is not fully exercised until all "*electors*" have a reasonable opportunity afforded them for its exercise, and with conclusive force it applies to those men whose absence the necessities of the State compels.

Article II does not in any sense fix the place of voting—nor does it confine the elector to any particular place for the

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deposit of his ballot — but section one says that he may vote at all elections authorized by law.

Who may vote at all elections authorized by law? The qualified voters. Who are the qualified electors? Persons white in color, of the age of twenty-one years, resident in the State six months and in the county thirty days, not idiotic, insane, or convicted of an infamous crime.

This section, to bear the interpretation given by the opinion, must contain after the words "shall be entitled to vote at all elections which are now, or hereafter may be, authorized by law," the addenda "*held in the county of which he is actually resident, and not elsewhere.*"

Neither can any argument be drawn against the law of April 25, 1863, by reason of its extra-territorial operation. A State is something more than a piece of land with defined boundaries. It is the land, the qualified electors, and their government. The municipal laws for a hundred purposes have an extra-territorial operation, and acts done under them abroad in conformity with these laws, have the same effect as done within the actual jurisdiction.

We have a number of laws which authorize acts to be done outside of the State. Thus we take depositions within almost every State of the Union in conformity with our own laws. We appoint officers to take acknowledgments of deeds out of the State. A will executed out of the State according to the formalities of the State law is just as valid as if made within its limits. We authorize a summons to be served out of the State. All these acts are common and valid. We do not profess to have the power to compel their performance, but we have the authority to say when the acts are done under the formalities of our statutes, under the guards, checks, and restrictions imposed by us, that we will give them the weight and authority which they would have if done upon our own soil.

Caleb Dorsey, for Respondents.

The Constitution of a State, like an Act of the Legislature,

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must be construed according to its spirit and intent, taking into view the right intended to be secured, the evils to be remedied, and the dangers to be guarded against. (Smith's Commentaries, 455.)

The Constitution of the State of California intended to secure to all of its citizens the *right of suffrage*; and it also intended to guard that right against abuse by prescribing the mode and manner in which it is to be enjoyed. Were this not the case, it would have only secured to the people of the State the right, and left the Legislature unrestricted in its power of prescribing the mode and manner in which it is to be exercised. But since the Constitution contains a provision directing how this right is to be exercised, it is clear that it has to a certain extent restricted the legislative power relative thereto, and has established a fixed, certain, and permanent rule by which the exercise of this right is to be governed, and which the Legislature is never to modify, alter, or change. And in order to ascertain if the Act of the Legislature, approved April 25th, 1863, is unconstitutional, it is only necessary to compare it with the Constitution itself and see if it falls within the restriction imposed by the Constitution upon the power of the Legislature in reference to the right of suffrage. If it does come within that restriction, it is clearly unconstitutional.

Article II, Section 1, of the Constitution of the State of California provides that every white male citizen of the United States, etc., of the age of twenty-one years, and who shall have been a resident of the State six months next preceding the election, and the county or district *in which* he claims his vote thirty days, shall be entitled to vote, etc.

This section of the Constitution makes a residence of six months in the State, and thirty days in the county or district ~~in~~ which the voter claims his vote, a necessary qualification to the exercise of the right of suffrage. What was the object of the framers of the Constitution in requiring a residence in the State, and thirty days in the county or district? Why would not one day's residence have done as well? These

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provisions were intended to protect the exercise of this right from abuse. It was to enable persons residing in the neighborhood where the voter intended to reside to become acquainted with him and know that he was *bona fide* a resident of the State and county before he could vote. The time required by the Constitution was evidence of his *bona fides*, and taken as proof that he was a resident of the State and county. This enabled the people of the county or district to guard against illegal voting by challenging the votes of those who have not been residents of the State, county, or district the length of time required by the Constitution, and of all strangers whom they might suspect of illegal voting. Residence in the State for six months, and in the county or district for thirty days, are constitutional safeguards thrown around the exercise of the right of suffrage to guard it against fraud and abuse, and which the Legislature has no power to modify or change. These safeguards are as much a part of the Constitution as that portion of it which guarantees the right itself, and the Legislature is forever inhibited from interfering with them.

The object of the constitutional provision which makes a residence in the State six months, and in the county or district thirty days, being intended to secure the purity of the ballot box, and guard it against fraud and abuse, any Act of the Legislature which is not in harmony with the Constitution in securing these ends is unconstitutional and void.

The Legislature has no power to shorten the time of residence in a State, county, or district; for if it had it would create by its action the very evils the Constitution intended to remedy, and open the door to the very frauds and dangers it tried to guard against. Any Act of the Legislature which is repugnant to those provisions of the Constitution which were intended to remedy particular evils or guard against certain dangers, or which is subversive of the ends which they are intended to accomplish, is unconstitutional and void. (*Cotton v. Smith*, 2 Serg. & Rawle, 268; 41 Penn. 421.)

It is much better that the constitutional provisions relative

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to the right of suffrage be enforced, and have the ballot box pure, free from fraud and corruption, than give effect to a law which will open the door for frauds and abuses, and which would endanger the very right itself. And it is the duty of the Courts to construe all laws relating to the right of suffrage in reference to the attainment of the ends which the Constitution intended to accomplish.

But, even admitting for the sake of the argument, that the Legislature could pass a law enabling the soldiers to vote in the State, out of the county or districts where they reside, can it do so to enable them to vote out of the State? We think not. The limits of the State define the jurisdiction of the State; the laws can have no force beyond those limits. It can enforce no law or punish any crime beyond its limits. (Story's Conflict of Laws, §§ 512, 539; 6 Johns. Chan. 357.)

Legislative bodies do not usually in their acts of legislation use language to limit their operation in this respect, but use general language, and the limitation is implied. (*Miller v. Ewer*, 27 Maine, 517.)

If the election is out of the State, the Legislature has no jurisdiction over the place where it is held, nor over the persons of the parties who hold or vote at said elections. It cannot compel said elections to be held or prevent them from being held. It is perfectly powerless to punish any violation of the election law which is committed without the limits of the jurisdiction.

Story says on the same subject: "It is plain that the laws of one country can have no intrinsic force, '*proprio vigore*,' except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Boullenois says: 'Of strict right all the laws made by a sovereign have no force or authority except within the limits of his domains.'"

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H. P. Barber, also for Respondents.

The Act of April 25th, 1863, allowing a particular class of the community in the military service of the United States to vote in one county for county officers in another county, is unconstitutional.

A Constitution is to be construed with reference to the laws existing at the time of its adoption and the practice under them. (2 Gill. & John. 254; Smith's Com. on Cons. 629, Sections 481, 482.)

The *words* of a Constitution furnish the only test to determine the validity of an Act of the Legislature, and those words must govern.

"I am thoroughly convinced that the *words of the Constitution* furnish the *only test* to determine the validity of a statute, and that all arguments based on general principles outside of the Constitution must be addressed to the people and not to us." (Mr. Chief Justice Black, in *Sharp v. Philadelphia*, 9 Harris, 162.)

The Constitution of California, Article II, section one, provides that every white male citizen of the United States of the age of twenty-one years "who shall have been a resident of the State six months next preceding the election, and of the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

"SEC. 4. For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison."

Now, taking these provisions according to their popular and commonly understood sense, can there be any doubt that the county in which a person "claims his vote" is the county of

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his actual residence, and where he is present, *in propria persona*, tendering his vote to the Inspector. In other words, it is the county where he actually offers his vote.

Under these plain provisions of the Constitution, two things are requisite:

1. He must have resided in the county *where he offers his vote*, thirty days.

2. He must be *actually present* in that county to deposit his vote for its county officers.

Supposing him to be a resident of Tuolumne County, he does not lose such residence by being in the United States service in Los Angeles; then how can he, being an *actual resident* of Tuolumne, proffer his ballot for county officers of Tuolumne, in Los Angeles, of which he is *not* a resident?

The Constitution provides, that to entitle him to vote he must have been a resident of the county where he offers his ballot for the space of thirty days; and further provides, that while in the United States service he shall neither gain or lose a residence. *If, then, he does not gain a residence in Los Angeles, he cannot vote there; if he does not lose a residence in Tuolumne, he must constitutionally vote there, or not at all.*

We have before seen that a Constitution is to be construed according to the laws and condition of the people existing at the time of its adoption, and the then common and popular construction of words and phrases. Is there any one so hardy as to pretend that the phrase, "the county or district in which he claims his vote," as specified in our Constitution, referred to anything else than the county or district where the voter was *actually* present tendering his ballot? or will any one contend that it was the intent of the framers of the Constitution that a resident of Del Norte might vote in San Bernardino for county officers of Del Norte because he happened to be in San Bernardino on election day?

The Constitution requires a party, before voting (that is, going up to the polls and depositing his vote in the ballot box) in such county, to have been a resident of it for thirty days,

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and any law contravening that provision is unconstitutional and void.

The constitutional provision that no person in the United States service shall lose his residence by reason thereof, gives such person no extra rights; it merely provides that if on election day he happens to be personally present in the county or district *where he was entitled to vote*, he can still vote *there*, notwithstanding he may not be an *actual* resident of such county or district. (Gilb. Debates on Cons. of Cal. 308.)

The Act is unconstitutional as to soldiers voting for county officers within the State and out of such county — *a fortiori* as to soldiers voting out of the State. (27 Maine, 509; Story's Conf. of Laws, § 512, and note; Ibid, § 539.)

The word, "vote" has in civil elections a well defined and understood meaning; when we speak of a man's "voting" in a certain county, we mean his being *personally present THERE*, and depositing his ballot *THERE*, and nowhere else; and such was the popular sense in which it was understood at the adoption of the Constitution.

The "Phoenix Reservoir" and "Seiver's Ranch" returns ought to be given to the persons there receiving the votes.

The votes as set forth in the statement are admitted to be correct, and it was solely owing to malconduct on the part of the Board of Judges, or some of them, that the votes were not returned in proper form to be canvassed.

The Court below has decided that the acts of the Judges, as set forth in the statement, amounted to malconduct; and such malconduct is made a specific cause for contesting an election. (Wood's Dig. p. 380, Art. 2, 155, Sub. 1.)

The Board of Supervisors, in canvassing the votes, act merely in a ministerial capacity. (4 Cowen, 297; 23 Wend. 228; 3 Hill. 42; 22 Barb. 72; 8 N. Y. [4 Selden,] 67; 14 Barb. 259.)

The County Court, on the contrary, in a contested election case, acts judicially, and can go behind the election returns and the certificate of the Supervisors. It determines who is *actually* entitled to the office on the *legal votes cast*, and may

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either adopt or reject the result as declared by the Board of Canvassers. (8 Cowen, 102; 4 Cow. 297; 20 Wend. 12; 5 Denio, 409; 14 Barb. 259; 8 N. Y. [4 Selden,] 67.)

By the Court, SHAFER, J.

At its session in 1863 the Legislature passed an Act, requiring the Adjutant-General of this State to make out a list, on or before the 15th day of July, 1863, of the names of all electors, resident of the State of California, who should then be in the military service of the United States, and to deliver the list to the Secretary of State on or before the said day.

The Act further requires the Secretary of State to classify and arrange the list so returned to him, and to make therefrom separate lists of the electors belonging to each regiment, battalion, squadron, and battery, from this State, which shall then be in the service of the United States; and on or before the 20th day of July, 1863, to transmit to the commanding officer of each regiment, battalion, squadron, and battery, a list of the electors belonging thereto, specifying the name, residence and rank of each elector; and, also, "the County, Congressional, Judicial, Senatorial and Assembly Districts, for officers of which the electors respectively should be entitled to vote."

The Act further provides that on the day fixed by law for holding the State election in the year 1863, "a ballot box, or other suitable receptacle for votes shall be opened, and votes received from the electors, whose names are upon said list, at each place where a regiment, or battalion, squadron, or battery of California soldiers, in the service of the United States, may be on that day; at which time and place the electors, whose names are upon said list, belonging to such regiment, detachment, squadron, or battery, shall be entitled to vote for all officers, for which, by reason of their residence in the several counties of this State, they are authorized to vote at elections in the several counties and districts in which they reside; and the vote so given, at such time and place, shall be con-

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sidered, taken, and held to have been given by them in the respective counties of which they are residents."

The operation of the Act is limited to a single year — 1863.

It appears from the record that under this Act two hundred and fifteen soldiers, having their legal residence in the county of Tuolumne, voted at the general election in September, 1863, for county officers of that county, and for Assessors in the different districts therein. It further appears that ninety of the two hundred and fifteen votes were given in camps and stations without the limits of the State, and one hundred and twenty-five within its limits, but outside the County of Tuolumne; and it also appears from the record that, if all of the two hundred and fifteen votes are to be excluded from the canvass, the respondents have a majority of votes in their favor for the offices for which they were respectively candidates, with the exception of the respondent Weinbeer.

The reason assigned on behalf of the respondents for excluding the two hundred and fifteen votes named is the alleged unconstitutionality of the Act of 1863.

Section one, Article II of the Constitution is as follows:

"SECTION 1. Every white male citizen of the United States, and every white male citizen of Mexico who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Queretaro on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, and the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law; provided, that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting to the right of suffrage Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body shall deem just and proper."

In this section the qualifications are stated upon which the right of suffrage is made to depend, viz: citizenship, particu-

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lar sex, color, age, residence. The reasons why the right to vote was made by the framers of the Constitution to depend upon these conditions are apparent. Citizenship was required with a view to keep the Government in the hands of those who owed allegiance to it. Color was established as a test in obedience to a prevailing opinion. Discrimination was made between the sexes under a conviction that it was required by the best interests of both. The age of majority at common law was made requisite in order to secure to the State self-reliance and capacity in those appointed to govern. Residence in the State for six months preceding any given election was required so that citizens, even, should not deal with public questions through the ballot box until they at least had had the benefit of an opportunity to learn the public wants, of concerting measures the best calculated to provide for them, and of selecting proper men to carry those measures into effect; and residence in given localities within the State for thirty days next preceding any election appointed by law was prescribed so that the voter, in the interval, might attain to some just understanding of local interests before charging himself with the responsibility of political action concerning them.

It is not claimed for the respondents that the Act of 1863 is unconstitutional for the reason that it authorizes voting, free of these tests, or free of any one of them; and it is obvious that the Act of 1863 silently assumes them all, except the last, and as to that—the qualification of residence—it is put expressly in the Act as a condition upon which the polling of the military vote is to depend. The point of contest relates to a matter with which the qualifications of voters have, in strictness, nothing to do. It is insisted for the respondents that the Constitution fixes the place or places at which the duly qualified electors are to perform the act of voting. This proposition is denied by the appellants, they insisting that that matter is left entirely to the control of the Legislature.

As to the power and the duty of the judicial department of the Government to set aside a legislative Act if found to be in conflict with the Constitution, there can be no question;

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and the considerations by which Courts are to be guided in the exercise of that power are well settled. The constitutional question, now to be passed upon, was determined, in effect, by the Constitution itself at the moment the Act of 1863 received the signature of the Executive, and in that point of view our distinctive service is one of inquiry rather than of judgment, and in the conduct of the inquiry we can do no more than interrogate the Constitution itself and report its responses when we shall have ascertained them. Though the judiciary, like other departments of the Government, is bound to use its powers so as best to promote the public good and fulfil the will of the people, still we can know nothing of that will, except as it has found expression in the Constitution; nor can we, under pretext of promoting the public welfare, usurp powers with which the people have never invested us.

The great object, with reference to which all the rules and maxims that govern the interpretation of statutes, Constitutions, and other written instruments have been framed, is to discern the true intent of their authors, and when that intent has been ascertained, it becomes the duty of the Court to give effect to it, whatever may be the convictions of the Judges as to its wisdom, expediency or policy.

One of the cardinal rules of interpretation referred to is, that in the absence of ambiguity no exposition shall be made which is opposed to the express words of the instrument. "Speech is the index of the mind, and that exposition which corrupts the text is accursed." (Broom, 396.) When an Act is conceived in clear and precise terms — when the sense is clear and manifest and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents to the mind. To go elsewhere in search of conjecture in order to restrain or limit the instrument, would be but to elude its force. If Courts were at liberty to search for foreign reasons to maintain what was not to be found in any just sense of the words used, then a statute or Constitution might be used for the accomplishment of a purpose which it was the intention of the lawgiver to discountenance and withstand. (Smith's

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Com. 688; 7 Mass. 524.) A writer on American law says: "When the meaning is satisfactorily perceived and understood, there is no room for a liberal or strict, or large or narrow, or other construction, than according to the meaning." (6 Dane's Ab. 600.)

The Supreme Court of the United States has held that where a law is plain and unambiguous, whether it be expressed in general or limited terms, its authors must be intended to mean what they have plainly expressed, and consequently no room is left for construction. (7 Cranch, 52.) Mr. Dwarria lays down the rule thus: "Though the Judges are to explore the intentions of the Legislature, yet the construction to be put upon an Act of Parliament must be such as is warranted by, or at least not repugnant to, the words of the Act. Courts must not, in order to give effect to what they may suppose to be the intention of the Legislature, put upon the provisions of a statute a construction not supported by the words."

It was held in *Rex v. Ramsgate*, 6 B. & C. 712, "that where the Legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what it has expressed. The fittest course in all cases where the intention of the Legislature is brought into question is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the Act of Parliament." Mr. Dwarria, in commenting upon *Rex v. Inhabitants of Great Bentley*, 10 B. & C. 520, remarks that "the most enlightened and experienced Judges have for some time lamented the too frequent departure from the plain and obvious meaning of the words of the Act of Parliament by which a case is governed, and themselves hold it much the safer course to adhere to the words of a statute construed according to their own import, than to enter into inquiry as to the supposed intention of the parties who framed the Act. Courts are not to presume the intentions of the lawmaker, but to collect them from the words; and they have nothing to do with the policy of the law. This is

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the true sense in which it is so often impressively repeated that the Judges are not to be encouraged to direct their conduct 'by the crooked chord of discretion, but by the golden metwand of the law;' i. e., to collect the sense of the law-maker by a sound interpretation of the language, according to reason." (Dwarris on Stats. 702, 703.)

Mr. Justice Blackstone has remarked that "words are generally to be understood in their usual and most known signification, *not so much regarding the properties of grammar as their general and popular use*; that if words happen to be dubious their meaning may be established by the context or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject matter with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because if a literal meaning would involve a manifest absurdity it ought not to be adopted; and that the reason or spirit of the statute, or the causes that led to its enactment, are often the best exponents of the words, and limit their application. (1 B. Com. 59, 60; Sto. Com. Sec. 400.)

It appears from the foregoing citations that laws are to be construed according to the intention of their authors; that the words used are to be first resorted to as furnishing the best index of intention; that if the meaning of the words in their popular import is clear, and is in harmony with the context and the subject matter, and comports with the causes that induced the enactment, then the words themselves determine the intention; that the words so illustrated should be adhered to by Courts, however unwelcome the results may be to the Judges or others, or however opposed they may be to mere personal views of public policy. In the language of the Supreme Court of the United States (*Van Howes' Lessees v. Dorrance*, 2 Dallas, 309,): "The Constitution of a State is stable and permanent—not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests and the

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violence of contending parties, it remains firm and immovable as a mountain amid the strife of storms, or as a rock in the ocean amid the raging waves." Chancellor Kent has justly said: "From the mass of powers necessarily vested in the Legislature, and the active and sovereign nature of those powers, from the numerous bodies of which the Legislature is composed, the popular sympathies which it excites and its immediate dependence on the people by means of frequent periodical elections, it follows that the legislative department of the Government will have a decided superiority of influence. It is constantly acting upon all the great interests of society and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. It is only by the free exercise of its powers that Courts of justice are enabled to repel assaults and to protect every part of the Government and every member of the community from undue and destructive innovations upon their chartered rights."

It is, however, to be borne in mind that the Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication, and the delicate office of declaring an Act of the Legislature unconstitutional and void should never be exercised unless there be a clear repugnancy between the statute and the organic law. These principles were repeatedly asserted by the late Supreme Court, and have never been questioned by us. In a doubtful case the benefit of the doubt is to be given to the Legislature; but it is to be remembered that the doubt to which this rule of construction refers is a reasonable doubt as distinguished from vague conjecture or misgiving. The point is well presented by Mr. Chief Justice Buchanan in *The Regents, etc. v. Williams*, 9 Gill. & J. 383; "It has been said that a legislative Act should not be pronounced unconstitutional or invalid in a

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doubtful case, nor should it where the doubt is *bona fide* and well founded and not the result of disinclination to deny the authority of the Legislature, which all must feel and to which none should yield in violation of a solemn duty. Where a Judge is satisfied, upon full consideration, that an Act is contrary to the Constitution, the supreme law which he is bound to obey and which must prevail over any Act that comes in conflict, and cannot stand with it, he has no choice, and all that is left for him is honestly and fearlessly to do his duty, from the faithful discharge of which, however unpleasant the task, no upright Judge can shrink if he will."

We have called attention to the foregoing rules of interpretation and construction at the outset, for the reason that they suggest the true methods by which the principal question raised by the record is to be investigated, and determine also the *criteria* of judgment with reference to which it should be decided. And now these general matters having been disposed of, we shall proceed to an examination of the case.

That part of Section 1, Article II, having the most important bearing on the question, is the following: "A citizen, etc., * * * who shall have been a resident of the State six months next preceding the election, and [of] the county or district in which he *claims his vote* thirty days, shall be entitled to vote at all elections," etc.

The words "claims his vote" are not used to define the word "residence." That word required no definition, for when the Constitution was adopted its meaning had been settled for ages. Nor are the words used for the purpose of indicating to the citizen in advance that he must reside in one county or district rather than in another in order that he may become an elector, for it is obvious that every citizen is left at liberty to reside in the county or district of his choice. Nor are the words used for the purpose of stating an electoral qualification either distinct from or anyway affecting those previously enumerated, for it would be absurd to suppose that the Constitution intended that a citizen should make a premature, and therefore false claim to "his vote," in order to qualify himself

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to make a valid one. What, then, is the meaning of the words "claims his vote," in the relation in which they stand? However clear our own convictions may be as to their real meaning, and however free from difficulty we may consider the question to be, if both the attention and the understanding are confined to the essential conditions of judgment, still, the acknowledged importance of the case, and the just consideration due from one department of the Government to another, call for a full exposition of the grounds upon which those convictions are based.

We have no doubt that the Convention by which the Constitution was framed, was unanimous upon the question of their meaning. We see no ambiguity or want of precision in the words, and as the Journals of the Convention show that almost every provision and passage in the Constitution became the subject of discussion and controversy, but that the words in question escaped both, we take it for granted that the Convention was not only unanimous as to the purpose, and as to the merit of the purpose for which the words were used, but also considered that the common intent found, in the words used, apt and plenary expression. We have every reason to believe, and do believe, that at the time the Constitution was adopted, and for at least twelve years thereafter a like unanimity prevailed among the people; and the whole course and the whole history of our legislation during the interval named, demonstrate that the unanimity of the people extended to and controlled the public councils. Had the words in question been ambiguous and indecisive in fact, it would have been detected; had it been detected the discovery would have been turned to account, or it is highly probable that some one at least, in the Legislature or out of it, would have turned the discovery to account, by securing or attempting to secure the legislative sanction to a system under which, if all the migratory vote, both within and without the State, was not polled at every current election, it would not have been for want of opportunity afforded. This entire unanimity of popular and legislative opinion, extending alike to both

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the points named, is all the more suggestive, when we consider the earnestness and virulence of party contests during the period when that unanimity subsided.

The passage calling for a six months' residence in the State and of thirty days in the county or district in which the elector claims his vote, contains six distinct conceptions. The first is of a fact—residence; the second is of place, represented by the words "county or district;" the third is of an event, represented by the words "claims his vote;" the fourth is of a relation, showing that the fact of residence is to obtain *in* a county or district; the fifth is of relation also, to the effect that the event of an elector's "claiming his vote" is to transpire *in* a county or district also; and the sixth is of the result of the last two conceptions when combined—that is to say, of the sum total of the meaning of the entire passage. The amount of it is this: The county or district "in which" the fact (residence) is gained, is the identical county or the identical district in which the event of claiming a vote is to transpire, and, *e converso*, the event is to transpire in the county or district of the residence. Neither the fact nor the event can, in the nature of things, occur irrespective of place, and the fact is to be gained and the event is to be enacted in the same place, by express constitutional appointment. The event referred to is a transaction to which the Government is a party, and is to transpire after a residence has been gained. The Government, through its officers, meets the elector in his proper person, and receives from him a "ballot," by allowing him to deposit it in a "ballot box," if he then and there offers to do so (Constitution, Sec. 6, Art. II; Sec. 2, Art. X.) The correctness of the construction, and of our conclusion as based upon it, may be verified by any one who will consent to look steadily at the passage hereinbefore quoted, and mark his own intuitions. To be known it must be seen; and if it cannot be seen, it never can be known. Though the point—the facts being given—and they are all apparent on inspection—like the truth of a mathematical axiom, does not admit of direct reasoning, still it may be illustrated. The twenty-

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fourth section of our Statute of Conveyances contains a provision that "every conveyance of real estate * * * to operate as notice to third persons shall be recorded in the office of the Recorder of the county *in which* such real estate is situated." By section eighteen of the Practice Act certain actions "shall be tried in the county *in which* the subject of the action or some part thereof is situated." By section twenty certain actions "shall be tried in the county *in which* the defendant resides." Each one of these passages contains a statement of a fact and of an event, and in each of them the place of the fact and the place of the event are the same, beyond controversy.

Again, it is provided in the second section of the First Article of the Constitution of the United States as follows: "No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of that State *in which* he shall be chosen." This provision involves the following elements: 1st, personal qualifications, of which the fact of inhabitancy is one; 2d, place, a State; 3d, an event or transaction, viz: the choice of a person by the people of a State to represent them in the House of Representatives. A State is the place of the inhabitancy, a State is the place of the event, and both the fact and the event are to transpire in the same State. Should the question be asked where is the act of choosing a Representative to Congress to be performed? the very text of the Constitution would answer—in the State of which he is an inhabitant. Without refining upon it, that is what we conceive to be "the plain and obvious meaning of the words used."

The event in hand is a transaction as distinguished from a mere status, or being, or rest, mental purpose present or ulterior, or opinion, or conviction, on any point of mere personal right. The transaction is overt. A duly qualified elector is an actor in it. He causes it, brings it about by open conduct on his part, instead of suffering or merely enduring it. He does something, and the thing which he does is represented by

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the words, "claims his vote." To every practical intent the elector is a part of the event, and he accomplishes it by means of a visible instrument which he handles, and which is itself a part of the event. The event is to transpire in the county or district "in which" the elector has his residence for thirty days previous to its occurrence, to the exclusion of the balance of space whether within the State or outside of it. The analysis of the disputed passage upon which our conclusion is based is not after the manner of the grammarians, but is an analysis of the governing conceptions that enter into the passage. The argument does not proceed upon the "properties of grammar," but upon ideas in their just relations.

The foregoing is a general exhibition of the grounds that have forced the conclusion to which our minds have been brought, and if the case was not one of extraordinary concern all further discussion would be forborne.

Subsequently to the judgment rendered by this Court on the first hearing of the case, the Legislature, assuming, and believing doubtless, that the judgment was erroneous, re-enacted the Act of 1863; and furthermore, the Supreme Court of Iowa has recently given the question involved a different resolution. All of which appearing, it is due to the question, to the law, and to all who are interested in its just administration, that the matter should be more fully discussed; and in doing so we shall proceed as in the presence of the law, and as in the presence of its great ministry both living and dead.

It will be observed that our conclusion is based, in the main, upon the analysis given of the passage in dispute. To this method of investigation we apprehend no objection can be taken, for it is the very method which the authorities cited require us to pursue. When the question raised is one of construction, the controlling grounds of reasoning are not to be sought for primarily in preambles nor in titles or headings; nor in the properties of grammar, nor in the assumption that propositions of compact or enactment are always simple and never compound; nor in the assumption that they are always direct and never incidental; nor in the assumption that the

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lawgiver never unites two distinct, but related elements in one general provision; nor in the assumption that if the lawmaker had intended a given thing, that he would have expressed his intention in some mode which the mind of the reasoner can conceive of as being more felicitous than the particular language adopted. On a question of constitutional construction, if the main and principal purpose were to develop a doubt as to the meaning, this method of *a priori* reasoning from the real or supposed rules of correct composition would undoubtedly be opposite to the end proposed, and would answer also as a shelter to the doubt which an observance of them had excited. But when a question of the character named is presented, the primary inquiry is not after a doubt, but after the true intent and meaning of the instrument or passage to be interpreted; and the intendment, to start with, is that the framers of the instrument have not failed to express their intentions in intelligible language; and it is only after the words and the context and the subject matter have all been reasonably exhausted, that the question of "doubt" can properly be considered, or even approached. And it may be here added, that there is not one of the supposed rules of correct composition referred to, that finds any practical recognition in the Constitution or in the general literature of the language. Compound propositions occur in the Constitution much more frequently than simple ones—incidental propositions are found on every page—and instances in which distinct but related provisions are found in the same section are not at all unfrequent; and our own reports afford multiplied proofs that the distinction between clearness of expression on the one hand, and mere infelicity of expression on the other—whether real or supposed—has never yet been lost sight of.

There is really but one question presented, in our judgment, and that relates to the correctness of the analysis which we have given of the disputed passage. That analysis, it will be remembered, gives as results, 1st. A fact—"residence;" 2d. Place—"county or district;" 3d. An event, as distinguished from the fact of residence—"claims his vote;" 4th. A rela-

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tion — residence in a county or district; 5th. A relation — the event of claiming a vote in a county or district; 6th. A relation also — it being one of absolute identity between the county or district of the “residence,” and the county or district of the “event” named. As we have already remarked, the question of the correctness of this analysis is primarily to be determined by inspection, and we may add, in utter forgetfulness, for the time being, of the consequence to which it may lead. The exact question at this point then is, not whether the Constitution fixes the place at which the act of voting is to be performed, but whether the passage named at once admits and calls for the analysis given. It is insisted that the analysis is a mistaken one, and that the passage, when taken to pieces, shows only the following results: 1st. Residence; 2d. Place — county or district; 3d. A relation — “residence” in the “place” named. This analysis denies three of the results of our own — that is, it denies that the words “he claims his vote” sets forth an event or transaction distinct from the fact or status of residence, and that event or transaction being expunged, the fifth and sixth elements of the analysis go with it, of course, for they are directly based upon it, or grow out of it.

The passage “he claims his vote” contains a personal pronoun, a transitive verb, an adjective pronoun and a noun; and the argument in favor of the shorter analysis, apparently admitting that it will not do to strike out a passage made up of words of the grades named, holds that they were inserted in the text for the purpose only of defining or helping out in some way the qualification of “residence.” We have carefully considered this view, and to our minds the words “he claims his vote” have in strictness as little to do with residence, considered merely as a qualification, as they have with the qualification of sex, age, color or citizenship. In the first place they have nothing to do with residence, considered as a qualification, on first inspection; and in the second place they cannot bear upon it by possibility except in one of three modes. First — by defining the meaning of the term “residence,” and that they do not attempt; second — by limiting

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the duration of the residence, and that they do not attempt; or, third—by dictating in advance the particular county or district in which the citizen must reside in order to qualify himself to vote, and of that there can be no pretense; and it follows, unless there is some other mode than these in which the two things can be brought into the relation of description and subject matter described, that the words cannot be put to the use named. Take the parallelism already put, with slight verbal changes, to make the resemblance the more perfect. "A duly qualified grantee, who shall have recorded his deed in the county in which the land is located, shall be entitled to priority," etc. Here is, first—a fact, land; second—place, a county; third—an event which may or may not occur in the election of the duly qualified grantee, the registration of his deed; fourth—a relation, land in a county; fifth—a relation, the event of registration occurring in a county; sixth—a relation, that of absolute identity between the county of the fact and the county of the event; and to this a seventh element may be added—the advantage to result to the grantee who has registered his deed. Suppose it should be asserted that this analysis is false—that the words "who shall have recorded his deed" do not set forth a transaction or event as distinct from the fact of land or the location of land in a county, and that the only purpose of the passage was to define the essential legal nature of "land," or to determine in advance in what county or counties "land" must lie so that a deed of it shall be entitled to the benefit of the legal effect stated, or that there was a reasonable doubt as to what the passage meant—we should have exactly the same question as the one now presented; and should we doubt here, we might, and probably would, be called upon before a great while to doubt in the other case also. On these grounds we hold that the passage under discussion is properly resolvable into the six elements stated, instead of the three contained in the shorter analysis, and that result being given, all further controversy is precluded.

It may aid in the further illustration of this matter, how-

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ever, if we refer to the provision in the Constitution of Ohio. It is as follows: "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election, and of the county, township or ward in which he resides such time as may be provided by law, shall have the qualification of an elector, and shall be entitled to vote at all elections." An analysis of this provision shows as results: 1st, residence—a fact; 2d, place—county, township, ward; 3d, a relation—residence in a county, etc., for such time as the Legislature shall prescribe. Here there is no event or transaction as distinct from the fact of residence, and the decision of the Supreme Court of Ohio that this provision does not touch the question of the place where the act of voting is to be performed, is, in our judgment, entirely correct. The shorter analysis given of the kindred provision of our own Constitution, assumes that the two provisions are identical—that is, that the words "in which he resides" and the words "in which he claims his vote," are the equivalents of each other. In view of the rule that "Courts are to collect the intentions of the lawgiver from the words used," we cannot adopt that conclusion. The one phrase sets forth a mere *status* of the elector, the other sets forth an *act* performed or to be performed by him after the status has been attained to. The words "he claims his vote" are in the one passage, and neither they nor anything like them is found in the other.

But another view still has been urged upon us, which, in effect, admits the analysis we have given to be correct, but insists that the event or transaction which constitutes its third result, does not involve the act of voting, or the act of "claiming a vote," but of claiming the abstract right of suffrage, or of claiming the "consequences or effect of a vote" upon the affairs of the county or district of the voter's residence, or a claim by a voter that his vote "shall be counted" in such county or district.

It will be observed that this view assumes that the object of the transitive verb "claims" is something distinct from

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"residence," and intraterritorial to the county or district of the residence, and raises the question simply as to whether that object is the "vote" of the elector offered or deposited according to the constitutional method, or something that precedes the act of voting and exists independently of it, or something that follows a performance of the act of voting.

First — Are the just calls of the constitutional proviso fairly met by a naked claim or assertion or announcement on the part of a qualified elector that he is one, no matter whether the assertion be made abroad or at his civil home — on election day or otherwise — excluding also even any present wish to exercise the right claimed?

In the first place it is to be observed that the language of the passage quoted is not "claims the right to vote," but "claims his vote;" and in the second place if the passage as written should be thus rendered, though it would not be made absolutely meaningless thereby, still it would mean nothing of the slightest practical value. The rule of interpretation is, that "it is never to be presumed that the makers of a law had nothing in view in making it;" that a "statute [or Constitution] should never be so construed as to render it a nullity, or quite elude its force, but such a construction ought to be put upon it that it shall have its full force and effect, and not be made vain and illusory." (Smith Com. 671.) Now a claim involving the mere right to vote as its distinctive and sole subject matter, can be of no civil or political moment, and therefore it cannot be regarded as the real point of constitutional concern. Further, the right of suffrage is personal; it follows the person, and cannot, to a legal or any other intent, have a county or district or any other *situs* in itself considered. A claim so limited would merely manifest the faith or opinion of the claimant on a point of personal quality, and would be as valueless for public edification and use as his expressed opinion would be on the point of his personal righteousness.

Second — Is the intraterritorial entity forming the object of the verb "claims," the "effect" or the "consequences" of a vote in the localities named, to the utter exclusion therefrom

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of all that enters into and forms a part of the constitutional process of personal voting, by a ballot deposited in a ballot box, some Government functionary being present and co-operating?

We begin by calling attention to the meaning of the word "vote," when used as a noun; and first to its customary meaning, and second to its meaning in the phrase "claims his vote," as it stands in the Constitution. The word, as commonly used, has three meanings:

1st—"Ballot," which in itself considered is nothing but a written note or communication from an elector addressed to the Government, expressing the choice of the elector, but which has not as yet been delivered.

2d—The expression of wish, or choice, or preference, to the exclusion of the means by which or the method through which that result was accomplished. "The popular vote is but the expression of the popular will." In this passage the word means choice expressed or made known, without involving any particular means which the term itself distinguishes and characterizes. The result may have been reached through a ballot, or by *viva voce*, or otherwise.

3d—The third and last definition of the noun "vote" is expression of choice by or through a ballot, or by outcry or any other particular means by which the choice of the voter may be lawfully made known or communicated to others in the given instance. The word here involves both the previous meanings, and brings them into the relation of means and end.

These definitions, as will be at once seen, demonstrate the falsity of the adverse proposition in hand, by showing that the very assumption of fact upon which it is built up has no foundation, and can have none by possibility, so long as the three definitions stated continue at once to fill and exhaust the meaning of the noun "vote." The allegation of fact involved in the adverse proposition is that in one of its known and established uses the word "vote" means the "effect" produced by it on public affairs in the course of a suffrage transaction — that is, it ascribes a fourth meaning to the word "vote," all of

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whose possible meanings, as now understood, are exhausted by the three definitions which we have given.

There is undoubtedly an "effect" that follows the lawful expression or publication of an elector's choice, and of which that publication is the sole and manifest cause, as distinguished from the antecedents, or causes of itself; and that effect is the final impression made through or by the force of a "vote," as last defined, upon public affairs; but as loss of reputation is not a part of the libel, nor of the publication which causes the loss, so the effect of which we are now speaking is not a part of the publication in question; that is, it is not within the largest and most comprehensive definition of the word "vote."

There is only one way in which this last general result can be contravened, and that is by showing that the word "vote" when used as a noun has a fourth meaning distinct from the three named, and indetical, too, with the additional meaning ascribed to it. It is further to be noticed that the question of whether it has any such fourth meaning is, in one sense, a question of fact, and being such it is one upon which "general principles" cannot be brought to bear; and it is further to be specially noted that there is no source from which any reliable information upon the subject can be derived, except the dictionaries of the language and its literature, or if there is any other source it must be found in the mere provincialisms of 1849.

But the Constitution itself decides the question and to our entire conviction. In the Constitution the word "vote" and its derivatives are used twenty-one times. The word is used five times as a verb; the participle "voting" is used three times, and "vote" or "votes" appears twice as "ballot" or "ballots," as defined in our first definition, and eleven times as a noun used in the sense of the third or most comprehensive definition; and we rely upon this circumstance as a fact of manifest importance; and over and beyond this we cannot fail to notice the fact that the word occurs twice in section one, Article II, once in addition to the disputed instance, and in the proviso to that section: "Provided that nothing herein

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contained shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting to the right of suffrage Indians," etc. As the word is used in this proviso it imports choice manifested by or through the use of a constitutional mean. But there is another fact still more impressive. In the second section of the Tenth Article the word is used not only in the sense of our third definition, but the whole of the conditions involved in that meaning are circumstantially detailed. "The Constitution that may have been agreed upon by such Convention shall be submitted to the people at a special election to be provided for by law for their ratification or rejection. *Each voter shall express his opinion by depositing in the ballot box a ticket whereon shall be written or printed the words 'for the new Constitution,' or 'against the new Constitution.'*" If there was ever a question of interpretation which the rule of *noscitur a sociis* should dominate, awing all dissent into silence; if there was ever an instance in which the meaning of a word should be determined by the concurrent voice of all the dictionaries of the tongue in which the word is found—it is the question of definition with which we are dealing; and as the word appears in the Constitution eleven times as a noun, and throughout all the varied relations in which it stands, with the exception of two instances in which it means "ballot," uniformly bears the meaning assigned it by the third definition; therefore the rule of common reason, as well as the rule of law, requires that that meaning should be given to the word at the point and in the place where its meaning is disputed; nor would the result be varied if the force of the word as disputed should within its own special relations be doubtful or ambiguous, for it is in such cases only that there is any occasion to resort to the context or to make search after companionship. The particular maxim, *noscitur a sociis*, is applicable only in cases of doubt. Its distinctive office is to dispel doubt, and all its value consists in its power to dispel it; and wherever a doubt has been dispelled by means of it, a certainty is revealed. The meaning of the word "vote" in the disputed instance is not doubtful in our judgment when

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we consent to read it in the light emanating from itself in its own immediate connection, and certainly not when to the inherent force which it puts forth there is added the force imparted by traditions that became historical, and the further force imparted by the fact of habits of thought—that became chronic and habits of action that became muscular almost, both in England and this country ages before 1849. But when from this advanced standpoint the fact of the companionship, and the multiplied coincidences hereinbefore referred to, have been duly weighed, and when it has been considered also that there is no question of “absurdity” or of “inconvenience” even involved, then and in that event, if any doubt lingers, it can, as we apprehend, find neither justification nor apology in any rule of interpretation recognized by law nor under any rule commending itself to the reason. On these grounds, therefore, we hold that the meaning of the word “vote” in the disputed instance, involves the act, and the activities of voting, as distinguished from its mere results. Treating the question as a question of fact, resolvable on the principles of circumstantial evidence—to which predicament it bears a manifest resemblance—it may be said, and truly said, that public justice has, in myriads of instances, claimed its extreme dues on evidence far less convincing.

Before leaving this subject it becomes necessary to consider the other form of words that has been suggested as setting forth the object on which the action of the transitive verb “claims” constitutionally terminates. The form is as follows: “in which he claims his vote shall be counted.”

First—The words “shall be counted” are not in the Constitution as framed by the Convention and approved by the people. By the insertion of the words the Constitution would be amended—and perhaps improved, and perhaps seriously damaged in the large and in the long run—but in no sense would an insertion of them be an interpretation of the passage as it now reads. Phrases supposed or alleged to be of equivalent import may be advanced for the purposes of argument or illustration, but it always is to be remembered that the

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phrase so advanced cannot be regarded as a test by which the meaning of a word or passage occurring in a written document is to be interpreted.

Second — But the words “shall be counted” suggest nothing differing in any particular from the fallacious “consequence” or the equally fallacious “effect” already discarded. But should it be said that the purpose or object of “claim” in the passage suggested is the mere manual process of counting our reply is that a mere official counting of votes conducted by public functionaries is not a “vote,” nor is it any part of a “vote,” and much less is it any part of “his vote.” There is not a man in the State who can say that he ever cast “his vote” at any “election” on the question of the process, as such; and as to the results of the process, considered as a distinct subject matter of “claim,” there is many a disappointed elector who can testify that he has known of election results arrived at by counting that were never any part of the object “claimed” by “his vote.”

The discussion upon the meaning of the word “vote,” in the disputed instance, as a detached point, terminates here. Its meaning is fixed, and if the word is to be struck out, there is only one thing that can properly be put in its stead — and that is the third definition in full detail, the entire accuracy of which the Constitution itself establishes.

Under the aspect which the question has now assumed, it is brought within the operation of a general principle, to which we shall for a moment advert. The franchise of voting is a special right, or power. The power has no existence independently of the restraints imposed upon it by the Constitution; that is, no existence except as subject to the peculiar method prescribed by the Constitution, governing its practical exercise. The mode, on received principles, must be considered as of the essence of the power. Now, under the Constitution there is but one method, and that method excludes all others; and, therefore, an exercise of the power can neither be constitutionally claimed, nor can it be constitutionally conceded, except as such claim shall be made or manifested in the

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mode or after the constitutional method of the power. According to that method, when the Government meets an elector at a time previously appointed by itself, for the purpose of learning his personal choice, he can neither make it known to the Government, nor can the Government consent to know it, except as he communicates it by vote or ticket in writing, called in the Constitution a "ballot," which the elector, in his own proper person, delivers to the Government by the act of depositing it in a ballot box then and there in the possession and custody of the Government by its officers duly appointed; or, alternatively, by actually offering so to deposit it. When a ballot has been so actually deposited, or has been so actually offered by an elector, it becomes "his vote" in the sense in which these words are used in the first section of the Second Article of the Constitution; that is, an expression of the elector's choice through the one method of the Constitution; and as all other methods of "claiming his vote" are forbidden, it follows that a ballot not cast into the box under that method is utterly idle.

We shall now reproduce the whole passage in which the phrase "claims his vote" occurs, and then restate the same passage in a form sufficiently extended to include within it all the minor conceptions involved in the word "vote," and on the statement thus extended shall consider the question of what conclusion follows from it determining the main question:

"A citizen * * * who shall have been a resident of the State six months next preceding the election, and of the county or district in which he claims his vote thirty days, shall be entitled to vote," etc.

"A citizen * * * who shall have been a resident of the State six months next preceding the election, and of the county or district in which he offers or performs the act of offering to deposit, or in which he performs the act of depositing, a 'ballot' in a ballot box, shall be entitled to vote at all elections," etc.

The general question is, where is the act of offering a ballot to the Government, or the act of depositing a ballot in a ballot

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box, to be performed? That question is now to be determined upon the constitutional provision as above extended, and it can be determined only by inspection—that is, by steadily looking at it and noting the responses of the intuitions.

Lest, however, the inspection should be embarrassed by some misgiving as to the accuracy of the extended statement, we will recast the statement, using the very language of the Constitution, found in the second section of the Tenth Article:

“A citizen * * * who shall have been a resident of the State six months next preceding the election, and of the county or district in which such voter shall seek (that is, perform the act of seeking) to express his opinion by depositing in the ballot box a ticket, whereon shall be written or printed” certain words, etc.

On this last statement, expressed as it is in the very language of the Constitution, and on the terms used in the second statement, which terms agree with the terms of the last in every material particular, as well as on the first statement, extracted from the first section of the Second Article, which differs from neither of the others except as it is somewhat more condensed, it is in our judgment entirely manifest that the act of voting is to be performed within the State and within the county or district in which the qualified elector has his civil home.

In aid of this conclusion, we deem it proper here to add that it is not opposed to any opinion which the Legislature has expressed as yet; but, on the contrary, the Legislature has sanctioned the conclusion stated, and in two instances. The Act of 1863 and the Act of 1864 are both framed upon the hypothesis of its truth. The provision of the Acts, respectively, which bears us out in this statement is as follows: “Ballot boxes shall be opened at each place where a regiment shall be on that day * * * and the votes so given at such time and place shall be considered, taken and held to have been given by them in the respective counties of which they are residents.” Had the Legislature enacted that an alien should be considered, taken and held to be a citizen; that

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minors should be considered, taken and held to be of adult age; that for voting purposes all colors should be considered, taken and held to be white, it would have been no abuse of terms to say that the Act bore upon its face an admission that the Constitution established the distinctions which it was the purpose of the Act to efface, and as clearly, too, as though the Act had contained a "whereas," reciting the constitutional provision at length, and further reciting that for certain reasons it was thought proper by the Legislature to suspend the constitutional rule for a limited time, or forever, and had then proceeded to ordain that for all the purposes of canvass, and for all the purposes of judicial determination, the distinctions named should be taken and deemed as utterly obliterate.

Judge Redfield, of the *Law Register*, in commenting upon a kindred provision in the New Hampshire statute, which the Supreme Court of that State had pronounced unconstitutional, in a learned review of the opinion, remarks that the Act contains "a virtual admission upon its face that it did, unless its provisions could be construed to mean something else besides what their words expressed, conflict in express terms with the provisions of the Constitution." So then it appears that the only issue made up between the Act of 1863 and the Constitution, or between the judicial and the legislative departments of the Government, is as to the power of the latter to abrogate an admitted constitutional provision, or what amounts to the same thing, to abrogate the whole instrument, as by ordinance. If we had any misgiving as to the absolute correctness of our own convictions as to the unconstitutionality of the Act of 1863, and we have not, the legislative sanction which the act itself exhibits would go far toward removing it.

We now propose to consider the decision of the Supreme Court of Wisconsin in *State ex rel. Chandler v. Main*, that of the Supreme Court of Iowa in *Morrison v. Springer*, and that of the Supreme Court of the State of Pennsylvania in *Chase v. Miller*.

The fifth section of the Thirteenth Article of the Constitution of Wisconsin is as follows: "All persons residing upon

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the Indian lands within any county of the State, qualified to exercise the right of suffrage under the Constitution, shall be entitled to vote at the polls which may be held nearest their residence, for State, United States or county officers; provided that no person shall vote for county officers out of the county in which he resides."

The Court held that the proviso did not mean to prohibit the voter from being allowed to cast his ballot outside of the county in which he resided, but to prohibit him from voting for officers of a county in which he did not reside. We have not seen the opinion delivered in the case, and therefore have no knowledge of the reasoning. The proviso, considered as detached from the context, presents a form of words analogous to those presented in the kindred passage of our own Constitution; and if the Court determined the meaning of the proviso *ex vi terminorum*, and without reference to the general rule prescribed in the body of the provision, and without any reference to or reliance upon any other provision contained in the Constitution at large—that is, if all the grounds of the Wisconsin judgment were like those upon which our conclusions are based, then the two conclusions stand opposed to each other necessarily; but should it appear that the grounds are unlike in any substantial particular, then the several conclusions are not necessarily opposed to each other, and both may be correct. We can, however, very well conceive that the judgment in the case cited was not based upon the words of the proviso alone, but that those words were construed in the light thrown upon their meaning by the immediate context, stating the general rule, and of which rule the proviso is a qualification. The immediate context states three conditions of fact, upon which the rule of voting, as unaffected by the proviso, is made to depend: 1st. Domicil in a county; 2d. Actual residence on Indian lands therein; 3d. The "nearest polls"—that is, the nearest point or place at or in which the Government should establish a poll; and the Court may have considered that, inasmuch as the Constitution did not describe that point otherwise than by the use of the word "nearest,"

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the Legislature was left at liberty to fix it, in its discretion, either within or without the county of the elector's residence, and thus have been brought to a conclusion directly opposite to the one it would have reached on the bare terms of the proviso. But if in fact the Court based its conclusions upon the proviso as detached from the context, then the correctness of the conclusion will be considered in connection with the conclusion in the Iowa case, which confessedly had no other basis.

The provision of the Iowa Constitution is as follows: "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or may be authorized by law;" and the Court holds that the provision means simply that "a person cannot claim to be an elector in any other county than where he has such residence; that, in substance, is what is meant by the word claims."

There are three propositions maintained in the opinion: 1st. That the object, or "leading object," of the section was "to define who should be entitled to vote"—that is, as we understand it, to define the qualifications of voters; 2d. That, however, the particular passage—"in which he claims his vote"—does not relate to electoral qualification, for it is asked, "what weight, then, shall be given to the word 'claims?'" Does the assertion of this right (the right of suffrage), or a claim to exercise it, constitute any part of the qualifications of the voter? In other words, if he is of the right age, sex and color, and has the requisite residence, is he not a qualified voter though he may not claim to exercise that right? If so, then how can the claim of a right already perfect, add to its completeness?" 3d. That the import of the passage is, that "a person cannot claim to be an elector in any other county than where he has his residence"—which means, affirmatively stated, that a person who is a citizen, and who is of the right age, sex and color, and who has resided in the State six months, and in some county or district therein for thirty days next pre-

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ceding the election, is a "qualified elector" of that county or district, and of no other.

We have already indicated our assent to the correctness of the second proposition, but it is apparent that its truth is wholly irreconcilable with the truth of the third—for in the one it is asserted that the passage does not bear upon the subject of electoral qualification, while in the other it is as broadly asserted that it does. Further, it cannot escape notice that some of the prominent terms of the passage to be interpreted are not found in the third proposition as stated, and particularly the words "his vote" are wanting, and the words "to be an elector" are substituted as the constitutional object of the word "claims" in their stead. But the words "to be an elector" and the words "claims his vote" obviously do not mean the same thing. The one merely involves a declaration of personal quality or character; the other sets forth an event brought about, or to be brought about, by an elector after the character has been acquired. But we propose to further briefly examine the reasoning upon which the conclusion is based that the disputed passage does not bear upon the place where the act of voting is to be performed, but upon electoral qualification instead. The whole reasoning proceeds upon the word "claims." The word is defined as importing "the demand of a right, or of a supposed right," and we admit the entire correctness of the definition. It is then said that "a right or other thing may be asserted (claimed) by words or by other means." This as an abstract proposition—and that is the form in which it is put—is unquestionably true. It is then stated that the word "claim" (in the abstract) by no means implies that place or presence are essential to its potency or completeness. This is not only sound, but entirely apparent also. We hold it to be quite manifest, that there are many cases in which the citizen may make known his preferences to the Government by mere verbal statement, and that there are also cases in which he may express his personal choice to the Government on matters of public concern by a note in writing sent either through the General Post Office or by the hand of

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a messenger, and it would not be a matter of the slightest importance whether he adopted the one course or the other. If the public mail should be used, it obviously would be of no practical consequence whether the point of delivery was in the county or district or even in the State of the citizen's residence; nor would it be of any constitutional or other public concern where the Government functionary to whom it was addressed should happen to be when he received it. So far, the opinion obviously engages itself in laying down a basis of conclusion. All after that is conclusion merely. The basis is found in the word "claim," as detached—isolated. The opinion ascertains and declares its abstract definition to be, "to demand a right or supposed right," without in any manner involving the means by or through which, or the place at which, the demand is made. Having determined what the word includes, and also that it does not include a certain other thing in the abstract, the opinion concludes not only by declaring what the word does not mean as it stands in relation in the phrase "in which he claims his vote," but by stating affirmatively what the whole phrase means when considered in connection with its context. We have no disposition to indulge in the triflings of hypercriticism, but much prominence has been given to this opinion in argument; it has been repeatedly pressed upon our attention as a case which we well might follow as authority, even if it did not exactly accord with the convictions resulting from our own reasonings; and in order to determine whether we could follow it without seriously imperilling the whole of that most important branch of the law which relates to the construction of wills, contracts, statutes, and Constitutions, we have felt it our duty rather than our privilege to subject the opinion to the same test to which we hereby subject our own.

As to the conclusion drawn by the opinion in question from the purely abstract definition named, we submit that it is a *non sequiter* to the whole extent of the terms in which it is stated. Let the process as such be inspected. The general question involves the meaning of a phrase containing some

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fifteen words as related to the disputed question of place. Some ten of the words are prominent as nouns or verbs, with other words interspersed showing the relations between them. The opinion begins by taking one of the more prominent words out of its position in the phrase and ascertains its definition in the abstract, and from that definition alone determines the conjoint force of all the words as they stand in relation. The conclusion may be right, or it may be wrong, but to every intent, whether practical or conceivable, the question is left just where it lay in the beginning, that is to say in hypothesis. The so called conclusion is one only in name; in fact, it is the original question itself in the guise of conclusion. Our purpose has not been to examine into the correctness of that conclusion here, for that we have done already and in advance; but on the other hand, our main purpose has been to test the accuracy of our own conclusion by looking, not at the bare conclusion of another tribunal, but by looking at the reasoning adduced in support of it; and we cannot surrender our own convictions merely on the authority of the case named, inasmuch as it nowhere brings them to the test of just challenge. We have a further remark to make touching the opinion before finally leaving it. While it is true abstractly that there is a diversity of modes in which a person may claim a real or supposed right, still the opinion makes no allusion to the fact that by the Constitution of Iowa, as by our own, there is but one mode by which an elector can claim his vote, and that is by the voter's depositing or offering to deposit a ballot in person in the ballot box. And again, the opinion nowhere touches the word "vote," either as detached or as it stands in the Constitution. The meaning of that word as it stands in position is not only entitled to consideration, but in our judgment it presents one of the pivots of decision. It is the constitutional object of the transitive verb "claims," and the fact cannot be got rid of. And here we cannot fail to notice that the argument submitted for the appellants also overlooks both of the points to which we have just alluded.

On these grounds we do not feel at liberty to surrender our

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own convictions, and pursue a course which would, in our judgment, throw the whole law relating to the construction of written instruments into hopeless confusion.

The Pennsylvania case previously referred to here claims a moment's attention. The Constitution of Pennsylvania uses the word "offers," where ours uses the word "claims." We have concluded that under our Constitution there is no mode of claiming a vote, except by offering it, and it follows that the word "claims," as it stands in our Constitution, is considered as the exact equivalent of the word "offers;" therefore, the correctness of our final deduction is sustained by the Pennsylvania decision. The correctness of that decision has never been doubted, and it has met the approval of the learned editors of the *Law Register*. In the Connecticut case cited by the appellants, the Supreme Court of that State expressed its concurrence in the doctrine of the Pennsylvania decision most emphatically. Speaking of time and place, the Court say: "In Pennsylvania the place was only prescribed by the Constitution, but that was sufficient to render an Act of the Legislature authorizing a reception of the soldiers' votes out of the State invalid." And in the Iowa case even the Pennsylvania decision is spoken of in terms of approbation, for the Court say: "Mr. Justice Woodward, in the case of *Chase v. Miller*, in what must be admitted to be a very able and almost exhaustive opinion, holds that the law allowing soldiers to vote outside of the boundaries of the State is in conflict with this section of the Constitution (referring to the Pennsylvania provision) and is therefore null and void." So it appears that the very cases relied on for the purpose of showing the incorrectness of our conclusion, themselves recognize the correctness of a decision that sustains it.

We have postponed an examination of the purely grammatical argument which has been suggested until it could be conveniently confronted with the case just cited. The reasoning is too elaborate and refined to enable us to review it here in full detail, but in substance it comes to this: That the passage "in which he claims his vote" is a "prepositional phrase,"

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and that the words "county" and "district" are "its objects of relation;" and from these premises the conclusion is deduced that the provision performs the office of designating the particular county or district in which the fact of a thirty days' residence must transpire in order to make the subject of the sentence "a qualified elector." In so far as the reasoning is based upon the language of the Constitution, it begins and ends in the foregoing grammatical exposition. The answers are as follows: 1st. The argument is inherently weak as being purely grammatical. 2d. The conclusion, however it may be in accordance with the premises assumed, is obviously fallacious when considered in itself, as a proposition of law. Is it true that the Constitution of this State, either in the disputed passage or elsewhere, "designates" the particular county or district in which the fact of a thirty days' residence "must" transpire "in order" that a citizen may take on the character of a qualified elector? 3d. However the phrase in question may be "prepositional" it is apparent that the corresponding phrase in the Constitution of Pennsylvania was affected with the same infirmity; and, 4th. Nothing can be claimed on the ground of the assumed "prepositional" character of the expression in the case stated, that must not be conceded to the one of like quality (by parity) in the provision: "A duly qualified grantee, who shall have recorded his deed in the county in which the land is located shall be entitled to priority," etc. The "prepositional phrase" there, instead of "designating" the "particular" county where the land "must" be located "in order" to entitle the grantee to priority, very clearly designates the place at which the act of registration is to be performed.

But another argument has been advanced which, when analyzed comes to this, that if our Constitution fixes the place of voting by force of the language in question, then the Constitutions of New York and Kentucky are tautological or redundant, inasmuch as it follows that those Constitutions, respectively, repeat themselves on the question of place. In the first place we do not appreciate the force of the reasoning,

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and in the second place it proceeds upon an entire mistake of fact, as any one may see by referring to the Second Article of the Constitution of New York, and the eighth section of the Second Article of the Constitution of Kentucky.

An argument has also been asserted, which is based upon what may be called the history of constitutional changes in two or three of the States during the last half century—but the argument is too remote and the grounds are too evasive to require serious consideration. Grounds of the quality named, find no recognition in the rules of interpretation previously cited.

Our attention has been called to the case of *Capen v. Foster*, 12 Pick. 485, but the only point decided in that case was, that the Massachusetts statute, requiring a registration of voters, was not in conflict with the State Constitution.

We have considered the argument drawn by counsel from the eighteenth section of the Eleventh Article of the Constitution. "The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult or other improper practices." It is said that "the power to regulate elections implies the power to provide the necessary means by which all electors may vote;" but in our judgment the scope of the implication is narrowed by the positive provision of Article Second, which we have discussed, and to the extent named.

Were it necessary the correctness of the conclusion at which we have arrived might be vindicated by reference to another constitutional provision. By section two, Article II, "electors shall in all cases except treason, felony, or breach of the peace, be privileged from arrest on the day of election, during their attendance at such election, and going to and returning therefrom."

This section treats of attendance at elections, in connection with the impediment of arrest on civil process, whereby such attendance would or might be prevented, and exempts electors from such arrest, leaving them, however, subject to arrest for

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treason, felonies, and breach of the peace. From arrest on civil process, the voters are, in the language of the section, "privileged." But if the act of voting, constitutionally considered, can be performed on California account, outside of the State's jurisdiction, it would not be true that the person thus voting in a sister State, or on national territory, or within the limits of a foreign nation would be exempt from arrest in civil cases on the score of the "privilege," secured in "all cases" by our Constitution, to electors whom it regards as having the right to go on election days to the polls and deposit their votes in its ballot boxes. The admitted immunity of such extra-territorial voters from arrest, on California process, would not find its source in the "privilege" provided for in section two, but would result from the fact that they were beyond the reach of our civil justice. Nor would their immunity from arrest on our civil process be limited to the day of election, but would include every day of the year. Nor would their exemption be confined to freedom from arrest on our civil process, but would comprehend arrests on California process for the very crimes to which section two provides in terms that the exemption shall not extend. The result is too obvious to be mistaken. If a valid election for home officers can, under our Constitution, be held either in whole or in part outside of our territorial jurisdiction, in so far as the voters participating in such election are concerned, the section in question contains an impossible provision. The section states no distinction between elections or electors, but applies itself in terms to all elections and to all electors, known as such in constitutional idea. Looking at all the possible electors in bulk and considering them all as within and as acting within the jurisdiction on the day of election, the section extends to them all a "privilege" which, on one of the adversary hypotheses here presented, would be of great practical moment but under the other would be not only unavailable, but destitute of all intelligible design. We do not put the argument here upon the ground that if it should be admitted that the Legislature has the power to fix the place of voting, that it might abuse the

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power, and therefore that the power should be denied, but upon the ground that the hypothesis that the power exists is irreconcilable with the express provisions of section second.

So far we have made little allusion to the fact that the persons to whom the Act of 1863 relates are soldiers in the service of the United States, and we have omitted to do so for the reason that the section of Article II of the Constitution, already considered, suggests no distinction between one class of voters and another. The standard of qualifications erected by those sections stands, so far as those sections are concerned, as the common measure of all voters alike, and the requirement involved in those sections, that every voter shall offer his vote in the county or district in which he resides, is a rule dictated to every man who claims the suffrage.

But it is urged that by section four, Article II, duly qualified voters of this State, employed in the service of the United States and being absent from the State by reason of the exigencies of such service, are specially exempted from the operation of the general rule established by the previous sections of the same Article. This section is as follows:

"SEC. 4. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, at public expense; nor while confined in any public prison."

And section nineteen, Article XI, extends the benefit of the provision to persons absent in the service of the State.

We shall not undertake to reply categorically to the argument of the counsel for the appellants, based upon this section; but shall proceed at once to a brief exposition of our own views of its meaning.

It is obvious that the section does not add to the tests of

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qualification as established by section one of the same Article. It is obvious, also, that it does not diminish the number of those tests, or in any manner vary their quality. Assuming, then, that the standard of qualification applicable to persons in the service of the State, or of the United States, or engaged in navigating the waters of this State, or of the United States, or of the high seas, on their own private account, and applicable, also, to students attending seminaries of learning, is no other or different standard than that which section one applies to aspirants to the suffrage without distinction, the question comes: What is, then, the distinctive function of section four? In what exact stead does it stand? The section answers these questions with great explicitness. None of the persons whom the section describes shall "lose their residence" by their absence. The qualification of residence having once been attained to by a person falling within any one of the classes named, that qualification shall sustain no detriment by reason of absence, and therein the section affirms the rule of the common law. The section does not contemplate soldiers as such, or in any manner touch them as such. They are within the section simply for the reason that they are "persons employed in the service of the United States." The section includes also within its beneficent range all persons engaged in navigating our internal waters for their own advantage, and the waters of the United States and high seas as well. Scholars at School are within it. The inmates of almshouses and other asylums at public expense are within it, and the section even saves the legal residence of the prisoner from deterioration during the confinement which holds him back from the polls. The section is enabling to no one. It gives no new right—it reissues no old right or new and easier conditions—but simply perpetuates a quality already won as against an absence that otherwise might bring it to question. How, then, does this section touch the point of contest here? That point does not relate to any one of the qualifications upon which the right of suffrage is conditioned, but to the question, where shall the elector, in whom the right to vote

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is fully vested, exercise that right? It is a question of place; rigidly, it is a question of venue, and section four exhausts itself upon a topic of different impression and substance.

But, further, if the Legislature is bound by section four (as is contended by the appellants) to send the ballot box to the soldier wherever he may be found, why, by parity of reasoning, is not the Legislature at liberty to send ballot boxes to qualified electors of this State employed in the civil service of the State or of the National Government, and absent from the State by the exigencies of that employment? And why is not the Legislature at liberty, by force of the same section, to open ballot boxes at all convenient points within the State for the accommodation of the navigators of our internal waters absent from their respective counties or districts on the day of election? And also, to answer the just claims of our navigators on the high seas, by sending ballot boxes with them or in pursuit of them? And so, also, as to the sick in the hospitals, the inmates of asylums, and as to prisoners not disfranchised by the nature of their offenses.

A word further, and this opinion will be concluded. To a certain extent the case is argued in the brief filed for the appellants as though a question of disfranchisement of the California volunteers was involved, and that our decision went to their disfranchisement. If it be so, however we may regret it as individuals, we have no power to prevent it as Judges. But the case raises no such question, nor does this decision involve any such consequences. Though opportunity to vote at current elections has been lessened, still, diminished opportunity of exercising a right is in no just sense a divestiture of it. Nor does the admitted fact that the volunteers cannot vote with the same facility in their new relation as in the old one—in war as conveniently as in peace—result in the remotest degree from any provision of the Constitution inserted for the purpose of discrediting qualified electors of the State enlisting in the national armies; but, on the contrary, the soldier's diminished facility of voting is attributable solely to the accident of his absence. It is true of those employed in the civil service of

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the Government as well as of those who are engaged in its military service, and it is true, also, of electors at large, that they are often kept from the polls by considerations of urgent convenience — by absence, voluntary or compelled — and by a great diversity of obstacles which they could not surmount if they would, and, perhaps, would not if they could. Considered in this point of view, there is absolutely no impediment or possibilities of hindrance affecting the military vote that do not affect the whole civil vote in like manner; or, if there is any difference between them, it is one of degree only.

The record shows that five hundred and forty votes were cast for York for the office of Assessor in District Number One, and that five hundred and nineteen votes were cast for Weinbeer, who was the rival candidate for the same office. Of the five hundred and forty ballots cast for York, forty were cast by soldiers under the Act of 1863, and on that ground are to be rejected — leaving five hundred votes only standing to the credit of York, and that number is overcome by the five hundred and nineteen standing to the credit of Weinbeer. But it is alleged by the appellant, York, that Weinbeer's vote should be reduced by deducting thirty-five votes therefrom, cast for him at Phoenix Reservoir, on the ground of certain alleged misconduct on the part of the Inspector, in the matter of transmitting the votes to the County Clerk.

It is admitted that the votes in question were cast by duly qualified electors, on lawful occasion and at the proper place. These facts being found, their effect cannot be defeated by reason of the mere official delinquency of the Inspector. (8 Cowen, 102; 4 Cowen, 297; 20 Wend. 12; 5 Denio, 409; 14 Barbour, 257; 8 N. Y. 67.)

The appellants further insist that the complaint does not state facts sufficient to constitute a cause of action.

All the cases were heard and determined upon an agreed statement of facts, and the only question before us in error is, whether the agreed statement will support the judgment — and to the sufficiency of the facts stated therein no objection is taken.

The judgments are respectively affirmed.

SAWYER, J., concurring.

Without repeating the accurate and exhaustive analysis of the disputed passage of the Constitution contained in the opinion of my associate, Mr. Justice Shafter, (in which I concur,) I propose to state briefly and in more general terms the conclusions at which I have arrived.

The leading rules of construction stated and relied on by the appellant's counsel are fully conceded; and especially that, wherever there is a reasonable doubt as to whether an Act of the Legislature is constitutional or not, the law should be sustained. Such is the united voice of a multitude of authorities, and I do not question the rule. I also yield assent to the proposition, that, if there is no restriction in the Constitution, either expressly or by fair implication, upon the power of the Legislature to determine the place where an elector must exercise his right of suffrage, then, electors may be authorized by the Legislature to cast their votes outside of the limits of the counties or districts in which they reside, or outside of the State.

The question, then, is, does the Constitution expressly or by plain implication, restrict the powers of the Legislature in this respect?

In examining the Constitution with a view of determining the question at issue, we must look to the language of the instrument; but the language must be construed according to its ordinary signification, when used with reference to similar subjects, as understood at the time when that instrument was framed. We are entitled and required to take notice of the history, condition and circumstances of the country prior to and at the time of its adoption.

California had recently and suddenly become populated by immigrants from every State in the Union, who had from the time of their earliest recollection been accustomed, in the various States from which they came, to popular elections. These systems of elections had been in use by their fathers from the earliest settlement of this continent, and with greater

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or less limitations and restrictions in the countries from which many of their ancestors emigrated. The universal mode of manifesting the will of the qualified elector was by vote, and the vote might be given in a variety of ways—as by ballot, by the voice, by a showing of hands, or dividing—a part going to one side and a part to the other. The last two modes, however, were confined to officers and matters of minor importance, except in legislative and other deliberative bodies. In elections by the people of all important officers, the only mode of voting known was by ballot, or by the living voice. In private corporations, and only in such cases, stockholders were allowed to vote by proxy. And so, also, in the House of Lords in England, by license of the king, a peer was authorized to give another peer his proxy to vote for him in his absence. But the principal, or his proxy, was required to be present. In the election of all civil officers, however, in every State in the Union, the personal presence of the elector was required at the place established by law for receiving votes, whether the vote was by ballot or by the voice, and these elections were always held within the district for which the officers were elected. The very idea of an election embraced the idea of a place appointed within the district for the meeting of the voters, persons appointed to receive and register the votes, and the presence of the elector in person to offer or claim his vote, to deposit his ballot, or announce his choice by the living voice. Men had no other conception of the process of voting, or of offering to vote, or of claiming their votes. This conception and these ideas were necessarily in the minds of the men who framed our Constitution, and of the people when they adopted it. They knew no other mode of voting, or of offering to vote, or of claiming their votes, and used the terms relating to the subject with reference to these conceptions, and in the sense in which they had been accustomed to employ them, and in no other.

The mode of voting established by the Constitution is by ballot, and there can be no possible difference of opinion as to what, in the minds of the people who adopted the Constitu-

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tion, constituted the process of voting by ballot. With these ideas of those who framed and adopted the Constitution, and this understanding of the process of voting in view, the disputed passage must be examined. The solution of the question as to whether the Constitution puts any limitation upon the place, at which the process of voting is to be performed, must depend mainly upon the construction to be given to the phrase "in which he claims his vote," in the connection in which it stands. According to the well settled rules of construction, some meaning, some effect, must, if possible, be given to it. It has some office to perform. What is it? It is perfectly clear to my mind that it forms no part of the qualification of the elector, for under the Constitution a man can be a qualified elector without claiming his vote at all. If a white male citizen of the age of twenty-one years has resided in the State of California six months, and in the County of Sacramento, or any other county, thirty days next preceding an election, he is a qualified elector, whether he claims his vote or not. If residence in the State six months, and in any county, no matter which, for a period of thirty days, is sufficient to give him the right to vote, then the fact of *claiming* his vote is no element in the qualification. Nor, is a phrase which does not, and cannot, express an element in the qualification of a voter, a natural, convenient or proper one to use for the purpose of describing or denoting a qualification. There is but one State, hence, residence in that particular State is required, but there are many counties or districts, but residence is not required to be in any given county, and for this reason no particular county need be designated. To describe the qualification, it is only necessary to say a white male citizen who has resided in the State six months, and in "a county," or "*some county*," or "*any county*," thirty days shall be entitled to vote. In the Constitution of Maryland the term "*any county*" is used. Thus: Every free white male citizen, etc., who shall "have been one year next preceding the election a resident of the State, and for six months a resident of the City of Baltimore, or of *any county* in which he may *offer* to vote,"

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etc., shall be entitled to vote, etc. Here the qualification would certainly have been complete had that part of the sentence terminated with the words "*any county.*" The phrase immediately following could by no possibility add anything to the qualification.

In the Constitution of Georgia, the clause is, "shall have resided six months within the county," and there terminates, without any such phrase as "in which he claims" or "offers to vote." The phrase is not necessary, then, to complete the qualification by designating any particular county. I can conceive of no office which the phrase "*in which he may offer to vote*" in the Constitution of Maryland can perform, unless it be to indicate the county in which the offer must be made and the vote cast. So in our own Constitution the phrase, "*in which he claims his vote,*" is no part of the qualification of the voter, as we have seen, for he is, and necessarily must be fully qualified before he is entitled to "*claim his vote*" *at all*, and I am unable to assign any meaning to it, unless it was designed to indicate the county or district in which the right of voting must be exercised, and thus by a single phrase to link the right of suffrage to the locality within which it must be enjoyed. It appears to me to be no argument against this construction, that the qualification of the voter and the limits of the place within which the right of suffrage is to be exercised, are expressed in a single sentence. Constitutions are but the skeletons of systems of government. It is a merit in these instruments that the last degree of consideration has been attained. The Constitution of Iowa was selected as the basis of ours, for the reason, as was stated in the Constitutional Convention, that it was "*one of the latest and shortest.*" (Debates, p. 24.) It might therefore be reasonably supposed to be the best and most condensed. The body which framed ours had the Constitutions of all the older States before it. One of the prime objects in all these Constitutions was to fix the qualifications of electors, and define the limitations under which the right of suffrage should be exercised; and all contained provisions upon the

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subject. In some of the older Constitutions, and especially in some of those of the New England States, these provisions partake almost of the prolixity of a statute. The later ones are more condensed. Nearly all, which require a county, district or precinct residence for a specified time, in addition to a State residence, as an element of qualification, have, in immediate connection with the specification of a county or district residence, a phrase similar or equivalent to ours, to indicate the place where the privilege is to be exercised, for the reason that it comes in conveniently in connection with the statement of a district residence; while those which only require a State residence do not admit of its introduction in that form, and hence require, and have, an independent and differently worded provision upon the subject, either in the same, or some other section.

Thus, the Constitutions which only require a State residence, and consequently require a different form of expression, are those of Indiana, Illinois, Arkansas, Minnesota and Oregon. The provision in the Constitution of Indiana will serve as an illustration of the mode of introducing the provision into the organic law of these States. It is: "Every white male citizen," etc., "of the age," etc., "who shall have resided in this State six months immediately preceding such election, shall be entitled to vote in the township or precinct where he resides." But, as before stated, when a county or district residence is required, the form of introducing it is different. Thus, as examples in this class of cases, in the Constitution of Rhode Island we have in one section, the phrase, "in the town or city in which he may *claim* a right to vote," and in another section, "in which he may *offer* to vote"—in that of Connecticut, "in the town in which he may offer himself to be admitted to the privilege of an elector"—in that of New York, "of the county where he may offer his vote"—in those of New Jersey, Iowa and California, "in which he claims his vote"—in those of Pennsylvania and Delaware, "where he offers to vote"—in that of Maryland, "in which he may offer to vote"—in that of Virginia, "in which he offers to give his

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vote"—in those of Kentucky, Kansas, Texas, Michigan, Florida, Louisiana, Mississippi, and West Virginia, "in which he offers to vote"—and in that of Tennessee, "wherein he may offer his vote." (American Constitutions, Pub. 1864.)

In some of these, where the place of voting is still further limited to a subdivision of a county, as, for example, New York, there are other words of restriction than those above quoted, but in those where there is only a State and county limitation, no other words are added, as in Pennsylvania, Michigan, Kansas, Delaware, Florida, and California.

These phrases are used in the several Constitutions in a similar connection, with reference to the same subject matter and evidently with the same object in view, and whatever variation there may be in the phraseology, it is manifest to my mind, that they were intended to convey the same idea. When we have ascertained the meaning of one of them, therefore, we have solved the question as to all.

The Convention which framed the Constitution of Georgia evidently supposed that they had fixed the place of voting by terms less significant than those contained in our own, or any other of the Constitutions supposed to contain a restriction in this respect. They seem to have contemplated, that a condition of things somewhat similar to the present might occur, and provided by an exception for elections to be held out of the county, when the exigency should arise. Had they not supposed the place to be fixed, there would have been no occasion for the exception so carefully provided.

The section is as follows: "The electors of members of the General Assembly shall be citizens and inhabitants of this State, and shall have attained the age, etc., and paid taxes, etc., and shall have resided six months within the county; provided, that in case of an invasion and the inhabitants shall be driven from any county, so as to prevent an election therein, such refugee inhabitants, being a majority of the voters of such county, may meet under the direction of any three Justices of the Peace thereof, in the nearest county not in a state of alarm, and proceed to an election," etc.

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I find no other provision restricting the place of voting than is contained in this section, yet it seems to have been thought necessary to add the foregoing proviso. But the proviso would have been unnecessary upon the theory that the place of voting was not limited to the county in which the elector had resided for six months.

The Constitutions of New York, Kentucky, Louisiana, and Alabama, go further than that of Pennsylvania, and others like it, and expressly provide that the elector shall vote in the election district, parish, town, city, or precinct, etc., and not elsewhere. Thus, for example, the provision in New York is as follows: "Every male citizen, etc., who shall have been, etc., and an inhabitant of this State one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election in the election district of which he shall be at the time a resident, and not elsewhere," etc., and from these last clauses it is argued that the framers of the instrument did not suppose the phrase "county where he offers his vote" fixed the place; but it must be noted that the "election district" is a much smaller territory than the county, and it was the intention to limit the place not to the county merely, but to the subdivision of the county — the election district; hence the necessity of the further provision, "shall be entitled to vote * * * in the election district of which he shall at the time be a resident." Thus far, then, there is no repetition.

But had it stopped here no man could doubt, that upon the well settled principles of construction, the maxim, *expressio unius est exclusio alterius*, would apply and the place would be fixed. But they add, *abundanti cautela*, the words "and not elsewhere." The Constitution of Virginia provides that "every white male citizen," etc., (stating qualifications) "and no other person, shall be qualified to vote," etc. Can it be inferred from the provision, "and no other person," that without it the framers of that Constitution supposed the right of suffrage would not be limited to those persons who possessed the prescribed qualifications? Yet such an inference is just as legiti-

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mate as a similar inference drawn from the provision "and not elsewhere," which was introduced into the Constitution of New York and some others to give greater certainty and precision to the restriction intended to be imposed.

Upon a full and careful examination of the subject, it is clear to my mind, that all these different phrases: "in which he may offer himself to be admitted to the privilege of an elector"—"in which he may claim a right to vote"—"where he may offer his vote"—"where he offers to vote"—"wherein he may offer his vote"—"in which he offers to vote"—"in which he offers to give his vote"—"in which he claims a right to vote"—"in which he claims his vote," etc., are all different forms of expressing the same idea, and that idea is something outside of and beyond a mere qualification, and were intended to designate the limits within which the right of suffrage is to be in fact exercised. If they have not this meaning, I am unable to give them any effect.

The Constitution of Ohio, North Carolina, and Wisconsin do not appear to contain any restrictive word whatever in this respect, and doubtless in those States the question of place is within the control of the Legislature. Among the miscellaneous provisions of the Constitution of Wisconsin, wholly unconnected with the chapter on the right of suffrage, there is a clause which, it was contended, put a limitation upon the place. This clause, however, seems to apply to a particular class of persons mentioned in that section. But whether it does or not, the proviso is clearly susceptible of two constructions—one of which would not interfere with the power of the Legislature over the subject, and this construction the Court very properly adopted.

In the recent case of *Chase v. Miller*, 41 Pa. 418, the words of the Constitution of Pennsylvania, "in the election district where he offers his vote," were held to fix the place. The reasoning of the Judge upon which the conclusion was based appears to me to be unanswerable; and, in my judgment, the words "in which he claims his vote," in our Constitution, were intended to express the same idea. The Supreme Court

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of Iowa, upon reasoning that does not command my assent—and I say it with due deference to the learning and ability of that Court—decided otherwise, reversing the judgment of the Court below, which took a different view of the question. I am not aware that the correctness of the decision in *Chase v. Miller* has been questioned by any Court. On the contrary, the Supreme Courts of Connecticut and Iowa referred to it with approbation. It is also commended by Mr. Redfield, formerly Chief Justice of Vermont, now one of the editors of the "American Law Register," and a distinguished law writer, whose works are often cited in our Courts. (Am. L. Reg., June, 1863, p. 146.)

At the time of the adoption of our Constitution, the universal practice was for electors to vote in the county, district, town or precinct in which they resided, and, as a general rule, this manifestly should be so. It was doubtless, not contemplated at that time, that any great emergency would arise wherein the very existence of the Nation would be at stake, as at present, and where a large portion of the electors would be absent, assisting in quelling a rebellion; hence, it did not occur to the framers of that instrument to make an exception in such a contingency, and none was provided.

Other States have found themselves embarrassed for similar reasons, and have been compelled to submit to the inconveniences resulting from elections held at an important crisis in the history of the country without the benefit of the voice of all their citizens. Some took the first opportunity to provide against future hazards of a similar kind by amending their Constitutions, as in the case of the State of New York. But, in making the required amendment in that State, the long established and safe principle of generally restricting the exercise of the right of suffrage to the immediate locality in which the elector resides was not abandoned. The object was wisely accomplished, not by changing the rule, but by engrafting upon it the exception required to meet the exigencies of such a condition of things as now exist. The following proviso was added to section one, Article Two:

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"Provided that in time of war no elector in the military service of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from the State; and the Legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the canvass and returns of their votes in the election districts in which they respectively reside, or otherwise." (Rev. Stat. N. Y., Supplement Vol. 4, p. 111.)

It is not, perhaps, inappropriate here to suggest that if the people of California, with their present experience, were again called upon to amend their Constitution, while they would doubtless make some such provision as this, it is highly improbable, that they would leave a matter of such vital importance to the interests of the people, as the exercise of the right of suffrage to the unrestricted control of the Legislature.

After a most patient, long continued, thorough and anxious investigation of the question in this case, with a full appreciation of the responsibility resting upon me, and of the fact that a large and meritorious class of citizens, may, for the time being, be unable to avail themselves of the inestimable privilege of the right of suffrage, and of the still more important fact that the State in a momentous crisis in her history may be deprived of the benefit of the voice of all her electors, I am unable to come to any other conclusion, than that the limits within which the right of suffrage must be exercised are fixed by the Constitution, and that the elector must claim his vote in the county or district in which he has his residence.

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The only questions involved in the determination of these cases relate to the constitutionality of the Act of the Legislature of the 25th of April, 1863, enabling the California Volunteers in the military service of the United States to vote at elections held in that year for State and county officers. It is unnecessary to repeat here the provisions of the Act. It will be found at page five hundred and forty-nine of the Statutes of

1863. Its object was to afford to the qualified electors of the State, absent on the day of election, either from the State, or, if within the State, from their respective counties in the military service of the United States, an opportunity to exercise their constitutional right of suffrage; a measure which was eminently just, as all must admit, and which ought to be upheld unless it be repugnant to the will of the people as expressed in the Constitution.

No controversy is made as to the object or intent and meaning of the Act; the only dispute being as to the true reading of certain provisions of the Constitution. The Act was passed upon the theory that the Constitution does not fix the place at which persons declared by its terms to be qualified electors shall perform the act of voting. If the theory be false, it is conceded that the Act is repugnant to the Constitution, and must be declared invalid. On the contrary, if the supposition be true, it is conceded that the Legislature has the same control over the place which it has over the time at which the act of voting is to be performed; and the Act is constitutional unless it may be justly declared obnoxious to section eleven of Article I of the Constitution, which provides that "all laws of a general nature shall have a uniform operation," or unless, upon general principles, it is, by reason of its extra-territorial operation repugnant to the general spirit and policy of the fundamental law.

In approaching the discussions of questions affecting legislative power it is proper to advert to certain fundamental principles which lie at the foundation of all reasoning upon that subject, and by the light of which, to a greater or less extent, every problem of constitutional construction must be solved.

At the commencement, all legislative power was inherent in the people. "In order to form a more perfect Union," etc., the people delegated a portion of this power to the General Government, as expressed in the Federal Constitution, and thereby practically parted with it forever. By the Act adopting the State Constitution they further exercised and exhausted

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the power remaining to them to the extent of the rules of civil conduct therein clearly expressed, or necessarily implied, and by their own direct act placed the rules thus established beyond the reach of change, except in one of the two modes expressly provided in the Constitution. The residue was held in reserve to be used, as the convenience or necessities of Government might require, not by themselves directly, but indirectly through a body to be chosen by themselves, by constitutional appointment, called the Legislature, which was thereby authorized to announce and express the will of the people upon all questions upon which it had not been already, in terms or by necessary implication, expressed in the Constitution. Thus the Legislature represents and stands in the place of the people, and when it speaks it speaks the will of the people as much so as the Constitution itself; and, in regard to obligations imposed, the rules of civil conduct ordained by the Legislature are of equal force and dignity with those prescribed in the Constitution except in case of conflict, when the former must yield to the latter, not because the latter is of higher origin or of more solemn character, but merely because the same will which created both has so declared. Hence all legislative power which has not been expressly or by necessary implication granted to the General Government, or in like manner exhausted by the State Constitution, must be assumed to reside in the Legislature. And inasmuch as it is the prerogative of the people to prescribe rules upon all questions of civil conduct according as occasion may require, they cannot be precluded from its exercise in any case, unless by their own constitutional enactment they have already declared what the rule shall be. Hence the well settled rule of construction, that every Act deliberately passed by the Legislature must be regarded as binding and valid, unless the Act is clearly and manifestly repugnant to some provision of the Constitution. The people cannot be divested of their prerogative right to say what shall be the rule of conduct in a given case upon the mere conjecture or suspicion (arising from an incautious use of words which, by possibility, may mean less or more than was

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intended) that they have already declared their will upon that subject. Nothing short of a constitutional prohibition, so explicit and clear as to leave no reasonable doubt upon the mind, can justify the Courts in declaring an Act of the Legislature null and void.

In his work on Constitutional Law, at page four hundred and eighty-two, Mr. Sedgwick upon this subject says: "The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the Act in question, and that the Courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said that every State statute, the object and provisions of which are among the acknowledged powers of legislation, is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated."

In *Clark v. The People*, 26 Wend. 606, Chancellor Walworth said: "Courts ought not, except in cases admitting of no reasonable doubt, to take upon them to say that the Legislature has exceeded its power, and violated the Constitution, especially where the legislative construction has been given to the Constitution by those who framed its provisions, and contemporaneously with its adoption."

In *The Sun Mutual Insurance Company v. The City of New York*, 5 Sand. 10, the Superior Court of New York said: "The power of Courts of justice to declare the nullity of legislative Acts, which violate the provisions of the Constitution of the United States or of the State, is undoubted; but the power, for manifest reasons, is to be exercised in all cases with extreme caution, and never where a serious doubt exists as to the true interpretation of the provisions that are alleged to be repugnant."

So in Illinois it has been said that the inquiry into the validity of an Act, on the ground that it is unconstitutional, is an inquiry whether "the will of the representative, as

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expressed in the law, is or is not in conflict with the will of the people as expressed in the Constitution; and unless it be clear that the Legislature has transcended its authority, the Courts will not interfere." (*Lane et al. v. Dorman et al.*, 3 Scam. 238.)

In Massachusetts it has been said that "Acts of a Legislature constitutionally organized are to be presumed constitutional, and it is only where they manifestly infringe some of the provisions of the Constitution, or violate the rights of the subject, that their operation and effect can be impeded by the judicial power." (*Foster v. Essex Bank*, 16 Mass. 245.)

In *The Farmers' and Mechanics' Bank v. Smith*, 3 Serg. and R. 73, the Supreme Court of Pennsylvania, through Mr. Chief Justice Tilghman, said: "We are now called upon to decide whether an Act of Assembly of this Commonwealth be void, because of its violating the Constitution of the United States. That this Court possesses the power, and that it is bound in duty, to declare a law void, when it violates the Constitution of this State or of the United States, has not been denied by the counsel for the plaintiff. It is a point on which I am well satisfied; but, at the same time, it is certain that it is a power of high responsibility, and not to be exercised but in cases free from doubt. Such has been the opinion frequently expressed by Judges of the highest respectability in different States, and sanctioned by the Supreme Court of the United States. I will not pretend to say that the meaning of that part of the Constitution on which this question arises is clear, but may safely say that it is doubtful. According to the established principles of construction, therefore, in doubtful cases, I am of the opinion that the law of the State is valid."

In *Fletcher v. Peck*, 6 Cranch, 87, Mr. Chief Justice Marshall said: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station

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imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."

It is said by the Supreme Court of Iowa (*Santo v. The State*, 2 Clark, 165,) that "a statute is not to be declared unconstitutional unless the necessity be clear, decisive and unavoidable, and therefore of two constructions, that which will make the statute good is the one to be adopted."— So in *The People v. Burbank*, 12 Cal. 384, Mr. Justice Baldwin delivering the opinion of the Court, said: "The delicate office of declaring an Act of the Legislature unconstitutional and void, should never be exercised unless there be a clear repugnance between the inferior and the organic law."

In *Hobart v. The Supervisors of Butte County*, 17 Cal. 30, the same learned Judge said: "The legislative department, representing the mass of political powers, is no further controlled as to its powers, or the mode of their exercise, than by the restrictions of the Constitution; such restrictions must be shown before the action of the Legislature, as to the fact or mode, can be held invalid. Accordingly, the Legislature having this general power of enacting laws, may enact them in its own form, when not restrained, and give to them such effect, to be worked out in such way and by such means as it chooses to prescribe."

The same Judge, in an elaborate opinion delivered in *Smith v. The Judge of the Twelfth Judicial District*, 17 Cal. 551, further said upon this subject as follows: "There is no question at this day of the power of the Courts to pronounce unconstitutional Acts invalid, for this power results from the duty of the Courts to give effect to the laws— of which the Constitution is the highest— and which could not be administered at all if nullified at the will or by the acts of the Legislature. But it is equally well settled that this power is not to be exercised in doubtful cases, but that a just deference for the

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legislative department enjoins upon the Courts the duty to respect its will, unless the Act declaring it be clearly inconsistent with the fundamental law, which all members of the several departments of the Government are sworn to obey."

In view of the foregoing well established principles we are called upon to interpret section one of Article Second of the Constitution, which is assumed to be ambiguous. Upon the one hand it is claimed that the section in question prescribes what shall be the qualification of an elector, and there stops. On the other hand it is further claimed that it also prescribes the place at which the act of voting shall be performed. If it be clear from the language used that it does fix the place, we are bound, regardless of consequences, to declare the Act in question unconstitutional. But, on the contrary, if it does not fix the place, or if there be reasonable doubt as to whether it does or does not, it is equally our duty, so far as the section under consideration is concerned, to declare the Act free from constitutional objection.

The rules of law governing the interpretation of Constitutions, statutes and private instruments are the same, and their object is to aid in ascertaining, from the language used, the true intent of the maker. They are necessarily of a very general character, and afford at best but an imperfect guide; and all who undertake the office of interpretation will find that they must after all rely mainly upon their own intuitions and perceptions. While a disregard of the strict rules of grammar is sometimes permitted, yet as a general rule the language used must receive an interpretation consistent with reason and grammatical usage, and never should the rules of grammar be departed from until they have failed to accord a satisfactory meaning to the doubtful words or passage. Their ordinary and popular signification should be given to the words used, unless from the nature of the subject it is apparent that some technical meaning was intended, yet as words individually or in combination do not always, even in common parlance, mean the same thing, it is necessary to consult the context for the purpose of ascertaining the precise meaning

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intended, or the particular purpose for which the doubtful word or phrase has been employed. Hence, neither words, phrases, sentences, nor paragraphs should be isolated and interrogated apart; on the contrary, each should be interrogated in the presence of its companions, for each has a voice, and the response of one may operate to enlarge or restrict the response of the other. No reading can be true which does not closely observe their just relations to each other of words and phrases. Owing to the imperfections of language at one time, and at another to a want of care or skill on the part of the composer, it not infrequently happens that adjunctive words or phrases are employed of a less or larger import in the abstract than is necessary to a clear expression of the idea intended to be conveyed. If such words or phrases are confined, upon the one hand, to their precise meaning in the abstract, or, on the other, allowed their full signification, the composer may be made to say less or more than he intended, and in the latter case to affirm two or more propositions, when in fact he designed to affirm but one. When such is the case, the words or phrases are themselves to be interpreted and their precise duty ascertained. Their abstract signification is to be expanded or trimmed to the true intent of the composer, as gathered from the general design and scope of the doubtful sentence or passage. But this process cannot be carried to the extent of divesting any word or phrase of all meaning; on the contrary, the presumption is that no word or phrase is idle, and therefore to each some duty, if possible, must be assigned. But it may be carried to the extent of divesting a word or phrase of a double or compound signification not essential to the main and leading idea affirmed by the predicate, and limiting its meaning to the purpose it was obviously intended to subserve.

"While interpreting such words or phrases," says Mr. Smith, in his *Commentaries*, at pages six hundred and ninety-one and six hundred and ninety-two, "great care must be observed that we do not, in all such cases, confound interpretation with criticism. The end of the latter is to find out what are the

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words of the lawmaker, and whether the same are genuine or forged — whether any part or material parts have been foisted in or omitted or erased or altered. The end of the former is to find what was the intent and meaning, and to clear up that meaning when obscure — to ascertain the sense of ambiguous words — to determine the design when imperfectly expressed.”

As I have already stated, the language to be construed should be first subjected to the test of grammatical analysis, and where the ambiguity is confined to a single sentence, as in the present case, it will generally be found that the rules of syntax afford all the aid required in order to determine the true intent and meaning of the author, or at least to determine whether he has affirmed the disputed proposition in language which admits of no reasonable doubt; for it is to be presumed, especially in respect to instruments of so solemn and deliberate a character as the Constitution of a State, in which simplicity and clearness of expression are studied, that the rules of syntax have been observed in the construction of its sentences. Such instruments are drafted by men of education, acquainted with the rules of the language in which it is written, and fully impressed by education and experience with the importance of stating separately and distinctly each organic rule of civil conduct.

A sentence is defined by grammarians to be an assemblage of words so arranged as to express an entire proposition. It is divided into principal parts and adjuncts. The principal parts are the subject, which is that concerning which something is asserted — the predicate, which is the word or words which assert something concerning the subject, and the object, which is that on which the act expressed by the predicate terminates. The subject and object may each consist of a word, or phrase, or sentence. The predicate is a verb with or without another verb, participle, adjective, noun, pronoun or preposition. A sentence is either transitive or intransitive; if the latter, it has no object.

Adjuncts are words used to modify or describe other words in the sentence. If they modify the subject or object, they

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consist of adjective words, phrases or sentences. If they modify the predicate, they consist of adverbial words, phrases or sentences. They are primary and secondary; the former attend upon the principal parts of a sentence, and the latter upon other adjuncts.

A phrase is defined to be two or more words properly arranged, not constituting an entire proposition, but performing a distinct etymological office. They are of several kinds, but it is necessary to define only that class to which the phrase in the sentence to be construed, the meaning of which is the subject of the present controversy, belongs: i. e., a prepositional phrase, which is one that is introduced by a preposition and has a noun or pronoun (word, phrase or sentence) or a participle for its object of relation.

Having thus referred to and briefly stated some of the leading rules of law and of syntax which should guide us in the interpretation of language assumed to be ambiguous, I will now proceed to read by their light the first section of Article II of the Constitution, and determine how far its meaning is clear, and how far, if at all, its meaning is doubtful. It is in the following words:

"SECTION 1. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro on the thirtieth day of May, 1848, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, and the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law; *provided*, that nothing herein contained shall be construed to prevent the Legislature, by a two-thirds concurrent vote, from admitting to the rights of suffrage Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper."

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This section contains much which is not pertinent to the question in hand, and therefore only serves to distract the attention. It may, therefore, for the purpose of reducing the language to be construed to a more connected and compact form, be omitted without prejudice to the construction contended for by either side. Thus pruned it will read as follows:

"Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, and the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Does this sentence, beyond all reasonable doubt, fix the place at which the act of voting is to be performed?

The only words contained in the sentence which give any color to the idea that it does, are found in the prepositional phrase "in which he claims his vote." The chief task, therefore, which we are called upon to perform consists in ascertaining and assigning to this phrase its proper office; or in other words, in ascertaining the precise use to which it was applied by the author of the sentence. Let us then, in the first place, subject the sentence to a syntactical analysis. In doing this we are at liberty to substitute for words or phrases others which are admitted to be, in the abstract, their precise equivalents. By doing this no change is effected in the sense, but the full meaning and design of the author may be made more distinct to the perceptions of the reader. Only one change in this respect is desired. Strike out the words "entitled to vote at all elections which are now or hereafter may be authorized by law," and insert in their place the words, "a qualified elector," which all must admit is the precise equivalent in idea of the former expression. Thus modified, the sentence will read as follows:

"Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, and the county

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or district in which he claims his vote thirty days, *shall be a qualified elector.*"

This sentence is intransitive and, therefore, of the principal parts of a sentence has but two, viz: the subject and predicate. The subject (which is that of which something is affirmed) is "every white male citizen of the United States." The predicate (which is that part of the sentence which affirms something of the subject) is "shall be a qualified elector." The remainder of the sentence consists of adjective adjuncts, for it is obvious that none of them are adverbial, for the reason that they do not qualify the verb "shall be." The expression "in which he claims his vote," is a prepositional phrase, having for its objects of relation the words "county" and "district," and, therefore, performs the office of designating the particular county or district in which the fact of a thirty days residence must transpire in order to make the subject of the sentence a qualified elector.

There are two facts of residence, both of which must be found to accompany the person of the citizen in order to constitute him an elector. The idea of residence is complex, consisting of the ideas of person and place, both of which must be defined before a complete description of the qualifying fact of residence is obtained; or, in other words, the ideas of person and place must combine in order to define the fact of residence, which is one of the elements of electoral qualification. In doing this we may describe the person by name, if the fact of residence is to be limited to an individual, or, where it is to embrace a multitude, we may designate the person by some general description which is applicable to all, as is done in the present instance by the words "every white male citizen of the United States." The same is true of the place. In this instance there are two facts of residence to be described. The person is the same in both, and one description suffices for both, but the places are different and require different descriptions. The two facts of residence are, first, a six months residence, and last, a thirty days residence. The place of the first is described by the words "the State." This is sufficient,

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because there is but one State, and no further description is required. The place of the second is described in part by the words "county" and "district;" but this description is insufficient, because there are to be, as provided in the Constitution, several counties and districts. It must therefore be further described by adding words descriptive of the county or district. This could not be done by name, for obvious reasons. The counties and districts of the State had no names at the time, and if they had they could not have been used for the purpose in question, because the citizen may change his county or district at pleasure, and the counties and districts may be increased or diminished in number, or changed in boundary at the will of the Legislature. Therefore it was necessary to adopt some general expression which, in view of a changing residence, would be equally applicable to all counties or districts, and meet the elector wherever he might go. Hence the phrase "in which he claims his vote" was adopted. This phrase, in connection with the words "county" and "district," performs the same office in describing the second fact of residence which the word "State" performs in describing the first. Thus one purpose intended to be subserved by the use of this phrase is made manifest, and it is apparent that without it or some equivalent expression the manifest design of the author would have been imperfectly expressed.

From the necessity of the case, this phrase or some other equivalent in purpose and object had to be employed in order to indicate the county or district in which the qualification of a thirty days residence should be attained by the elector. No phrase could accomplish this except one which would in some manner associate the elector with the county or district. This could not well be done except by describing some act, claim, event or fact with which, in the nature of things, he must be connected. The necessity for some such expression is exemplified in every Constitution in the Union where the framework of the sentence is at all similar to the one in hand. And this is true, independent of the fact whether such Constitution does or does not fix the place of voting by other words

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than those contained in the phrase employed for the purpose of designating the county or district in which the second fact of residence must subsist. Thus, the phrase used for this purpose in the Constitution of Massachusetts is, "in which he may claim a right to vote," which is equivalent in idea to the phrase used in our own. That used in the Constitution of New Hampshire is, "wherein he dwells." The Constitution of Connecticut has the following: "In which he may offer himself to be admitted to the privilege of an elector." In that of New York the expression is, "where he may offer to vote." In Pennsylvania and Virginia, "where he offers to vote." In Louisiana, Alabama, Mississippi, Kentucky and Missouri, "in which he offers to vote." In Ohio, "in which he resides." In New Jersey and Iowa the expression is the same as in our own Constitution. Although these expressions may, when abstractly considered, express different ideas, nevertheless they are manifestly used for the same purpose, and reach the same object by a different line of thought. They are used alike in Constitutions which do and do not fix the place of voting by the use of other words. In the former, necessarily they have been used only for the purpose which we accord to them. How, then, can it justly be said that words, which are confessedly used from necessity for a specific purpose, are, beyond all reasonable doubt, also used to indirectly accomplish another purpose, originating from an entirely different conception, when in many instances in which they have been used for the former purpose they have not been understood by the parties using them, as accomplishing the latter?

That the phrase in question has been used for the purpose indicated, is not denied by counsel for the respondents. The claim that it also fixes the place where the elector shall cast his vote, is, in my judgment, completely negatived by the predicate of the sentence, which sums up the whole meaning of all that has gone before, and expresses it in the words, "*shall be a qualified elector.*" In that single expression all the conditions previously enumerated are united, and the complete

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design and intent of the author is disclosed and affirmed by himself in language too precise and clear to admit of doubt. The expression is equivalent to saying, "*When these various conditions, which I have described, are found united in the same person, such person shall be a qualified elector.*" By it the author has himself expressed the whole design and scope of the sentence, viz: the definition of a qualified elector, and by it he has also qualified and limited the meaning and scope of his words to the expression of that design. This is made more obvious by transposing the sentence so as to make it read as follows: "Every person shall be a qualified elector who is a white male citizen of the United States, who is of the age of twenty-one years, and has been a resident of the State six months next preceding the election, and of the county or district in which he claims his vote thirty days." Manifestly, every word used subsequent to the predicate, "*shall be a qualified elector,*" is merely descriptive of the individual represented as the subject of the sentence by the words "*every person.*"

The ideas of qualification and place are not homogeneous, nor do they bear any just relation to each other, but are wholly distinct and independent. They exist separately. Each is perfect and complete without the other. A man is just as much a qualified elector when absent from the place of voting as when present. In the former case he has the right to vote, but not the opportunity. In the latter he has both. Although these two ideas may be expressed in the same sentence, yet it is fair to presume that no writer who aims at even ordinary clearness of expression would interblend the two, but would give to each a separate position; and ordinarily such a writer would accord to ideas so distinct a separate sentence. The most ordinary observance of the rules of syntax would lead to the statement of distinct propositions in separate sentences, or at least in separate parts of the same sentence. These considerations are ignored entirely by the reading contended for by respondents. The author, while in the midst of stating a complete proposition, is made

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to pause and assert another of entirely different character, and bearing no relation whatever to the former, not in complete and apt terms, but in a mere phrase, which, by its own definition, does not contain an entire proposition, but which, by admission, is a relative expression, qualifying other words which are used for a foreign purpose.

It is safe to affirm that no writer of ordinary literary attainments who should take his pen with the deliberate intention of defining the qualifications of an elector, and also of defining the place at which such elector, should cast his vote, would stop with the sentence in question. He would either add another independent sentence, or add to the sentence already written the words, "and every elector shall vote in the election precinct of which he is a resident, and nowhere else," or their equivalents. And it is permitted, and it is conducive to correct results, when we are searching language in order to discover the intent of the author, to put ourselves in his place, and assuming every theory which may be suggested, read his words for the purpose of determining how far they express our own conceptions of the subject. If they fail to do it fully and clearly, we may well doubt whether our conceptions have not gone beyond those of the author.

A further argument in support of our views may be drawn from some of the words used, when taken in connection with their definitions as given in other parts of the Constitution, and also in connection with the universal practice of the American people in selecting places at which polls are to be opened on election days.

Counsel for respondents seem to regard the words "county" and "district" as synonymous with precinct, or ward, or election district. Neither of these latter words, nor their equivalents, are used in any clause of the Constitution. The words "county" and "district" are of frequent occurrence. The word "county" is well understood, and is never used in the sense of an election district. By reference to other parts of the Constitution it will be readily perceived what is meant by the word "district," as used in the sentence in question.

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The Constitution speaks of Congressional, Senatorial, Assembly and Judicial Districts only, and it is to them only the author refers.

An election district is a region of country within which a single poll is opened, and it is safe to affirm that the political history of the United States will rarely, if ever, and certainly not at the date of our Constitution, afford an instance where such a region embraced a whole county, or a Congressional, Senatorial, Assembly or Judicial District. It is confined to towns, wards, precincts, or other divisions greatly inferior in extent to "counties" and "districts." When therefore the idea of place is suggested in connection with the act of voting it does not remind us of counties or districts, but of towns, wards, precincts, and the like, in which a single poll is opened. Ordinarily therefore no person who intended to fix the place at which an elector should cast his vote would use the words "county" or "district," for by so doing he would fail to accomplish the object sought by restricting the elector to a particular place. The objects sought by such restrictions are safeguards against fraud upon the elective franchise. So far as it imposes any checks or restraints upon fraud or the abuse of the right of suffrage, the bare restriction to a county or district would be practically as ineffectual as no restriction at all. He would, therefore, in view of the end to be accomplished, use words designating a single poll, thereby requiring the elector to vote in the immediate place of his residence and among those to whom his qualifications are likely to be known, thus guarding against any supposed evils which might result from his being allowed to vote elsewhere. Therefore in view of the reasons which are urged in support of the rule confining the elector to a given place, it cannot, in any just sense, be said that the words "county" and "district" do fix the place, for they are words of too great jurisdictional import to warrant the belief that the supposed benefits of the rule can thereby be practically secured.

In support of this view reference may be made to the Con-

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stitutions of other States, which confessedly fix the place of voting.

The language of the Constitution of New Hampshire is, "to vote in the town or parish wherein he dwells." The language of the Constitution of Connecticut is, "at the meetings of the electors, in the respective towns." That of New York is, "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere." That of Maryland is, "shall be entitled to vote in the ward or election district in which he resides." That of Kentucky is, "and he shall vote in said precinct, and not elsewhere." That of Indiana is, "shall be entitled to vote in the township or precinct where he may reside." That of Louisiana is, "no person shall be entitled to vote at any election held in this State, except in the parish of his residence, and in cities and towns divided into election precincts, in the election precinct in which he resides." Thus it appears generally that in Constitutions where the intent to fix the place of voting is manifested beyond all controversy, words of so broad a territorial signification as "county" and "district," as defined and understood in our Constitution, have not been used, but words descriptive of a much inferior territorial jurisdiction have been employed, for the obvious reason that the supposed evils resulting from the absence of such a constitutional restriction could not otherwise be sufficiently guarded against, nor the benefits thereof sufficiently secured. It is therefore reasonable to presume that the author of the sentence under consideration had he intended to fix the place of voting, would have followed the examples cited above, and given full effect to the reason of the restriction.

We have not as yet examined minutely the phrase "in which he claims his vote," for the purpose of ascertaining upon what precise foundation the claim that it appoints the place of voting is grounded. Obviously it is not a complete sentence, and does not express an entire proposition when confined to its own terms—or if it does it asserts a proposition which is absurd upon its face; for unless some words, which

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are not expressed, but understood, are added, the phrase does not represent the elector in the attitude of giving his vote, but in the attitude of seeking to obtain it. In order, therefore, to make sense of this phrase, we must presume that there are certain words understood which are not expressed. This is of frequent occurrence in all languages, and if doubt exists as to the true meaning of the author in such cases, it is the office of interpretation to supply the missing words which are necessary to complete the sense. But this rule does not extend to striking out words which the author has used and indifferently inserting others of our own choice. Hence the striking out of the word "claims" and inserting the word "offers" as suggested by counsel for respondents, is not supported by any rule of construction. Striking out and inserting is permitted for the purpose of sounding the meaning of the author; but in every such case the abstract import of the words inserted must be the equivalent of the abstract import of the words stricken out. Were we allowed to do as proposed by counsel, we should be writing Constitutions instead of reading them. There is no similarity of ideas between the abstract significations of the two words "claim" and "offer." On the contrary, they are directly opposed. To claim is "to call for," "to seek to obtain," "to demand something," "as a right," or "debt," or "obedience," or "respect." Thus the subject of the verb "to claim" is by the meaning of the verb itself always placed in the attitude of a recipient of the object or thing claimed. On the contrary, "to offer" is to present something for acceptance or rejection by another, thus placing the subject of the verb in the attitude of parting with the object or thing offered. Thus it appears, abstractly considered, that the two words, instead of being of equivalent import, are directly the opposite. We cannot, therefore, under any rule of law, or grammar, governing questions of interpretation, substitute the one for the other. And here we might drop this branch of the case, for the whole argument of the respondents is grounded upon the theory that these words are of equivalent import when used in this phrase, and may there-

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fore be substituted the one for the other, without prejudice to the true intent of the author. But in view of the importance of the question and the great interest which it has excited in the public mind, it is thought proper to extend the examination.

By the process of substitution, therefore, we can only insert in the place of "claims" the words "to call for," "to seek to obtain," "to demand," and the like. But it is obvious that these words afford no better clue to the meaning of the phrase than the one already employed. It is, therefore, clear that we have presented to us the ordinary case of words omitted or understood which must be supplied in order to give complete expression to the idea intended to be conveyed. The full meaning of the author not being, in my judgment, very obscure, a variety of words suggest themselves, either of which will serve equally well to fill the vacancy which being incorporated complete the expression of the author's idea in all of the following forms: "in which he claims his right to vote," "in which he claims his vote shall be cast," or "shall be counted," or "shall be received."

Neither of these expressions, by the mere force and effect of its own express terms, can be said to declare that an elector shall vote in the county or district where he has resided for the last thirty days. They do not assert an entire proposition for they are still but phrases. To the extent to which they do assert a proposition they do not assert a distinct and independent one, for they are still prepositional phrases, and by force of their own definition bear relation to words which have gone before, which words are terms confessedly in use to express an idea foreign to the alleged proposition. The meaning, therefore, for which respondents contend does not find positive and affirmative expression in the words used, but if it has any foundation it is grounded entirely upon an implication, which in my judgment is too thin and shadowy to afford a secure support for that certainty of conviction which, as we have seen, is exacted by every rule of constitutional construction, in cases where the validity of an Act of the Legislature is

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called in question and Judges are asked to declare it void. An inference so far fetched is more suggestive of the unreal foundations of speculation and conjecture than the substantial basis upon which must rest every implication that is made to dictate a rule of constitutional law. Before we can ground a rule of civil conduct upon a mere implication we must be satisfied that it is an implication which stands out clear to the view when called, and not one which refuses to appear unless summoned by microscopic power.

If the implication contended for exists, other eyes than mine have been unable to detect it, as I will now proceed to show.

The Constitution of New York, prior to the late amendment made to enable the volunteers to vote out of the State, upon this point read as follows:

“Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this State one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election, in the election district of which he shall at the time be a resident, and not elsewhere.”

Here we have the phrase “where he may offer his vote,” which, as all must admit, is much more favorable to the respondents’ theory than the one which we are reading, and much more likely to beget the implication contended for. But this implication does not seem to have been perceived by the learned men who framed the Constitution of New York; for they, with those words fresh upon their lips, immediately proceed in other and apt words to fix the place of voting, not suspecting that they had already established it beyond controversy by a *necessary implication*. It is clear that they did not use the phrase in question for the purpose of fixing the place of voting, nor did they suppose that while engaged in defining the qualifications of an elector they had also inadvertently, by a necessary implication, declared where he should vote.

The framers of the Constitution of Kentucky seem to have been afflicted with a like dullness of comprehension, for they

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were also unable to see the necessary implication in question, and stupidly repeated themselves in the same sentence. The following are their words:

"Every free white male citizen, of the age of twenty-one years, who has resided in the State two years, or in the county, town or city in which he offers to vote, one year next preceding the election, shall be a voter; but such voter shall have been, for sixty days next preceding the election, a resident of the precinct in which he offers to vote, and he shall vote in said precinct and not elsewhere."

Here the expression which gives rise to the necessary implication contended for is used twice; nevertheless, the implication does not seem to have been discovered, for the place is immediately thereafter fixed in other and certainly more explicit words. Thus, if the implication contended for does necessarily arise from the use of this phrase, the authors of the Kentucky Constitution have, in effect, stupidly repeated the same idea three times in the same sentence—twice by necessary implication, and once in express and unmistakable terms.

The first Constitution of Louisiana was adopted in 1812. It prescribed the place of holding elections, and the qualifications of an elector in separate sections. Section five of Article II provides that—

"Elections for Representatives for the several counties entitled to representation, shall be held at the places of holding their respective Courts, or in the several election precincts into which the Legislature may think proper from time to time to divide any or all of those counties."

By other clauses of the Constitution, all other State officers who are to be elected by the people, are required to be elected at the same time and place as Representatives. Having thus fixed the places of elections, the framers of the Louisiana Constitution proceeded, in the eighth section of the same Article to prescribe the qualifications of an elector in these words:

"In all elections for Representatives, every free white male

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citizen of the United States, who, at the time being, hath attained the age of twenty-one years, and resided in the county in which he offers to vote one year next preceding the election, and who, in the last six months prior to the said election, shall have paid a State tax, shall enjoy the right of an elector; *provided*, however, that every free white male citizen of the United States, who shall have purchased land from the United States, shall have the right of voting whenever he shall have the other qualifications of age and residence above prescribed."

That the phrase "in which he offers to vote" was used in this section, in the understanding of the Convention, only for the purpose of defining the electoral qualifications of residence, is apparent from the fact that the place of voting had already been provided for in the fifth section of the same Article already quoted; and in addition the section bears internal evidence of the fact, which is found at the close of the proviso in the words, "*the other qualifications of age and residence above prescribed*;" for by those words it is expressly declared that the preceding part of the sentence had been devoted to the subject of *qualification* only.

A second Constitution was adopted in Louisiana in 1845, in which both of the foregoing provisions were retained in substance, and still a third bearing upon this question was introduced in the following words:

"No person shall be entitled to vote at any election held in this State, except in the parish of his residence, and in cities and towns divided into election precincts, in the election precinct in which he resides."

A third Constitution was adopted in 1852, in which all three of the foregoing provisions were retained in substance, and, so far as the present question is concerned, in precisely the same phraseology.

Thus it is manifest that neither of the three Constitutional Conventions of the State of Louisiana used the phrase "in which he offers to vote," for any other purpose than defining the qualification of an elector; and that neither of them supposed that the phrase which they were thus using, also, by a

necessary implication, established a rule for which they had elsewhere carefully provided.

The clause of the Constitution of Connecticut which defines the qualifications of an elector is expressed in the following words:

"Every white male citizen of the United States who shall have gained a settlement in this State, attained the age of twenty-one years, and resided in the town *in which he may offer himself to be admitted to the privilege of an elector* at least six months preceding * * * *shall be an elector.*"

In 1862 the General Assembly of that State passed an Act to afford her volunteers in the service of the United States an opportunity to vote out of the State, of which, in its leading features, our Act of 1863 is a counterpart. They also, in pursuance of a custom which prevails in that State, passed a supplemental Act directing the Governor to take the opinion of the Supreme Court as to the constitutionality of the Act, and, in case it should be held unconstitutional, to make proclamation of the fact, upon which all persons should be released from the duties imposed thereby. The Governor accordingly submitted the Act to the Judges of the Supreme Court for their opinion as to its constitutionality. The Judges were of the opinion that the Act was repugnant to the Constitution. And it is a significant fact, in this connection, that no allusion whatever is made to the foregoing clause of the Constitution in the very able opinion of the Judges delivered by Mr. Justice Butler. (30 Conn. 591.) Their opinion was grounded upon entirely different and independent clauses of the Constitution, clearly showing that in their judgment the clause in question exhausted itself in defining the qualifications of an elector, and afforded no ground for an implication that it also designated the place at which the elector should cast his vote.

Aside from what is said of Mexican citizens and Indians, the clause in our Constitution under consideration is a *verbatim* copy of a like clause in the Constitution of Iowa; and it has been recently decided by the Supreme Court of that State, after mature deliberation, that it does not designate the place

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of voting. The process of reasoning differs from that which I have adopted, but the conclusion is the same. How, in the presence of these many eminent and opposing witnesses, comprising the Constitutional Conventions of New York, Kentucky and Louisiana, and the several members of the highest judicial tribunals of two of our sister States, can it be justly claimed that the reading contended for by the respondents is correct beyond all reasonable doubt?

It is a familiar principle of constitutional interpretation that in doubtful cases the cotemporaneous construction of the legislative department of the Government should be followed by the Courts. Our Constitution was adopted on the 13th day of November, 1849, and the first Legislature assembled on the 15th day of December thereafter. Many persons who were members of the Constitutional Convention were also members of the Legislature and fresh from the labors of the former body. At their first session the Legislature passed an Act regulating elections, which they divided into several chapters, each treating of a distinct branch of the general subject. The first treats of "*general, county and special elections*," the second of the "*qualifications and disabilities, of electors*," and the third of the "*place of holding elections, Inspectors, Judges and Clerks of Election*." Such are the headings of each chapter, respectively as adopted and expressed by the Legislature. (Wood's Dig. 375.) The first section of the chapter entitled "qualifications and disabilities of electors," is a *verbatim* copy down to the proviso of section one, Article II, of the Constitution. Thus, for the sole and only purpose, as they themselves expressly declare, of defining the qualifications of an elector, they borrowed and used the language of the Constitution, which, it is now asserted, was used by a portion of them at least, only one month previously for another and distinct purpose as well. In addition to this, in the next chapter, entitled "of the place of holding elections," they provided that there should be, not "*counties*" or "*districts*" for holding elections, but *precincts*. And further on in the same chapter, at section twenty-nine, they prescribed the oath which, in case of challenge, should be exacted

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of the elector before he should be allowed to vote. Thereby the elector is required to swear, among other things, that he has resided in the State six months, and in the district, county, or township (as the case may be) thirty days. In 1863 this oath was amended so as to allow an elector to vote for State officers in any part of the State, upon swearing to a six months, residence, but leaving the law as it stood before so far as district, county and township officers are concerned. (Statutes of 1863, p. 745.) Thus, in the light of the Constitution, the Legislature have legislated upon this question of place from the commencement down to the present time, upon the theory that the Constitution does not designate the place, but leaves it, as well as the time, to their selection.

Sections two and three of Article II are cited by counsel for respondent in aid of the construction for which he contends. They are as follows:

"SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the day of election, during their attendance at such election, going to and returning therefrom.

"SEC. 3. No elector shall be obliged to perform militia duty on the day of election, except in time of war or public danger."

It is argued that these sections strengthen the foundation upon which the respondents' alleged implication rests; and it is said that the framers of the Constitution by thus providing aids to the unobstructed enjoyment of the right of suffrage, manifested their intention of confining the exercise of that right to California soil. If this be so, it must be confessed that those eminent gentlemen unfortunately adopted a very obscure and roundabout way of affirming a very simple and straightforward proposition.

It is further said, in support of this not very plausible theory, that the exemption from arrest and militia duty as provided in these sections cannot be enjoyed by the elector, in

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case of need, except upon California soil; that if the Legislature has the power to designate the place of voting it may direct all places of voting to be fixed upon foreign soil, and compel all who desire to exercise the right of suffrage to leave the State for that purpose; that hence (aside from the inconvenience of such a proceeding), it is in the power of the Legislature to practically deprive the elector of his constitutional right to freedom from arrest and militia duty on election day, thus making the two sections in question impossible and absurd.

Counsel should remember that in order to establish an absurdity they have no right, and no rule of logic will permit them, to commence by assuming an absurdity themselves. Yet it has been done in this instance. In order to show that these sections might by possibility become inoperative and absurd, it is, if I am permitted to say so, absurdly assumed that the Legislature will take advantage of its power and send all the electors out of the State to vote. Such reasoning, I must beg leave to say, does not rise to the level of argument. It may with equal fairness be used to prove that the Legislature has no power whatever because it may by possibility abuse it. The utter fallacy of such reasoning may be illustrated as follows:

It is admitted that the Constitution does not fix the time or appoint the officers of an election. So much, at least, is within the power of the Legislature. Suppose the Legislature should refuse to appoint either, what would be the consequence? This question the respondents have answered. The clause of the Constitution designed to secure to the citizen the right of suffrage would thereby become inoperative and absurd. Again: The Constitution provides that the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families. Thus it was intended that every head of a family should have a homestead. Suppose, however, that the Legislature should obstinately refuse to carry this constitutional intent into effect by proper and apt legislation, what would be the result?

Evidently, according to the respondents' theory, this clause of the Constitution would also become inoperative and absurd.

Thus it may be shown that every end and object of constitutional government may be defeated by non-action and abuse of power on the part of the Legislature. The argument leaves nothing to the good sense of mankind, without which Governments can neither be organized nor maintained. Against such consequences as the argument contemplates no safeguard can be found save in the good sense of the citizen, and for such results no remedy can be found save in the ballot box, or, if need be, in revolution. If the sections in question do not become inoperative and absurd until the Legislature fails to provide for elections within the State, and sends all the voters to a foreign soil to vote, it is safe to affirm that they will long remain living rules of civil conduct, securing to the citizen, so far as they go, the unobstructed enjoyment of his right of free suffrage. I am therefore unable to perceive how the respondents' theory is aided by the section in question. Their object is to further assure the right of suffrage by adding other rights which make more secure and certain the enjoyment of the former. They were framed in aid of the right conferred by the previous section. To hold that they operate as restrictions upon it would be to convert aids into obstacles and friendly allies into foes. It does not follow that because the elector cannot for reasons beyond his control avail himself of certain constitutional immunities, he cannot enjoy when opportunity offers, a constitutional right expressly conferred. To hold that he cannot would be to countenance a glaring *non sequitur*.

It is fair to presume that the framers of our Constitution did not perform their task without consulting other Constitutions. It is apparent from the debates of the Convention that they had before them several if not all of the Constitutions of the other States. Our examination has shown that some of those Constitutions fix the place of voting and others do not. That some of them use the same or equivalent language as that found in our Constitution for the sole purpose of defining

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the qualifications of an elector, which is manifest from the fact that other and different language is used for the purpose of designating the place of voting. The policy, therefore, of confining, by constitutional provision, the exercise of the elective franchise to the county or district of the elector's residence must have been suggested to the minds of the Convention, as well as the phraseology adapted to a clear and apt expression of such a rule. Yet we find that they have not adopted such, or equivalent phraseology. We know by comparison that they have in various parts made *verbatim* copies from other Constitutions: yet they have not copied in this particular of place from any of the Constitutions before them which, in other words than the phrase in question, fix the place of voting. It is therefore reasonable to infer that they wrote with their eyes open, and that they omitted to insert any clause designating the place, because they judged it wise policy to leave the place, as well as the time of voting, to the discretion of the Legislature. In view of that precision and clearness of expression which ought always to be observed in Constitutions, and which may be reasonably expected in all instruments of so solemn a character; and, in view of the many examples before them, in which language of even more weighty import than that finally adopted by them was used, for the sole purpose of defining the qualifications of an elector, and other language used for the purpose of fixing the place of voting, it is unreasonable to believe that the framers of our Constitution would have left so important a question to be solved by an implication so obscure that it does not rise much, if any, above the level of speculation or conjecture. On the contrary, the belief is reasonable, that had they intended to establish a rule upon this subject, which is second in importance only to the right of suffrage itself, they would have followed some of the examples before them, and grounded the rule upon express terms, and not left it tottering upon a doubtful implication.

It is worthy of note, in this connection, that in the debates of the Constitutional Convention upon section one of Article

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Second, not one word is said in regard to the place of voting. The only question in the minds of the Convention, as is clear from the debate, was that of qualification. The report of the debate covers fifteen pages, yet through the whole not one word was said indicating that in the understanding of the Convention the language used by them did more than define the qualifications of an elector. (Debates of Convention, p. 61.) This fact is significant and establishes beyond question the fact that the idea of place was not present to the minds of the Convention; for it cannot be presumed that so important a feature would be passed by in silence through a long and elaborate debate upon the section in which it is alleged to have been incorporated, without a single word falling from the lips of a single member of the Convention indicating that he was aware of its presence. To suppose that a feature of so great political consequence would be adopted without a word of comment is to run counter to every intrinsic probability.

There are certain other sections of the Constitution which throw some light upon the question under consideration, and serve to fortify the conclusion that the place of voting is not prescribed in that instrument. The only sections of the Constitution which directly speak or refer to the places of voting are the following:

Section 5, Article IV. "Senators shall be chosen for the term of two years at the same time and *places* as members of Assembly," etc.

Section 2, Article V. "The Governor shall be elected by the qualified electors at the time and *places* of voting for members of Assembly," etc.

Section 16, Article V. "A Lieutenant-Governor shall be elected at the same time and *places* and in the same manner as the Governor," etc.

Section 20, Article V. "The Controller, Treasurer, Attorney-General and Surveyor-General shall be chosen by joint vote of the two houses of the Legislature, at their first session under this Constitution, and thereafter shall be elected at the

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same time and *places* and in the same manner as the Governor and Lieutenant-Governor."

For obvious reasons the foregoing quotations are made from the Constitution as it read prior to the amendments of 1863.

From the foregoing provisions it is apparent that all State officers, who were to be elected by the people, and members of the Senate are directed to be chosen at the time and *places* of voting for members of the Assembly. If then the time and places of voting are fixed in the Constitution, we would, in view of these provisions, expect to find them in the section relating to the election of members of the Assembly. But upon turning to that section it will be found that the time, though fixed for the time being, is left to the discretion of the Legislature and the places not fixed at all. It reads as follows:

Section 3, Article IV. "The members of the Assembly shall be chosen annually by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November, unless otherwise ordered by the Legislature, and their terms of office shall be one year."

The places of voting mentioned in the first three sections above quoted, are manifestly not "counties" or "districts," but election precincts, wards or districts, in each of which there is but one poll. Aside from certain special questions affecting State indebtedness and amendments to the Constitution, the right of suffrage exhausts itself in the choice of public officers. The Constitution directs that all public officers who are created, and their election provided for by that instrument, so far as they are to be chosen by the people, shall be elected at a time and at *places* at which the members of the Assembly are chosen; but neither the time, except temporarily, nor the places of voting for members of the Assembly, are designated. Thus the whole right of suffrage is to be exercised at times and places not appointed, but left to the selection of the Legislature.

In leaving this branch of the case it may be well to direct

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attention to section nineteen of Article XI, which provides that—

“Absence from this State on business of the State or of the United States shall not affect the question of residence of any person.”

On the score, therefore, of qualification merely, the absent soldier is as much entitled to vote as the elector who remains at home. All he needs in order to enjoy that right is the opportunity which the Act of 1863 affords.

Some stress has been placed upon certain words contained in the fourth section of the Act under consideration, it being claimed that they imply serious doubts on the part of the Legislature as to its validity. The words are as follows:

“And the votes so given by such electors, at such time and place, shall be considered, taken and held to have been given by them in the respective counties of which they are residents.”

We cannot presume that the Legislature deliberately intended to pass an Act which they believed to be repugnant to organic law. On the contrary, every presumption of law points to an opposite conclusion. It is well known that the validity of the Act was mooted at the time of its passage and it is possible that these words were used by the authors of the bill (knowing that the common law, in former times at least, dealt largely in fiction) under the impression that they might possess some magic power which, if otherwise questioned, would establish the validity of the Act. The words are idle and no more affect the argument as to the validity of the Act than they do its operation. They may be struck out without prejudice to either. They serve no other purpose than that to which they have been applied in this case. They afford a target at which wit, if inclined, may aim its shafts.

It is next claimed that the Act is repugnant to section eleven of Article I. That section is in the following words:

“SEC. 11. All laws of a general nature shall have a uniform operation.”

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The language of this section, like the laws of which it speaks, is of a general nature. So general as to leave in doubt, when by itself considered, the nature and extent of the rule it was designed to establish. The more one turns it over in his mind with a view to extract therefrom some intelligible rule for legislative guidance, the more strongly he will become impressed with the idea that this clause in our Constitution, by itself considered, does not rise much above the level of nonsense. The meaning of the predicate, however, is clear, for by a "uniform operation," I understand as was said in *French v. Teschemaker*, 24 Cal. 544, an operation which is equal in its effect upon all persons or things upon which the law is designed to operate at all. The difficulty is in determining the precise definition of a general law. All laws operate upon persons or things. Are we then to understand that a general law is only one which operates upon all persons, or upon all things? If so, it is obvious that our general laws are very few, if, indeed, there are any of that class. Obviously such cannot be the meaning of the words "of a general nature," as here used. The word "general" comes from *genus*, and relates to a whole *genus* or kind; or in other words to a whole class or order. Hence, a law which affects a class of persons or things, less than all, may be a general law. If so the California volunteers in the military service of the United States on the fifteenth day of July, 1863, may be regarded as a class, and the Act in question a general law. In that case it is not obnoxious to the constitutional objection on the ground under consideration, for it is not denied but that it operates uniformly upon all persons upon whom it was intended to operate at all.

This view is much the same as that taken by Mr. Justice Baldwin in *Smith v. The Judge of the Twelfth Judicial District*, 17 Cal. 554, in which case he had occasion to construe this provision of our Constitution. He there said:

"The language must be carefully noted. It is not that laws shall be universal or general in their application to the same subject, nor is it even that all 'laws of a general nature' shall

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be universal or general in their application to such subjects; but the expression is that these laws 'of a general nature' shall be 'uniform in their operation;' that is, that such laws shall bear equally in their burdens and benefits upon persons standing in the same category."

Whatever of difficulty there may be in comprehending, when by itself considered, the precise office which this clause of our Constitution was designed to perform, it is removed when we read it in connection with the context of the Constitution from which it was manifestly borrowed.

As a matter of history it is well known that our Constitution is in many respects copied from that of Iowa. Upon motion of Mr. Gwin, the Constitution of Iowa was adopted by the Constitutional Convention as a basis for ours, for the reason, as stated by him, that it was one of the latest and shortest. (Debates of Convention, p. 24.) The First Article was reported by a committee of which Mr. Norton was Chairman, and as first reported consisted of sixteen sections, including the one in question, bearing the same number which it now has. Speaking of the report, Mr. Gwin said the first eight sections were from the Constitution of New York, and all the others were from the Constitution of Iowa. (Debates of Convention, p. 31.) So far as it goes, section eleven is a *verbatim* copy of section six of Article I, of the Iowa Constitution, with the most important part left out. The latter section reads as follows:

"SEC. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Here the meaning of the first clause of the sentence, which, by reason of the "glittering generality" of the language, when by itself considered, is obscure if not unintelligible, is explained and made clear by the latter clause, which serves as a definition to the first. The first clause is the shell and the latter is

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the meat; and it is a little surprising that our Constitutional Convention, if unwilling to take both, should choose the former. Viewed through the medium of the latter clause, the meaning of the first is made so obvious that they may not have detected its intrinsic obscurity, and with a view to brevity may have concluded to take the rule without its definition. However that may be, the meaning of the clause as used in the Iowa Constitution is obvious, and we must presume that when our Constitutional Convention borrowed the language they also borrowed the meaning, and designed that it should establish the same rule of legislative action which, by express definition, it is made to establish in the Constitution from which it is taken.

I am, therefore, of the opinion that the true intent and meaning of section eleven of Article I of our Constitution is to the effect that the Legislature shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Thus interpreted it affords a reasonable and salutary restriction upon legislative power, and in my judgment any other reading would render it meaningless and absurd.

Thus read it is obvious that the rule which it establishes has not been contravened by the Act of 1863, enabling California volunteers to vote outside of the counties of their residence, either within or without the State. The only privilege conferred by the Act is the privilege of voting outside of the county or district, or State of the voter's residence. The terms and conditions upon which this privilege is conferred and may be enjoyed are, that the voter on the 15th day of July, 1863, shall be in the military service of the United States, and thereafter on election day, and by the exigencies of that service absent on election day from the county of his residence. As to them the law is general, and makes no distinctions between individuals, but operates uniformly upon all. And it did not confer upon them any privileges or immunities which might not have equally belonged, "*upon the same terms,*" to all citizens. Every citizen, envious of the privilege conferred, could

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have secured its enjoyment to himself by following the example of the volunteers, and leaving his household goods behind, enlisting in the military service of his country.

It is lastly argued in effect that the Act is, by reason of its extra-territorial operation, repugnant to the true intent and spirit of the Constitution. A like point was made in *Pattison v. The Board of Supervisors of Yuba County*, 13 Cal. 182, in reply to which Mr. Justice Baldwin, whom we have had frequent occasion to quote during the progress of this discussion, said:

"The generality of such a proposition creates an instinctive suspicion of its soundness. We do not deny that there may be a declared policy in a Constitution, as in a penal law or system of laws, and that it is not within the power of the Legislature to contravene this policy, although the act do not oppose the express language of any clause of the instrument. But this policy must be manifested by the terms of the Constitution fixing with precision the particular rule, and not be gathered by general inference or vague or uncertain speculation of what the framers of the Constitution designed but failed clearly to express. Mr. Justice Daniel, of the Supreme Court of the United States, took occasion in a recent case to disapprove of this course of reasoning, and, relaxing something of the austere dignity of that august tribunal, remarked that if the Judges were to adopt the notion that a law might be unconstitutional because of its supposed repugnancy to the spirit of the Constitution, they ought to employ a rapping medium to procure authentic revelations from that spirit."

But little stress has been laid upon this point. I know of no restriction upon the power of the Legislature to pass laws, except the Federal and State Constitutions, unless they be found in the laws of natural justice; but if any are found there they practically belong to the department of the moralist rather than that of the jurist. There is nothing in the letter of the Federal or State Constitutions prohibiting the Legislature from passing laws by which acts are authorized to be done outside of the State, and their effects to be felt within it.

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If there is anything in either which prohibits it, it finds no manifestation in the language of those instruments, and we have no other medium by which to consult their spirits. There is not a State in the Union in which the Legislature has not passed laws authorizing the testimony of witnesses residing out of the State to be taken by deposition and returned to the State and read in actions and proceedings pending in the Courts, with the same force and effect upon results as if delivered orally by the witness. Thus the testimony of an absent witness is lawfully allowed to affect the final determination of the rights of persons and property. No more is done in this case. The analogy between the two laws is perfect. The ballots of qualified electors are authorized to be received outside of the State, and when brought within it to be counted and allowed their effect in the choice of public officers.

Upon this point the Supreme Court of Connecticut use this language: "In relation to the time, place and manner of holding elections, the Constitution of the several States differ. In some of them all three are prescribed with that particularity which forbids all action by the Legislature. In others, neither are prescribed but the qualification required of the voter is fixed, and the power to regulate the time, place and manner committed to the Legislature; and in such States the reception of votes *out of the State may be constitutionally authorized.*"

In view of what has been said, it might be fairly claimed that it is clear that the Constitution contents itself with prescribing the qualifications of the voter and the manner of voting, so far as the manner is measured and filled by the ballot system, and leaves the *time* and *place* to be selected by the Legislature; but it is not necessary to go so far, as we have already seen, in order to establish the validity of the Act in question, for if, after mature deliberation, it can be safely affirmed that its validity is involved in reasonable doubt, our duty is as plain in the latter as in the former case, and we are bound by every principle of constitutional construction to declare that the Legislature has not usurped a power which it

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does not possess, and that the Act under consideration is valid and free from all constitutional objections.

Entertaining these views, I am compelled to dissent from the conclusion reached in these cases by a majority of my associates. In my judgment the Court below erred in excluding the soldiers' votes, and for that reason the several judgments in these cases should be reversed.

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The first section of the Second Article of the Constitution of this State provides that every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State six months next preceeding the election, and of the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections authorized by law.

All the members of the Court are agreed that if an individual has these qualifications on the day of an election authorized by law, he is an elector and entitled to vote at such election; but there is, unfortunately, a difference of opinion among us as to what is the entire scope and meaning of the words "in which he claims his vote," and, of consequence, as to the extent of the functions of these words. While the Chief Justice is of opinion that they are purely words descriptive, or rather designative, of the county or district of the elector's residence on the day of the election and for thirty days immediately prior thereto, the majority of the Court hold that they also designate the county or district of the elector's residence as the place where his right of suffrage must be actually exercised. If the place at which the elector must vote, if he votes at all, is not fixed by the words "in which he claims his vote" as the same stand associated with the words "county or district," as found in the section referred to, then it is not denied that the Legislature may, by legal enactment, provide for and appoint the place at which the elector may exercise his right.

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After having given to the subject a careful and earnest consideration, the inclination of my mind is that this section has reference only to the character of persons who may be electors and the conditions on which they become such, and that the subject of the place at which the right to vote must be exercised is not fixed by this or any other provision of the Constitution. While this is the result of my most deliberate judgment, I cannot regard the question free from doubt. The principle is well settled and firmly established that an Act of the Legislature is not to be pronounced unconstitutional unless it so appears to the judicial mind, beyond a reasonable doubt; and, recognizing this principle as fundamental and just, I concur in the conclusion to which the Chief Justice has arrived in his able and elaborate discussion of the subject, and believe the judgments in these cases ought to be reversed.

STEPHEN A. WRIGHT v. ANN S. ROSS *et al.*

SERVICE OF NOTICE OF APPEAL.—When the record shows that a notice of appeal was served on the respondents' attorney the same day that it was filed by the Clerk, and the indorsement of the filing precedes the indorsement of admission of service, the inference is that the filing preceded the service.

SAME.—If the notice of appeal is served on respondents' attorney, and immediately afterwards filed by the Clerk, the service and filing will be regarded as one act.

AFFIDAVITS TO CONTRADICT RECORD.—When the record shows that the notice of appeal was filed and served on the same day, and the indorsements indicate that the notice was first filed and then served, it is doubtful whether affidavits can be received to show that the service preceded the filing.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Judgment was rendered in favor of the defendants by the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellant.

Patterson, Wallace & Stow, for Respondents.

Opinion of the Court.

By the Court, SAWYER, J.

Respondents move to dismiss the appeal, on the ground that there was no service of notice of appeal after it was filed with the Clerk.

The notice appears by the record to be indorsed, "Filed July 13, 1864;" and under this is an indorsement of admission of service, also dated, "this 13th day of July, 1864." The necessary inference would be that the filing preceded the service. But the affidavit of respondents' attorney shows that the service in the order of time actually preceded the filing, while that of appellant's attorney shows that the service was made in the Court-room, and the notice immediately taken to the Clerk, in the adjoining room, and filed; and that not to exceed five minutes was required to accomplish both the service and filing. This must be regarded as one act. The record indicates the proper order of proceedings, and it is at least doubtful whether affidavits could be received to show a different order. But this must be regarded as one continuous transaction. The whole was done at one time; and in *Hastings v. Halleck*, 10 Cal. 31, and *Warner v. Holman*, 24 Cal. 228, it was held that, "the service should be made after, or at the time of the filing of the notice." The notice is sufficient.

Motion denied.

WILLIAM ST. JOHN, M. H. DOW, AND WILLIAM O.
ST. JOHN, v. JOHN A. KIDD AND P. G. MYERS.

TECHNICAL OBJECTIONS TO THE TRANSCRIPT.—If a case is submitted on its merits by consent of counsel, this submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript.

EXCEPTIONS TO CHARGE OF COURT.—The one hundred and eighty-eighth section of the Practice Act does not fix the precise time when an exception to the charge of the Court to the jury must be taken.

DISCRETION OF COURT IN ALLOWING AN EXCEPTION.—If an exception to the charge of the Court to the jury is taken after the jury have withdrawn to consider of their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the Court, and whether allowed or disallowed, the Supreme Court will not interfere with the exercise of this discretion.

Statement of Facts.

CONVEYANCE OF MINING CLAIMS.—Mining claims may be conveyed by bills of sale or instruments in writing not under seal; and such conveyances have the same force and effect as *prima facie* evidence of sale as if made by deed under seal.

BILL OF SALE OF MINING CLAIMS AS EVIDENCE.—A bill of sale of a mining claim executed by three grantors is admissible in evidence, if the execution of only two of the grantors is proven. If the execution of the third grantor is not proven, the failure to make this proof should be taken advantage of by asking the Court to instruct the jury to disregard it so far as it purports to convey the interest of the person whose signature is not proven.

DISTRICT RECORD OF SALE OF MINING CLAIMS AS EVIDENCE.—The entry of the sale of a mining claim made by the Recorder of a mining district, in a book kept for the record and transfer of mining claims, and authorized by the mining customs and laws in force in the district where the claim is situated, is admissible in evidence to prove the sale of the claim, unless objected to. Such entry is at least secondary evidence of the sale.

FORFEITURE OF RIGHT TO HOLD A MINING CLAIM.—The term forfeiture, as used in our mining customs and codes, means the loss of a right, previously acquired, to mine a particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated.

ABANDONMENT OF A MINING CLAIM.—Abandonment in its common law sense is purely a question of intention. An abandonment takes place when the ground is left by the locator without any intention of returning or making any future use of it, independent of any mining rule or regulation.

FAILURE TO COMPLY WITH LOCAL CUSTOMS IN WORKING MINING CLAIMS.—A right to hold and work a mining claim when acquired may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims, in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

In the course of the trial, plaintiffs offered in evidence the following bill of sale:

“This is to certify, that we have this day sold to Wm. St. John, the undivided one half of four claims situated on Wild Goose Flat, and known as the St. John Claims, of two hundred feet square, for the sum of two hundred and fifty dollars, the receipt of which is hereby confessed; together with the tools and sluices.

“WILD GOOSE FLAT, February 7th, 1857.

“S. J. SWEET,

“EARL J. BARNEY,

“D. E. JONES, (by power of attorney.)”

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Sweet, the witness, proved his own signature and that of Barney; but as to the signature of Jones, stated that at the time of the sale Jones was in the East, but Barney was his agent, with written power to sell, and that Barney signed Jones' name to the bill of sale, and that witness did not know where the power of attorney was.

Defendants' attorney objected to its introduction as evidence because not under seal, and further objected to it so far as it affected the interest of Jones.

The Court overruled the objection.

The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellants.

Tuttle & Hillyer, for Respondents.

By the Court, SANDERSON, C. J.

The respondents make certain technical objections to the record in this case, which come too late. The case was decided upon its merits by the late Supreme Court, and thereafter upon petition that Court granted a rehearing; but after the rehearing was had the record became lost and no final decision was made. At the April term of this Court the appellants, with the consent of the respondents, were allowed to file the present transcript to supply the place of the former. In view of the history of the case it can hardly be presumed that the defects insisted upon, if they existed in the old record, were not in some way disposed of before the merits were reached, either by an adverse decision of the Court or an express or implied waiver on the part of the respondents. Moreover, if the case was now before the Court for the first time, these objections come too late. The case was submitted upon its merits on briefs by consent of parties, without any exception being taken to the transcript, and it makes no difference that such submission was made prior to the day on which the case was set for argument. Technical objections to the transcript, not taken before the final submission of the case upon

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its merits, regardless of the time when submitted, must be considered as waived.

The action was brought to recover the possession of a mining claim. The plaintiffs aver title, possession and ouster in the usual form. The defendants specifically deny all the material averments in the complaint, and affirmatively aver a forfeiture and abandonment by the plaintiff under the mining laws of the district embracing the claim, and that thereafter, finding the premises vacant and unappropriated, they lawfully entered and occupied the same. The trial resulted in a verdict and judgment for the plaintiffs. The exceptions are to the admission of evidence, and to the giving and refusing of instructions.

It is insisted by counsel for respondents that the exceptions to the instructions must be disregarded, because the same were not taken at the proper time. The record shows that the exceptions were taken after the jury had withdrawn to consider of their verdict and before the verdict was rendered. In support of this proposition *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company*, of New York, 7 Wend. 31, decided at the May term, 1831, is cited. In that case, as in the present, an exception was taken to the charge of the Court after the jury had withdrawn and before they had returned with their verdict. The Court refused to allow the exception upon the ground that it came too late and should have been taken, if at all, before the jury had withdrawn. On appeal this action of the Court below was sustained by the Supreme Court. Yet the same Court, but a little more than a year afterwards, at the October term, 1832, in *Wakeman v. Lyon*, 9 Wend. 241, where the bill of exceptions expressly stated that the exception to the decision of the Judge was taken after the verdict was delivered, said: "We will presume that the exception was taken in due time unless it is expressly shown that it was not taken until after the verdict. We do not regard the manner in which the proceedings on the trial are stated in the bill, and so we have repeatedly ruled." In *Jones v. Thurmond's Heirs*, 5 Texas, 318, it was held that

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if there is anything in the charge of the Court to which either party desires to except it is in time to indicate the exception as soon as the jury shall have retired, and the exceptions so indicated may be reduced to writing and signed by the Judge during the term. In *Jones v. Van Patten*, 3 Ind. 107, and *Roberts v. Higgins*, 5 Ind. 542, it was held that exceptions to the instructions of the Court must be taken before the jury render their verdict, or they will be disregarded by the appellate Court. The same doctrine was announced in *Letter v. Putney*, 7 Cal. 423. While the last three cases do not directly decide the point under consideration, yet they obviously imply that an exception to the instructions of the Court is well taken, if taken at any time before the verdict is rendered.

The one hundred and eighty-eighth section of the Practice Act thus defines an exception: "An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, Court or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision."

This section does not in terms fix the precise time at which an exception must be taken, but it implies, we think, that the exception should be taken at the time the ruling is made, that is to say, before any further steps are taken or progress made in the trial, and in time to enable the opposite party or the Court, as the case may be, to remedy the objection if it be deemed a substantial one. The question is doubtless one which rests very much in the discretion of the Court below, and which the District Courts might regulate by a rule, as provided in the twenty-eighth section of the Judiciary Act. In the present case the Court below allowed the exceptions, and we think it was not error to do so, and, had the Court refused to do so, we should have been of the same opinion.

It appears from the evidence that the plaintiffs, with the exception of William O. St. John, did not seek to recover upon the ground of a location by themselves, but by virtue of a

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location made by others and a purchase from them. The ground seems to have been located in 1854 by Randall, Sherman, Rogers and Martin. Randall sold to Jones & Co. in December, 1854. Sweet, Barney and Jones constituted the firm of Jones & Co. What became of Sherman's, Rogers' and Martin's interests does not appear. One of the witnesses heard one Perry making a bargain with either Sherman or Rogers for his interest, but when and with what result does not appear. The ground appears to have been relocated in March, 1855, by Sherman, Perry, Jones and William O. St. John, one of the plaintiffs in this suit. This location was entered in a book kept by the Recorder of the district under the mining rules in force therein. By an entry in the same book it appears that Perry's and Jones' interests were transferred to William St. John, another of the plaintiffs in this action, on the 7th of February, 1857. By another entry in the same book it appears that Sherman's interest was transferred to William H. Dow, the other plaintiff in this action, on the 13th of January, 1860.

The exceptions taken to the admission of evidence all relate to the testimony which was offered for the purpose of proving title under the first location, and the sales thereafter made by the then locators, except the one taken to the bill of sale from Jones & Co. to William St. John, made on the seventh of February, 1857. As we understand the evidence, which we confess as presented in the record, is somewhat obscure, this latter bill of sale is of the interest which Jones & Co. acquired under the second location, and not of that purchased by them of Randall, which he held under and by virtue of the first location. Aside from this last exception, we deem discussion unnecessary, for the reason that under the view which we take of this case the rulings of the Court below upon the evidence relating to the title derived under the first location, whether erroneous or not, become immaterial, for the reason that they could not have possibly affected the verdict. So far as the plaintiffs attempted to derive title from the first location and the transfers under it, they, in our judgment, utterly failed. But under the second location, as we shall presently see, they

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made a clear title under the mining rules and regulations by evidence, which was not objected to by the defendants. This latter evidence is amply sufficient to sustain the verdict, so far as the question under consideration is concerned. And it is clear that the jury based their verdict upon this latter title, so to speak, and were not misled by the evidence or rulings of the Court touching the former.

The exception to the bill of sale from Jones & Co. to William St. John was not well taken. The grounds of the exception were, first, that the bill of sale was not under seal; and, second, that it purported to be executed by Jones, one of the grantors, by his attorney in fact, who it was shown had at the time a written power which was not produced at the trial. The first objection is answered by the statute concerning the conveyance of mining claims (Statutes of 1860, p. 175) which provides that mining claims may be conveyed by bills of sale or instruments in writing not under seal, and that all conveyances of mining claims heretofore made by bills of sale or instruments in writing not under seal, shall have the same force and effect as *prima facie* evidence of sale as if they had been made by deed under seal. The second objection does not go to the admissibility of the bill of sale, but to its effect when admitted. It was the bill of sale of Sweet and Barney as well as Jones. Its execution by Sweet and Barney was fully proven, and that was sufficient to entitle it to admission. If its execution by Jones was not proven, counsel for the defense should have asked the Court at the proper time to so instruct the jury, and direct them to disregard the bill of sale so far as it purported to convey the interest of Jones, and if the Court refused, taken his exception. Such is the only way in which, under the circumstances, counsel could have made the point which he sought to make by his demurrer to the evidence. But this course was not pursued, there being no exception except to the ruling of the Court admitting the bill of sale in evidence, which ruling, as we have seen, was correct.

But if there was a failure of proof as to the sale by Jones,

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so far as the bill of sale itself was concerned, the failure was remedied by other evidence offered by plaintiffs, which although perhaps of a secondary character, was not objected to by the defendants, and which, in our judgment (independent of all the other testimony), not having been objected to, made a *prima facie* case for the plaintiffs, and put the defendants upon their defense. A book, to which we have before referred, purporting to be a book for the record and transfer of mining claims, and shown to have been authorized by the mining customs and laws in force in the district where the claim in controversy was situated, was offered in evidence by the plaintiffs, and admitted without objection on the part of the defendants. From this book three entries were read to the jury by the plaintiffs. The first showed a location of the ground in question on the tenth of March, 1855, by Sherman, Perry, Jones and William O. St. John, one of the plaintiffs. The second showed a transfer by Perry and Jones to William St. John, another of the plaintiffs, on the seventh of February, 1857. The third and last showed a transfer by Sherman to Dow, the only remaining plaintiff, on the thirteenth of January, 1860. Thus, the title or right acquired by the second location on the tenth of March, 1855, according to this book, became vested in the plaintiffs prior to the alleged entry and ouster of the defendants, which took place on the twentieth of March, 1860. This book was at least secondary evidence of the appropriation of the ground and its conveyance to plaintiffs, and not being objected to on the ground that it was secondary, of itself made out the plaintiffs' case under the mining laws of the district, and put the defendants to the proof of the plaintiffs' forfeiture or abandonment under the same.

We now come to the exceptions to the giving and refusing of instructions.

The defendants relied upon an alleged forfeiture or loss of the right to mine the ground on the part of the plaintiffs, if they had ever acquired such a right, by a failure to work the ground and keep the right alive, as required by the mining rules and regulations in force in the district. And that, by

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such neglect and failure on their part, the ground, at and prior to the defendants' entry, had become again, as it was prior to the location under which plaintiffs claimed, *publici juris*, and open to their occupation. In support of this defense the book before referred to, containing the rules and regulations of the district, was offered in evidence by the defendants, accompanied with testimony tending to show that plaintiffs had failed and neglected to comply therewith, and had therefore failed to keep alive their alleged right to mine the ground in question.

Without noticing in detail the instructions of the Court, it is sufficient to say that the jury were instructed in effect that if they found from the evidence that the plaintiffs had acquired a right to mine the ground in controversy prior to the entry of the defendants, that right could not be divested by a non-compliance on their part with any rules or regulations adopted by the miners; but that such rules and regulations might be considered by them in connection with the other evidence for the purpose of determining whether or not the plaintiffs had abandoned their claim. We understand the learned Judge of the Court below to have here used the term forfeiture in its mining law sense, and the word abandonment in its common law sense. Such being the case, the jury were, in effect, instructed that there was not, and could not be, any such thing as a forfeiture under mining rules and regulations, and if so, the instruction was undoubtedly erroneous.

The term forfeiture as used in our mining customs and codes means the loss of a right to mine a particular piece of ground, previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated, prescribing the acts which must be done in order to continue and keep alive that right after it has been once acquired. As a defense it is entirely distinct and separate from that of abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether, in point of fact, those rules and regulations have been

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observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been. Whereas the principal question involved in the defense of abandonment is one of intention. Was the ground left by the locator without any intention of returning, or making any future use of it? If so, an abandonment has taken place upon common law principles, independent of any mining rule or regulation, and the ground has become once more *publici juris* and open to the occupation of the next comer.

That the miners may make rules and regulations to govern the acquisition and tenure of mining rights have been expressly and, in our judgment, wisely declared by the Legislature, with the further declaration that such rules and regulations shall be admitted in evidence and shall control the decision of mining controversies. (Prac. Act. Sec. 621; *Morton v. The Solambo Mining Company*, post, 527, decided at the present term.)

Judgment reversed and new trial ordered.

ROBERT B. ELLIS v. THOMAS JEANS, WILLIS LONG,
AND W. B. LONG.

NEW TRIAL.—Where an action is tried and facts are found by the Court without a jury, and the evidence is conflicting, a new trial will not be granted on the ground that the findings are not supported by the evidence.

JUDGMENT IN EJECTMENT.—In an action of ejectment brought by E. against J. and L. and L., the Court found as a fact that defendants had at all times since the ouster withheld the possession of the premises from the plaintiff, and gave judgment for plaintiff against the defendants jointly for damages during the whole time. The evidence showed that defendant, J., had been in the exclusive possession of one hundred and twenty acres of the five hundred acres sued for, and had not been in possession during the whole time for which the damages were computed. The Court was not requested to distinguish in its findings from that made against L. and L. *Held*, that plaintiff was entitled to judgment against the defendants jointly.

DAMAGES IN EJECTMENT.—If a plaintiff in ejectment is in possession of a portion of the land sued for, it is error, if the answer denies damages, for the Court to assess damages against defendant for the use of the entire tract.

DISCLAIMER.—In an action of ejectment disclaimers are unknown.

OFFER TO RELEASE PORTION OF JUDGMENT IN SUPREME COURT.—E. recovered judgment against J. and L. and L. for possession of five hundred acres of

Argument for Appellants.

land, and five thousand dollars damages. The Supreme Court reversed the judgment, because the damages were excessive, and because E. was in possession of one hundred and eighty acres of the land when suit was brought. E. offered to release the damages and the one hundred and eighty acres from the operation of the judgment. *Held*, that as neither the pleadings nor findings of fact fixed the location of the one hundred and eighty acres, the Supreme Court could not modify its judgment.

FINDING OF FACTS.—The Supreme Court cannot examine the evidence for the purpose of finding a fact. To do so would be the exercise of original rather than appellate jurisdiction.

APPEAL from the District Court, Seventh Judicial District, Solano County.

This action was commenced February 18th, 1856, and judgment was rendered December 20th, 1862. It has been twice before appealed to the Supreme Court, and will be found reported in 7 Cal. 415, and 10 Cal. 456:

Defendant, Jeans, in his separate answer, not only denied the allegations of the complaint, but set up that the defendants had not at any time possessed the land described in the complaint, or any part thereof, as joint or common occupants.

The other facts are stated in the opinion of the Court.

John Currey, and M. A. Wheaton, for Appellants.

The defendant Jeans has shown no right to any of the land. He occupied only one hundred and twenty acres of the land from eighteen hundred and fifty-four until eighteen hundred and fifty-seven. This he occupied *exclusively*, yet he is included jointly in the judgment, and the same is against him for all the accumulated damages on five hundred acres, (four times as much as he ever touched) for one year before he was on the land, and for six years after he left.

Such a judgment is evidently unjust. Jeans was only liable for the land he occupied, and for the time he occupied it, and he cannot legally be held to pay for the use of the land he never had nor claimed to have, which he never detained nor assisted to detain from the plaintiff for a moment, and with which he never in any capacity had any connection. Three hundred and eighty acres of the land Jeans never had

Argument for Respondent.

any connection with for a moment, nor never was nor claimed to be a joint holder with the Longs.

Another objection to the judgment in this case is that it is against defendants Longs, and in plaintiff's favor, for five hundred acres, yet during all the time, for years before the suit was commenced, and up to the present time, the plaintiff was in the full possession, use, and occupation of one hundred and eighty acres of the eastern portion of it, and to and in which the Longs claimed an interest.

It is respectfully submitted that this error, as ejectment must be brought against the terre tenant. (*Dutton v. Warschauer*, 21 Cal. 609; *Garner v. Marshall*, 9 Cal. 268.)

The only action Ellis could maintain against the Longs as to the one hundred and eighty acres he had in possession would be to quiet his title against their claim under section two hundred and fifty-four of the Civil Practice Act.

Had the Longs no claim to the one hundred and eighty acres against which Ellis holds the present judgment, the judgment would do them no harm. But their deed and claim does cover it, and their right to it cannot be tried in an ejectment suit in which they are defendants and out of possession of the land, while Ellis is plaintiff and in possession.

P. W. S. Rayle, for Respondent.

The first point urged by appellants is that injustice has been done defendant Jeans, because he says that Jeans only had one hundred and eighty acres of the land in controversy.

The defendant Jeans was sued jointly with the defendants Longs and failed to demand a separate verdict, or in this case, there being no jury, separate findings at the trial, and is concluded by a general verdict or judgment. It was not for the plaintiff to *apportion* the wrongs committed by these defendants. When this case was before this Court first, the same point was made by counsel and was decided against them. (See *Ellis v. Jeans*, 7 Cal. 417, 418.)

It seems that this point has been too often decided to require

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argument, and, if erroneous, is the *law of the case*, and cannot be questioned now.

P. L. Edwards, also for Respondent.

By the Court, SHAFER, J.

This is an action of ejectment, brought to recover the possession of a certain tract of land situated in the County of Solano, containing five hundred acres. The several answer of Jeans denies all the allegations of the complaint. The joint answer of the other defendants contains a like denial and a plea of title and right of possession in themselves. The trial was by the Court. The findings were in favor of the plaintiff, and judgment was entered thereon against the defendants jointly, for restitution of the premises demanded and five thousand dollars damages. The defendants moved for a new trial, on the ground that the evidence was insufficient to justify the findings, and of errors of law occurring at the trial. The motion was denied, and from the order, and also from the judgment, the defendants appeal.

The plaintiff claims under one Vaca, through a deed executed by Vaca to McDaniel on the 21st of August, 1850, and recorded on the 22d of said month. McDaniel deeded to Mizner one undivided half of the land on the day last aforesaid, which deed was recorded June 2, 1851. McDaniel and Mizner deeded to Bayse on the 3d day of May, 1851, which deed was duly recorded on the same day, and Bayse conveyed to the plaintiff March 18, 1852. This deed was recorded on the 24th of March, 1852.

The defendants, with the exception of Jeans, who exhibits no title, also claim under Vaca, by the following deraignment: Deed of Vaca to Pattens and Lyon, dated April 7, 1849, recorded September 24, 1856. This deed was made in pursuance of a contract to convey, executed March 20, 1847, which contract was never recorded. The Pattens and Lyon

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conveyed to the defendants Long, March 17, 1851, and the deed was recorded on the second day of July following.

It appears from the forgoing statement that the title of the defendants derived from Vaca, the common source, was older than that of the plaintiffs; but that the deed of Vaca to McDaniel, constituting a step in the plaintiffs' deraignment, was first recorded. The defendants introduced evidence for the purpose of proving that the plaintiff and Bayse, and Mizner and McDaniel, had actual notice at the date of the purchases respectively, of the prior deed of Vaca to Pattens and Lyon. The testimony on the point presented was conflicting; and, furthermore, the evidence introduced by the defendants was mainly circumstantial, and, standing by itself, was not, in our judgment, so demonstrative in its character as to preclude intelligent differences of opinion on the question of its weight. Under the settled practice of this Court, a new trial cannot be granted in this case on the ground that the findings are not supported by the evidence.

It appears that the defendant Jeans occupied one hundred and twenty acres of the five hundred acres demanded from 1854 to 1857; that his occupation was limited to the one hundred and twenty acres, and that his occupation was exclusive. It further appears that Jeans was not in possession during the whole of the interval for which damages were computed and given against him and the other defendants jointly.

It does not appear with any proper distinctness that the Court was requested to distinguish in its findings the case of Jeans from that made against his co-defendants; and therefore we consider the plaintiff was entitled to a recovery against the defendants jointly. (*Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 Cal. 417.)

The appellants further insist that the deed of McDaniel and Mizner to Bayse, and the deed of Bayse to the plaintiff, are void for uncertainty, and that the Court erred in admitting the deeds against the defendants' objection. We have examined the deeds referred to, and are persuaded that in neither of them is the description of the land intended to be conveyed

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ambiguous or in any respect uncertain. The place of beginning is fixed in the deeds respectively with entire precision, and thereafter the calls are clear and consecutive until the point of beginning is reached.

It is further objected that the findings are erroneous for the reason that the parol testimony introduced for the purpose of applying the deeds last mentioned to the lands in controversy was insufficient to warrant the conclusion that the Court drew from it. We have examined the testimony in its relations to the question named, and while we fail to detect any conflict we find the testimony to be somewhat loose and disjointed. Objects and localities are referred to in the testimony of the witnesses, which are not produced upon the map introduced for the purposes of illustration, and the oral testimony, though positive enough on certain points, is in other respects somewhat embarrassed by hypothesis. Still we consider that the testimony has some appreciable tendency to support the finding.

But it further appears from all the evidence in the case, and the admissions of counsel in argument are to the same effect—that the plaintiff, at the time this action was brought, in February, 1856, was himself in possession of one hundred and eighty acres, parcel of the five hundred acres demanded; and that the possession continued in him thereafter to the day of the trial. On this state of the evidence, the Court found that the defendants had been in possession of the whole of the five hundred acres since the 6th of May, 1852, and the damages seem to have been assessed through the whole interval and upon the whole area. This finding of the Court upon the subject of damages was undoubtedly erroneous, both in fact and in law. It is true that the defendants, in their answers, deny the plaintiff's title to the whole or any part of the five hundred acres; but it is also true that the plaintiff could not recover damages for the use of land of which the defendants had never dispossessed him.

The counsel of the respondent insists that the defendants should have disclaimed as to the one hundred and eighty acres

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in possession of the plaintiff. To this there are two answers. One is, that when damages are denied, no more damages can be given than what the party proves he has actually sustained; and the other is, that in the orderly conduct of an action of ejectment, disclaimers, as such, are entirely unknown. (*Noe v. Card*, 14 Cal. 609.)

Judgment reversed and cause remanded for new trial.

By the Court, SHAFER, J., on motion of Respondent to vacate judgment.

Ejectment. Motion by respondent to vacate the judgment of this Court reversing the judgment of the District Court and granting appellants a new trial on the respondent's filing a release of damages. The motion is objected to by the appellants on the ground that the new trial was granted not only for the reason that the damages were excessive, but for the further reason that the Court below found that the defendant had disseized the plaintiff of the whole of the five hundred acres sued for, when it appeared from all the testimony in the case that the plaintiff was himself in the actual possession and enjoyment of about one hundred and eighty acres thereof at the commencement of the action. To avoid this objection the respondent offers to release the one hundred and eighty acres from the operation of the judgment. If the particular location of the one hundred and eighty acres appeared either in the pleadings or by the findings we might order the modification upon the basis of the record, but there is nothing in either showing the location, and we are not at liberty to examine the evidence for the purpose of determining the location as a question of fact. To do so would be to exercise original rather than appellate jurisdiction.

Motion denied and stay dissolved.

Mr. Justice CURREY, having been of counsel, did not sit on the trial of this case.

Statement of Facts.

S. ELLSASSAR v. ALEXANDER HUNTER AND A. J. LOWRY.

NOTICE OF MOTION FOR NEW TRIAL.—If the notice of motion for a new trial is not served and filed within five days after the rendition of the verdict, where the case is tried by a jury, the right to move for a new trial is waived; and although a statement may be afterwards made, filed, and settled, and the motion for new trial passed on by the Court below, yet the Supreme Court will, if the objection be taken, strike the statement from the transcript.

DECREE DISCHARGING AN INSOLVENT DEBTOR FROM HIS DEBTS.—A decree discharging an insolvent debtor from his debts will not afford him any protection, in bar of an action brought against him for debts contracted prior to such decree, if it is made to appear that he has concealed any part of his property, or given a false schedule, or committed any fraud in procuring such discharge.

FRAUD IN PROCURING A DISCHARGE IN INSOLVENCY.—If a judgment is obtained against one who afterwards procures a discharge from his debts as an insolvent debtor, and after this discharge an execution is issued on the judgment, and the Sheriff, by virtue of the same, makes a levy on personal property in the hands of a third person, as the property of the defendant in the execution, and this third person sues the Sheriff to recover damages, it is error in the Court to refuse to allow the Sheriff to show in his defense that the property really belonged to the insolvent, who had placed the same in the plaintiff's hands to defraud his creditors, pending the proceedings in insolvency.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

This action was commenced September 1st, 1863. The complaint averred the wrongful taking on the 22d day of August, 1863. The joint answer of defendants avers that the execution by virtue of which they levied on the goods was issued out of the District Court of the Eleventh Judicial District, El Dorado County, on a judgment rendered on the 13th day of February, 1862.

The separate answer of defendant Hunter avers that on the 24th day of December, 1862, Newbauer filed his petition in insolvency in the County Court of El Dorado County, and on the first day of August, 1863, executed an assignment of his property to the defendant, and on the same day was discharged by a decree of the County Court from all his debts and liabilities.

The other facts are stated in the opinion of the Court.

Argument for Respondent.

George E. Williams, for Appellants.

The two first offers set forth fraud — the third sets forth agency. The principal objection made by plaintiff to the introduction of this testimony was on the ground that it would again litigate the matter which had been tried and determined in the case of *Newbauer v. His Creditors*. It is admitted that the issues of fraud set forth by the answers in this cause are the same as those contained in the opposition made by Moses O'Connor in the County Court. The District Court decided that the judgment of the County Court in *Newbauer v. His Creditors* was *res adjudicata* of the question of fraud. This subject of *res adjudicata* was thoroughly discussed by this Court in the case of *Gray v. Dougherty*, and I deem it entirely unnecessary to do more than make a brief argument on that point.

The judgment of a Court, in order to be binding upon parties to a subsequent action, must be shown to have been rendered in an action between the same parties, or their privies in estate or blood; and that the judgment, if it had been different, would have been binding upon the party in whose favor it is offered in evidence. For instance, that if the judgment of the County Court had been against Newbauer upon the question of fraud, that then, in an action brought by the creditors against Ellsassar for the property, they could have used the judgment of the County Court as conclusive evidence upon that question. That Ellsassar, without being a party to the action in the County Court, without any opportunity of appearing upon the trial and cross-examining the witnesses, has, nevertheless, to be bound by the judgment. The injustice involved in such a construction of the doctrine of *res adjudicata* proves it not to be sound law.

George G. Blanchard, for Respondent.

The Court did not err in rejecting the evidence sought to be introduced by the defendants.

It is admitted that the matters sought to be proved are the

Argument for Respondent.

same as were adjudicated and set up in the proceedings in insolvency in the County Court.

The right of Hunter to hold the property, assumed in his supplemental answer, has no more force than in the original. He claims to hold it by virtue of the assignment for the benefit of the creditors, and sets up the same transactions of fraud passed upon in the insolvency case. The same objection arises here that arose in the first instance.

Before the defendants can justify the holding, it is necessary for them to establish the allegations of fraud averred in the answers. Defendants claim no title in themselves; and it is admitted that the allegations are the same as adjudicated in the County Court.

What did the trial of those issues determine? and what was the legal effect of the verdict? (Wood's Digest, p. 499, Secs. 20-24.)

It determined that Newbauer was not guilty of the fraudulent transactions averred in the answer. Its effect was to secure to him a discharge from all his debts and liabilities. Under the pleadings in this cause, a determination of the questions of fraud raised fixes the ownership of the property in dispute, so far as Newbauer is concerned, and that the charges of fraud are ill founded determines Newbauer not to be the owner of the property. Under the nature of the action no other result or conclusion could follow.

The trial of title to this property, then, once having been had by the privies of defendants, (for O'Connor and the creditors of Newbauer are the privies of defendants,) they are estopped from asserting title in him in this action, unless acquired subsequent to the trial in the County Court, which they do not pretend.

In *Doty v. Brown*, 4 N. Y. 71, the Court held: That where A. took from B. a bill of sale of certain personal property, and C., a constable, afterwards levied upon it by attachment in favor of B.'s creditors; and subsequently A. converted it to his own use, for which C. sued him, and recovered judgment in Justice's Court, on the ground that the bill of sale was fraudu-

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lent and void as to creditors: *It was held*, that the judgment was conclusive upon the *question of fraud* in an action of replevin afterwards brought by A. against C. in the Supreme Court. Also, in *St. John v. St. John's Church*, 15 Barb. 346, C. sued A. and recovered for a trespass; A. claimed that the trespass was committed under the direction of B., and sued him for indemnity: *It was held*, that the judgment in the suit of C. v. A. was conclusive upon the question of trespass, the parties not being the same in the two suits; for one of the cases was *Baird v. St. John*, and the other was *St. John v. St. John's Church*.

By the Court, CURREY, J.

This action was brought to recover damages for the alleged wrongful taking of the goods and chattels of the plaintiff by the defendants and converting the same to their own use.

In answer to the complaint the defendants say, at the time of the commission of the wrongs and injuries complained of, the defendant Hunter was Sheriff, and the defendant Lowry was Deputy Sheriff of El Dorado County, and that by virtue of a writ of execution issued upon a judgment obtained by M. O'Connor against D. Newbauer for a large sum of money specified, they levied upon and seized the property described in the complaint as the property of said Newbauer, and they aver that the same was his property and liable to be seized for his debts. The answer also charges that while Newbauer was indebted to O'Connor, he made pretended sales and transfers of his personal property to the plaintiff, for which no consideration was paid, and that such pretended sales were made to hinder, delay and defraud O'Connor in the collection of the debt due him, of which intent the plaintiff had knowledge; that the property so transferred by Newbauer to plaintiff was sold by the latter, and with the proceeds thereof and other funds of Newbauer, other goods and chattels were purchased by the plaintiff in his own name, but in fact for Newbauer, and that they claimed and pretended that the property

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thus acquired belonged to plaintiff for the purpose of hindering, delaying and defrauding Newbauer's creditors in the collection of their debts. Other transactions of like character are set forth in the answer implicating Newbauer and the plaintiff, and other persons co-operating with them in a conspiracy to defraud Newbauer's creditors by other pretended sales and transfers of the goods and chattels of Newbauer, and by procuring the institution of actions for fictitious debts against him and the seizure and sale of his property on judgments suffered in such actions.

The defendant Hunter also, by a separate answer, alleged that Newbauer applied to the County Court of El Dorado County to be discharged as an insolvent from his debts, and that he, as the Sheriff, was appointed his assignee in insolvency, and that such proceedings were had in the insolvency case that Newbauer was discharged from his debts; and he then charges that Newbauer was, at the time of his discharge, the owner of the property on account of which this action was brought, and omitted to surrender the same to him as such assignee; but that afterward the same property came to his possession under the execution issued on the judgment in the case of O'Connor against Newbauer, and having thus obtained the possession he claimed to hold the property by virtue of the assignment, in trust for the creditors of Newbauer.

The issue joined between the parties was tried before the Court and a jury, and a verdict was rendered for the plaintiff, on which judgment was entered. On motion of the defendants the Court "ordered that all proceedings be stayed for twenty days, with leave to defendants to file papers herein." Twenty days afterward the defendants filed and gave to the plaintiff's attorneys notice of a motion for a new trial. Sometime subsequently the Court passed upon the motion, denying the application for a new trial. From this order and from the judgment the defendants have appealed.

The counsel for the respondent makes an objection that the notice of motion for a new trial was not filed and served until twenty days after the verdict and judgment were rendered,

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and therefore the right to move for a new trial was waived. This objection is well taken, which carries with it the statement prepared and filed as on motion for a new trial. (Prac. Act, Sec. 195; *Flatau v. Lubeck*, 24 Cal. 364; *Bear River and Auburn Water and Mining Company v. Boles*, 24 Cal. 354.)

This statement being rejected, the case stands to be decided on the judgment, and the matters properly of record. By a bill of exceptions taken at the trial and signed by the Judge, it appears that the defendants, who are now the appellants, offered to prove that Newbauer was in the months of September, October, and November, 1861, the owner and in the possession of a large amount of goods, wares and merchandise — and in the last named month transferred the same in trust for himself to the plaintiff; that the plaintiff sold the same goods and used the proceeds thereof in purchasing the goods in controversy for Newbauer. Also, the defendants offered to prove that in the same month of November Newbauer was the owner of a large amount of goods, wares and merchandise, which he transferred to one Glanber without consideration, with the understanding that Glanber should transfer the same to the plaintiff; that Glanber afterward transferred said goods to plaintiff, who sold the same and applied the proceeds in the purchase of the goods in controversy. And, further, the defendants offered to prove that the money used in the purchase of the goods in controversy belonged to Newbauer, and that such money had come into plaintiff's possession from sales made by him of the property of Newbauer, for whom he acted therein.

The plaintiff objected to the evidence offered to prove these facts on the grounds:

First — That it was irrelevant and immaterial.

Second — That it was incompetent.

Third — That it was an offer to again litigate the matter shown to have been tried and determined in the case of *Newbauer against His Creditors* — which determination or degree, it was alleged, the defendants could not attack collaterally.

The Court sustained the objection and the defendants duly excepted, and this ruling of the Court is assigned as erroneous.

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The several matters sought to be proved by the defendants were set forth in the answers and were relevant and competent evidence, unless barred by the decree discharging Newbauer as an insolvent debtor. And the only question to be decided is as to the effect of this decree as pleaded.

The rights and immunities to which an insolvent debtor is entitled under a decree discharging him from the payment of his debts, depend for their foundation upon the provisions of the statute entitled "an Act for the relief of insolvent debtors and protection of creditors," (Laws 1852, p. 69) and the effect of the decree in such case is subject to the qualification comprehended in the thirty-second section of that Act, which reads as follows: "Whenever any insolvent debtor has had the benefit of this Act, if thereafter, at any time, it is made to appear that he has concealed any part of his property or estate, or given a false schedule, or committed any fraud under the provisions of this Act, it is hereby declared that he has forfeited all benefit and advantage which he would otherwise have had by virtue of this Act, and he cannot avail himself of any of its provisions in bar to any claim that may be instituted against him."

The transactions of which the defendants proposed to prove that Newbauer had been guilty, with the co-operation of the plaintiff and others, for the purpose of defrauding his creditors, were of a grossly base and fraudulent character, and if true as charged, in any essential particular, should forever bar him of all benefit and advantage which, by an honest surrender of his property, he would have been entitled to by virtue of the Act for the relief of insolvent debtors. This Act was not designed alone for the relief of insolvent debtors, but it was also intended, as its title suggests, for the protection of creditors, and this protection the section of the Act quoted conserves to the creditors notwithstanding the alleged insolvent debtor may have obtained a decree discharging him from the payment of his debts.

The judgment is reversed and a new trial ordered.

Statement of Facts.

Mr. Chief Justice SANDERSON, being disqualified, did not participate in the decision of this case.

**DANNEBROGE GOLD QUARTZ MINING COMPANY
v. J. T. ALLMENT AND H. BARRETT.**

CERTIFICATE OF INCORPORATION AS EVIDENCE.—The certificate of incorporation of a company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, is admissible in evidence in a private suit to which the company is a party, as evidence of its right to act as a corporation, although it is not acknowledged by all the corporators.

CONTESTING RIGHT TO ACT AS A CORPORATION.—The right of a company, doing business as a corporation *de facto*, and claiming in good faith to be a corporation under the laws of this State, to act as a corporation, cannot be inquired into collaterally, in a private action to which the corporation *de facto* may be a party.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The defendant Allment on the 21st day of May, 1863, recovered judgment in the District Court of Yuba County, against H. Harris & Co., for the sum of eleven hundred and forty dollars and ten cents, and on the 4th day of June, 1863, procured an execution to be issued on the same, which was placed in the hands of defendant Barrett, who was Sheriff of Yuba County. Barrett, by virtue of the execution, levied upon — as the property of Harris & Co. — a mineral lode or vein in Brown's Valley, Yuba County, formerly known as the Plymouth Ledge, but then called the Dannebroke Gold Quartz Mining Company's Ledge, together with a steam mill erected thereon, and advertised the same for sale. Plaintiff claimed to own the ledge and mill, and filed a bill in equity to enjoin the sale.

The complaint averred that plaintiff was a company duly incorporated for mining purposes, and was formed under the laws of this State, and that plaintiff had claimed and still claimed in good faith to be a corporation under the laws of this State, and had done and still did business as such corporation.

Argument for Appellant.

The answer denied these allegations.

On the trial, plaintiff offered in evidence the certificate of incorporation. The same purported to be signed by H. Harris, Chris. Reis, and M. D. Howell. It was duly acknowledged by Reis and Howell. Harris acknowledged it by Charles L. Farrington, his attorney in fact.

Counsel for plaintiff also offered, in connection with the certificate, to prove that the parties signing the same, immediately after the execution and filing of the same, organized as a corporation, issued stock, and did business as a corporation, and claimed in good faith to be a corporation, etc.

Defendants' attorneys objected to the introduction in evidence of the certificate of incorporation and accompanying proofs, upon the ground that the certificate was not acknowledged by H. Harris, and was therefore void.

The Court sustained the objection, and plaintiff excepted.

Judgment was rendered in favor of defendants, and plaintiff appealed.

W. C. Belcher, and C. E. Filkins, for Appellant.

It must be assumed, for the purpose of this appeal, that the plaintiff could have proved, if permitted, all it offered to prove. (*Hackett v. Manlove*, 14 Cal. 90; *Hawley v. Bader*, 15 Cal. 44.)

The question of the due incorporation of the plaintiff and of its right to exercise corporate powers could not be inquired into in this action. The certificate of incorporation made by Harris, Reis, and Howell, with the accompanying proof offered, should therefore have been received in evidence to show at least a *de facto* corporation, good in all collateral proceedings and against all the world, except the State, and the Court erred in excluding it. (Acts of 1862, p. 110; *Black River R. R. Co. v. Barnard*, 31 Barb. 258; *Spring Valley Water Works v. City and County of San Francisco*, 22 Cal. 434; *Caryl v. McElrath*, 3 Sand. 178; *Searsburgh T. Co. v. Cutter*, 6 Vt. 323; *Dunning v. New Albany and Salem R. R. Co.*, 2 Ind. 437; *Judah v. Am. Live Stock Ins. Co.*, 4 Ind. 338.)

J. O. Goodwin, for Respondents.

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By the Court, SANDERSON, C. J.

The Court below erred in excluding the certificate of incorporation and accompanying evidence. The sixth section of the Act concerning incorporations, as amended in 1862, (Statutes of 1862, p. 110,) provides "that the question of the due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the State on information of the Attorney-General."

Judgment reversed and new trial ordered.

OSCAR F. MORRILL v. GEORGE P. MORRILL, AND
OSCAR F. MORRILL v. GEORGE P. MORRILL.

DENIALS IN ANSWER.—If the complaint in an action by the assignee of a promissory note against the maker avers that the note was assigned to the plaintiff for a valuable consideration before maturity, and is sworn to, an answer which denies that the note was for a valuable consideration, indorsed and delivered by the payee to the plaintiff before maturity, or at any other time, does not put in issue the fact of the assignment before maturity; but if it puts in issue anything, it is only the allegation that the assignment was made for a valuable consideration.

DEFENSE TO AN ACTION ON A PROMISSORY NOTE.—If a promissory note is assigned by the payee before maturity, payment to the assignor is no defense to an action brought by the assignee against the maker, unless it was made before the assignment, and the assignee took the assignment with notice of the payment.

EVIDENCE OF PAYMENT OF A NOTE.—A bill of sale made by the payee of a promissory note to the maker which bargains and sells, among other property, "all debts, notes, and accounts of whatever nature due me," is not evidence of the payment of the note.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The notes in suit were executed by George P. Morrill to C. Morrill, and by C. Morrill assigned to Oscar F. Morrill, the plaintiff. C. Morrill afterwards made the sale to George P. Morrill.

Argument for Appellant.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The question is: Did the bill of sale include or exclude the promissory notes in suit?

It is morally impossible to look at the fifteenth clause of the bill of sale, and say that for the three thousand dollars which we paid, all the notes which Charles Morrill held did not pass to us. The words used are of the most sweeping character, the consideration therefor is large, and there are no words of restriction or of exception.

The language used is: "All other debts, *notes*, and accounts, of whatever nature due me." The preceding clauses specified other notes, followed by this fifteenth section, which was to embrace everything not enumerated. After words could not have been used by a lawyer or man of business in drawing an instrument which was to divest him or a client of title to all his notes and accounts. The words used exclude any other interpretation. Thus, "*all other notes of whatever nature*," imply that all were sold or satisfied regardless of their nature; that the defendant was to take them all; that Charles Morrill was to retain none.

Broom's Legal Maxims, p. 381, under Maxim "*Verba chartarum fortius accipiuntur contra proferentem*," says: "In like manner, with respect to contract not under seal, the generally received principle of law undoubtedly is that the party who makes any investment should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention he should be bound; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party."

In Parsons on Contracts, Vol. II, 61, it is said: "The parties write the contract, when they are ready to do so, for the very purpose of including all that they have jointly agreed upon,

Argument for Respondent.

and excluding everything else, and making this certain and permanent."

In 2 *Parsons on Bills and Notes*, pp. 235, 236, under head of "Satisfaction," that author says: "If he made such a declaration or promise before or after maturity for a valid consideration, which is really beneficial to the holder, and retain possession of the note—that is, giving and receiving satisfaction for the same—and it is the equivalent as to all parties to the note, and as to all who may become holders of it after maturity, or with knowledge; and his possession of the note gives him no more rights under it than if it had been paid."

R. C. Clark, for Respondent.

This third answer superseded the other two, and destroyed their effect as a pleading. (*Gilman v. Cosgrove*, 22 Cal. 356.)

This answer being the only one really in the case at the time of the trial, and upon which alone the case was tried, presents an immaterial issue.

It does not deny the allegation of the complaint, that Charles Morrill had assigned these notes to the plaintiff, before maturity, and for a valuable consideration but admits that allegation to be true, the complaint being sworn to. (*Smith v. Richmond*, 15 Cal. 501; *Blankman v. Vallejo*, 15 Cal. 638.)

The answer presents an immaterial issue in this, that every fact stated in the answer may be true, and yet afford no defense to the action.

These notes were still left by the payor in the hands of Charles Morrill, the payee, and were by him assigned to the plaintiff for a valuable consideration, before maturity, and in such case the law is well settled, that "if negotiable paper be paid before it is due, and afterwards be indorsed for value, as indorsers cannot know or guard against such payment, it constitutes no defense to their claim." (*Parsons on Notes and Bills*, 2d Vol., p. 215.)

Again: under the title "Satisfaction," the same author says: "But if the transaction took place before maturity of the note (even if the release be for consideration or under seal), and

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afterwards, but also before maturity, the note is indorsed for value to an innocent holder, such holder is unaffected by this agreement." (Id. p. 236.)

In *Dod v. Edwards*, 2 Car. & P. 602, Lord Tenterden said: "You must show that the plaintiff knew it. If you cannot show that the plaintiff was aware of the release, your defense fails. If it were not so, you would put an end to the circulation of bills." (See note, p. 236, Parsons on Notes and Bills, 2d Vol.)

The bill of sale did not, by its terms, purport to sell or assign these notes — no mention is made of them.

Promissory notes, as between payor and payee, are not the subject of sale or assignment. The payor may pay his note, or he may plead accord and satisfaction, but in either case the evidence must be direct to the point, and show that the parties were contracting directly in reference to such note.

By the Court, SANDERSON, C. J.

These are actions upon promissory notes by an indorsee against the maker. The pleadings and facts are the same in both. The complaint in each alleges that the note was assigned to the plaintiff for a valuable consideration before maturity. Three answers were filed by the defendant, respectively denominated "Answer," "Supplemental Answer," and "Further Answer." The first attempts to put the assignment only in issue. The second alleges that the money due on the note has been attached in the hands of the defendant at the suit of a third party. The third pleads payment to plaintiff's assignor prior to the assignment. The second answer seems to have been abandoned at the trial. The first answer was filed on the 11th of September, 1863, and the last on the 5th of November thereafter.

The notes were dated on the 1st of January, 1862, one due four and the other six months after date. On the 8th of February, 1862, the plaintiff's assignor sold to defendant a large amount of merchandise and other property, notes and debts

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due and owing, and gave him a bill of sale thereof, in which the property, notes, etc., are particularly described, until we come to the last item, which is in the following words:

"All other debts, notes and accounts, of whatever nature, due me, and the good will of the business, for the sum of \$3,000."

On the trial the defendant offered in evidence this bill of sale in support of the plea of payment contained in his third answer. It was excluded by the Court, which ruling is the only error assigned.

If the notes were assigned before maturity, as alleged in the complaints, payments to the assignor would be no defense to an action by the assignee, unless it was made before the assignment and the assignee took with notice, which is not pretended in this case; and it is insisted by the respondent that his allegation respecting the assignments is not sufficiently denied by the answers, and is therefore admitted, and we are of the opinion that such is the case. The denial is in these words:

"That he denies that the promissory note mentioned in said complaint was for a valuable consideration indorsed and delivered by C. Morrill to plaintiff before its maturity or at any other time." This denial does not put in issue the fact that the note was assigned before maturity. If it puts anything in issue it is only the fact that the assignment was made for a valuable consideration, and not the fact that it was made before maturity. (*Burke v. Table Mountain Water Company*, 12 Cal. 407.) The pleadings being verified, and the assignment before maturity not specifically denied, it must be taken as admitted for the purposes of the trial. And being admitted, the defense of payment to the plaintiff's assignor fails, for it is not alleged or pretended that the plaintiff took the notes with notice of such payment. Admitting, then, that the bill of sale amounts to proof of the alleged payment, its rejection by the Court was right, for the payment in view of the admission of the assignment before maturity constituted no defense.

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But independent of what has been said, the bill of sale was properly excluded, for the reason that, in our judgment, it neither proves nor tends to prove the payment alleged. The bill of sale is thus headed: "Mr. Geo. P. Morrill bought of C. Morrill, wholesale druggist." Then follows a particular description of the property, notes, accounts and debts sold and transferred, with the prices annexed, until we come to the last item. No mention is made of these notes, nor were they delivered up. The language is that of bargain and sale, and not of discharge and satisfaction. The holder does not sell the maker his note, nor does the latter buy it; he pays it, and the transaction is not described by words of bargain and sale. If there was any doubt upon the question whether the parties to this bill of sale intended to include in the transaction which it describes the satisfaction and payment of these notes, it would be effectually removed by an examination of the sworn answer of the defendant first filed in the case, in which is found the following language: "And defendant, further answering said complaint, says that the said C. Morrill" (plaintiff's assignor, and the person to whom the pretended payment is alleged to have been made in the last answer filed) "though the owner and holder of said note, and entitled to receive the payment thereof, fraudulently caused Oscar T. Morrill to be made the plaintiff herein." The defendant does not here pretend that the notes have ever been paid to C. Morrill, but admits that they are due and payable to him but not to his assignee, the plaintiff. The latitudinous scope of the bill of sale in question was not discovered at the time the first answer was filed, nor the second. It was, however, discovered in time for the third and last. It is but just to the defendant to state that the last answers were not verified by him. There is a glaring inconsistency between the first and last; and the last was verified by an agent for the reason that the defendant was absent from the State.

Judgments affirmed.

Points decided.

**WILLIAM M. STODDARD v. L. L. TREADWELL AND
GEORGE R. CARTER.**

DEMURRER TO COMPLAINT.—If a complaint contain several counts, and the defendant demur to the whole complaint, the demurrer should be overruled if there is one good count in the complaint, although the other counts may be bad.

COMPLAINT ON WRITTEN CONTRACT.—If a complaint be based upon a written contract, a correct copy of which is attached to and made a part of the complaint, and if the averments of the complaint put a false construction in law upon the terms of the contract, the complaint will not for that reason be bad, but the erroneous allegations will be regarded as surplusage.

SAME.—A written contract may be declared on according to its legal effect, or it may be set forth *in hæc verba*. If declared on according to its legal effect, the defendant may, by the rule of the common law in a proper case, crave *oyer* of the instrument, and if it appear that its provisions have been misstated, he may set out the contract *in hæc verba*, and demur on the ground of the variance.

EVIDENCE OF COUNTER CLAIM.—When the action is based upon a contract to pay a stipulated sum, and the answer sets up a counter claim for damages for matters arising out of the same contract, the defendant cannot, on the trial, introduce evidence of any damages except those specially set up in the answer.

EVIDENCE OF COUNTER CLAIM WHEN NOT SET UP IN ANSWER.—If the complaint is based on a written contract, by the terms of which plaintiff is to do certain things, and the complaint avers a faithful performance on his part, and the answer denies the performance, the defendant cannot, under this allegation and denial, introduce evidence of a counter claim.

EVIDENCE OF LOSS OF PROFITS AS COUNTER CLAIM.—If a merchant employs one by written contract, at a stated salary, to act as his chief clerk and managing agent for a stated term, and an action is brought by the clerk on the contract for wages, and the answer sets up a counter claim for damages arising out of neglect of the clerk to attend to the business, the defendant has a right on the trial to introduce evidence of a loss of his profits and diminution of business caused by the clerk's neglect; and to do this, he may ask a witness what amount of additional business would have been done if the clerk had attended to his business.

SUIT FOR COUNTER CLAIM.—Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, to act as his clerk or transact business for him, and the employé neglects the business, the employer is not precluded from maintaining an action for damages for this neglect, by payment in full of the employé's wages, or by allowing the employé to sue and recover judgment, by refraining from interposing any counter claim for a breach of the employé's contract.

WAIVER OF COUNTER CLAIM.—An omission to assert a cross claim when a demand is presented for payment, does not involve a waiver of the counter claim, nor is a failure to discharge an unfaithful servant before his term of service has expired a release of damages arising from his neglect.

COUNTER CLAIM FOR UNLIQUIDATED DAMAGES.—Where the claim of plaintiff and counter claim of defendant both arise out of the same contract, defendant may introduce evidence of unliquidated damages embraced in his counter claim, unless the plaintiff come to the contract by assignment.

Argument for Appellants.

EVIDENCE OF COUNTER CLAIM.—Where the plaintiff's action arises out of contract, defendant may introduce evidence of any counter claim arising out of contract existing at the commencement of the action, even though the contracts are not the same.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Henry H. Hartley, for Appellants.

The Court erred in refusing to permit defendants' counsel to ask the witness Horton how the expense account of the defendants was at Sacramento, compared with what it should have been?

This was clearly erroneous. The plaintiff, by his own pleading (in the complaint) tendered the issue directly to the defendants as to the faithful performance of his duties by him, for he says "that he has continued to act as the chief clerk of the defendants, *faithfully and honestly prosecuting their business.*" Now the evidence, if admitted, would have gone to show the very converse of the allegation of the plaintiff. It was directed to prove that the plaintiff had dishonestly and unfaithfully increased the expenses of the house, and that knowingly. The Court seemed to hold that this matter should have been specially pleaded. In other words, that we should have been compelled to have put into the answer a full statement of what the previous expense account had been, and what it should have been, and wherein the plaintiff had dishonestly increased it. We submit this cannot be the rule, surely, if the plaintiff had, as he says, in all things acted honestly and faithfully, he would be prepared to explain away any apparent increase in the expense account, and particularly when it was to matters specially within his own cognizance, i. e., the financial affairs of the house.

The Court erred in refusing to permit defendants' counsel to prove by the witness Freeman the amount of additional business which would have been done in defendants' store if plaintiff had attended to it as closely during the last year

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as he had done the previous one; and also erred in refusing to permit defendants to prove from a comparison of their sales that the plaintiff had neglected their business.

The objection made to the first portion of this proof was that no specific acts of neglect had been charged in the complaint. We urge this was unnecessary. The plaintiff chose to put his entire general conduct and manner in which he discharged his duties for defendants to the investigation, and he should have been fully prepared to have supported it. The evidence was directed to the establishment of the fact that he was continually and improperly absent from the store of defendants, and thereby their business suffered and was neglected, and customers were lost to the house. How was it possible to prove specifically when and at what times plaintiff was absent from the store? It would almost amount to a denial of any proof on this point if defendants had been compelled in their complaint, as if it had been in a bill of particulars, to have specified the days and parts of days plaintiff had been absent from his business. The witness then on the stand was doubtless able, from his personal observation, to have stated in general terms the effect of plaintiff's absence, though he might not have been in a condition to specify particularly and exactly the periods of that absence. Can it be contended that on such a contract of hiring it would not be competent to prove generally that the employé was negligent and careless, and did not attend to the business, and was frequently absent from his employer's business, and thereby depreciated it, without being compelled to set forth at large in the pleadings all the minutiae of the neglect? It might be very probable such specifications, if required, would be impossible to be furnished, and therefore the injured party would be without any remedy. We can imagine no more direct or proper method of proof than the one attempted, and think the Court manifestly erred in rejecting it.

J. P. Treadwell, also for Appellants.

The contract in the first count declared upon is in writing

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and is set out in and annexed to the complaint. Profert of it is thus made gratis; and any error in the legal effect assigned it by the pleader, is thus reached by the demurrer, though without such profert such error could not only appear after answer upon the production of the written instrument in evidence.

The first count, then, states and insists, as the legal effect and force of the writing, that the defendants promised the plaintiff to pay him seventeen thousand eight hundred and twelve dollars and seventy-six cents in certain instalments, and also to employ him as a clerk for one year, at a salary of to wit: three thousand six hundred dollars per year; all in consideration of the sale and delivery by the plaintiff to the defendant of a certain stock of goods in Sacramento, and of the good will of the plaintiff's business. This is a misstatement of the *consideration of the defendant's promise*, as is shown by the instrument of which profert is made. Recurrence to the writing shows that the sale and transfer of the stock of goods and good will of the business was upon and for the defendant's promise to pay the sum of seventeen thousand eight hundred and twelve dollars and seventy-six cents, and it was for no other or further consideration; and the defendant's promise to employ the plaintiff for five years at the stated salary, was upon and for the plaintiff's promise to serve them for that time at such salary. *These two contracts in the same instrument are independent, not dependent.*

The instrument purports that Stoddard "has sold, and hereby sells and transfers the stock of goods and good will of the business of T. & Co., *at and for the price or sum of seventeen thousand eight hundred and twelve dollars and seventy-six cents, to be paid,*" and which they thereby agree to pay in certain instalments designated.

It is here as distinctly as it can be stated, that the whole consideration for the transfer of the goods and good will, is the promise to pay the seventeen thousand eight hundred and twelve dollars and seventy-six cents; the transfer is "at and for the price or sum" named. The statement of an *independ-*

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ent stipulation has commenced, when it is continued that "*said Treadwell & Co. further agreed to employ the said Stoddard as clerk for five years, at a salary of three thousand dollars per year, etc., and said Stoddard agreed to so serve T. & Co. all said time, upon and for such salary.*"

It is quite possible that T. & Co. would not have bought the stock of goods and good will, unless they had been able to contract for the former owner's services; and, on the other hand, that Stoddard would not have sold unless he could also get a contract for future employment. Yet both parties were willing to and did rest upon the independent personal promise of the other as to the employment at a salary. Is it not as clear as the sun that Stoddard could have sued for the instalments of the price of the goods and good will as they became due, without averring that he had performed his contract (till then) to serve as clerk? Or that he could recover the price of the goods though he had not kept his contract so to serve? And it is just as clear that T. & Co. could have maintained an action for a breach of the defendant's independent stipulation to serve as clerk, though they had failed to pay him the instalments of the price of the goods that had already fallen due. Then T. & Co.'s promise to employ the plaintiff was no part of the consideration for the transfer of the goods and good will, as is erroneously stated in the complaint.

In overruling the demurrer, in which this point is specially stated, the Court below held otherwise, and gave a wrong construction to the written agreement. It held that plaintiff was entitled to the month's salary sued for, "*as a part of the consideration of the sale of said merchandise and good will of said business;*" the ground on which it is claimed in the complaint. The plaintiff was entitled to recover the month's salary sued for, then, by the law of the case settled on decision on the demurrer, though he never performed the services.

Crocker & Robinson, for Respondent.

Whether the two parts of the contract are dependent or independent, or whether the consideration of the sale of the

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goods and good will of the business runs through the whole contract or not, can make no difference with the demurrer; because in either case the complaint states facts sufficient to constitute a cause of action, and the demurrer was therefore properly overruled.

We further contend that the alleged errors were not errors in fact. The exclusion of the evidence was generally upon the ground that the facts they were intended to support had not been stated or pleaded in the answer, and were not involved in the issues made by the pleadings.

The complaint, as was necessary, averred in general terms the performance of the contract by the plaintiff on his part. This is allowable under section sixty of the Practice Act, which makes it unnecessary to state the facts showing such performance.

But the complaint was sworn to, and therefore the defendant could not put in the general issue, or a general denial of the whole complaint. In this case the defendants denied the averments of performance, following almost the exact language of the complaint. They did not aver any special acts wherein the plaintiff had failed to perform his duties, but contented themselves with simply negating the general averments of the complaint. We contend that if they desired to introduce any such kind of evidence they should have specially averred them, and not confined themselves to such a general denial. It presents a case similar to that of the impeachment of a witness. His general character for truth is liable to be inquired into, but specific acts or circumstances affecting his character cannot be introduced, because he is supposed to be prepared to meet evidence of general reputation, but not special circumstances. So, in the present case, the answer only required the plaintiff to rebut proof showing a general neglect of defendant's business, and no specific acts of non-performance being set forth, he could not be prepared to meet that character of evidence. His pleadings were verified for the very purpose of narrowing the issue to the specific averments of the pleadings.

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The Court cannot properly, even upon the consent of the parties, pass upon questions not raised by the written allegations of the pleadings. (*Boggs v. Merced Mining Co.* 14 Cal. 356.)

Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. (*Green v. Palmer*, 15 Cal. 415.)

The verdict must be confined to matters put in issue by the pleadings. (2 Cal. 256, 285.)

The plaintiff is compelled to set out every fact necessary to constitute his cause of action, and the defendant every matter of defense. (*Piercy v. Sabin*, 10 Cal. 27.)

But there is still another and conclusive answer to these points of the appellants.

The appellants claim that the contract contains two separate and independent contracts, upon separate and independent considerations: 1st. The sale of the goods and the good will of the business and the price to be paid therefor. 2d. The agreement to employ the plaintiff and the compensation to be paid him therefor — and we have no objection to giving it that construction. They admit the balance due on the purchase money of the goods, and we were entitled to a judgment therefor upon the pleadings alone. These exceptions, therefore, cannot affect that cause of action.

The small items of account for matters not stated in the contract, although some were denied and others admitted, yet could not be affected by questions arising out of the contract, for they had no connection with the contract. These exceptions, therefore, did not affect our right to recover those items, upon proof of their correctness, and the verdict establishes the fact that they were duly proved.

By the Court, SHAFER, J.

The complaint in this action contains three counts, the first two of which are based upon the following written contract annexed to and made part of the complaint:

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"Memorandum of agreement and sale made this 14th day of January, 1861, between Wm. M. Stoddard and Treadwell & Co. The said Stoddard has sold and hereby sells and transfers to Treadwell & Co. all the stock of goods and fixtures in the store hitherto kept by him, said Stoddard, on J street, Sacramento, an inventory of which has been made out by said Stoddard, and is now present, and also the good will of the business there, hitherto done by said Stoddard, at and for the price or sum of \$17,812.76, to be paid therefor to said Stoddard by said Treadwell & Co., and which they hereby agree to pay in the manner following, that is to say, the sum of \$13,248.91, from time to time, as Treadwell & Co. realize money from sales in the course of their business hereinafter mentioned, and the balance in six months from this date.

"Said Treadwell & Co. further agree that they will carry on the hardware and agricultural implements business in Sacramento (for which purpose they will take the store hitherto occupied by said Stoddard) for the period of five years, next hereinafter, and to employ the said Stoddard as their chief clerk and managing agent in the prosecuting of said business there during all said five years, at a salary of three thousand dollars per year the three first years, and thirty-six hundred dollars per year the last two years, to be paid in equal monthly payments; and said Stoddard agrees to serve said Treadwell & Co. during all said time, upon and for such salary, diligently and faithfully, and to the utmost of his ability in all things; and not to engage in any business on his own account. The sickness of said Stoddard, if it should happen during said time, will not be reason for Treadwell & Co. to discharge him, but he will retain his situation, his salary ceasing during the time he may be sick, if it be for a considerable time. The words \$13,241.91 interlined before signing.

"TREADWELL & Co.

"M. M. STODDARD."

The purpose of the first count is to recover one thousand and forty-three dollars and eighty-seven cents, balance of the

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purchase money alleged to be due on the sale of the goods, with interest thereon; and the purpose of the second count is a recovery for the personal services of the plaintiff under the contract during the month ending on the 31st of October, 1862. The third count is for keeping a horse for defendants, at their request, forty-five dollars; for money had and received, twenty-five dollars; and for fourteen dollars money laid out and expended on a trip to San Francisco, made by defendants' direction; the amount of which said several sums is, however, subject to a deduction of fifty-three dollars and thirty-two cents.

The defendants demurred to the complaint, on the ground that it disclosed no cause of action, and on the further ground that it is ambiguous, unintelligible and uncertain. The demurrer was overruled and the defendants answered. On a trial of the issues, the plaintiff recovered a judgment, and the appeal is taken therefrom. There is a statement annexed to the record on which errors of law occurring at the trial are assigned.

1. As to the order overruling the demurrer.

Should it be admitted that both the first and second counts are unintelligible, and that neither of them discloses facts sufficient to constitute a cause of action, still the demurrer was properly overruled, for the reason that the demurrer was not good to the whole extent of it. (Ch. Pl. 643.) The third or general count is not obnoxious to either of the objections named.

But we do **not** consider the objections taken to the first and second counts in argument to be well founded. It has been already stated that those counts are based, respectively, upon the written contract annexed to and made part of the complaint. The complaint not only sets out the contract in *hæc verba*, but contains a statement of its legal effect according to the views of the pleader; and it is insisted that the consideration upon which the promises of the defendants, for breaches of which the counts respectively proceed, has been misapprehended in that statement. Should all this be conceded, still the erroneous version of the pleader may be rejected as sur-

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plusage, for the true relations of the different parts of the contract to each other are disclosed by the contract itself. A contract may be declared on according to its legal effect or in *hæc verba*. If the former mode should be adopted, then the defendant may by the rule of the common law in a proper case crave *oyer* of the instrument, and if it appear that its provisions have been misstated, he might set out the contract in *hæc verba* and demur on the ground of the variance. But where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds by averment to put a false construction upon the terms, the allegations, as repugnant to the terms, should be regarded as surplusage, to be struck out on motion. *Utile per inutile non vitiatur*. (1 Ch. Pl. 232.)

The further objection that the first count does not disclose any breach of the promise upon which it is founded, and that there is no consideration stated for the promise to pay extra interest, we are satisfied, on a careful examination of the complaint, are neither of them well founded.

2. As to the alleged errors occurring at the trial.

The answer admits the one thousand six hundred and forty-three dollars eighty-seven cents claimed as due on the sale of the goods; and as to the two hundred and fifty dollars claimed for personal services during the month of October, 1862, the performance of the service is not effectually denied, though all indebtedness on that ground is. The matters of defense more particularly relied on are set forth in a special answer interposed by way of counter claim. The answer admits that the defendants purchased the goods and good will named in the special contract; that they employed the plaintiff as their chief clerk and managing agent as claimed, and that plaintiff continued in their employment without fault until the 9th of December, 1861, but avers that from that time forth he did not "diligently, or faithfully, or to the utmost of his ability in all things, or in anything, serve defendants as he was bound to do under said contract, but on the contrary, during all said time from December 9, 1861, and more particularly from April,

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1862, to October 21, 1862, he grossly neglected the said business of said defendants, in violation of said contract and to the great damage of defendants. That during all said time, and particularly during the entire spring and summer of 1862, and the fall thereof up to October 21, 1862, plaintiff habitually failed to attend to defendants' said business, absented himself from their said store nearly the whole of each day, and engaged himself in his own private affairs; in consequence whereof numerous customers of defendants, who had been in the habit of dealing with plaintiff prior to his said sale to defendants, and also with defendants subsequent to said sale, called at said store to make purchases of goods, but not finding plaintiff there to trade with, said customers went away and traded elsewhere, which they would not have done had plaintiff been present attending to his duties under said contract; and even when plaintiff was occasionally in said store during said period, he manifested no interest in defendants' business, and made no efforts to keep up said business; and by reason of such neglect, and such engaging in his own private affairs, defendants have sustained great loss and damage, amounting to more than the sum claimed by plaintiff in his complaint. * * * That the main reason of plaintiff's employment by defendants was his acquaintance with said hardware business in Sacramento, his skill therein, his knowledge of the persons dealing in such trade, and the custom his presence (as chief clerk and managing agent) would bring to defendants; and that by reason of plaintiff's gross neglect of defendants' business as aforesaid, the main consideration of said stipulation so to employ plaintiff has entirely failed. Defendants pray to have their damages sustained as aforesaid *recouped* against the amount claimed by the plaintiff, and for judgment for the excess, with costs.

The defendants offered to prove that the expense account of their establishment at Sacramento was larger than it should have been — that plaintiff had changed the boarding place of the hands employed, with a view to promote interests of a relative who was employed to board them at a higher rate;

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that the plaintiff employed another relative about the store, whose services were entirely unnecessary to the proper management of the business; that divers instructions were given by the defendants to the plaintiff between December 9, 1861, and October 15, 1862, relating to the management of the business, which the plaintiff disobeyed. The plaintiff objected to the introduction of this testimony on the ground that these various acts of misconduct were not specially pleaded.

In the statement of the counter claim, nothing is alleged as the ground of it but neglect, the precise character of which is not set forth. The matters which the defendants offered to prove are, with the exception of the disobedience of instructions, acts of positive misconduct; and as to the disobedience, it is not included in the specification by which the general charge of negligence and unfaithfulness in the special answer is narrowed down. From this it follows that the testimony was properly excluded, unless it was admissible under the denial of the plaintiff's allegation that "he continued to act as the chief clerk and managing agent of said defendants, faithfully and honestly prosecuting their said business, and not engaging in any business on his own account, and doing all things connected therewith as directed by said defendants."

We consider that the evidence offered was not admissible under the denial. The employment and the facts of the offer being assumed, it follows that the defendants had a right of action against the plaintiff, sounding in damages, for a breach of his undertaking. The plaintiff's action is not based upon a *quantum meruit*, but is brought to recover a sum stipulated, and by the strict rule of the common law the defendants could obtain redress by cross action only. (Sedg. on Dam., Chap. XVII.) But, however this may be, the defendants, under our system, were put to their election either to oppose their claim to the claim of the plaintiff or to resort to a cross action; and this whether they claimed a deduction merely, or that the two claims were the equivalents of each other, or that there was an excess in their favor for which they sought a recovery. (*Ruiz v. Norton*, 4 Cal. 357; *Earl v. Bull*, 15 Cal. 425;

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Prothingham v. Everton, 12 N. H. 239; *Cook v. Mosely*, 13 Wend. 277.) And in either alternative, the claim cannot be considered in this action, for the reason that it has not been set up by way of counter claim. The right or demand of the defendants is a counter claim by legal definition, for the defendants might have maintained a suit upon it, (12 How. 311; 13 How. 249;) and the forty-sixth section of the Practice Act requires that the answer of a defendant who would avail himself of a counter claim "shall contain a statement" of it. (*McKyring v. Bull*, 16 N. Y. 297.) The counter claim asserted in the answer goes upon grounds distinct from those embraced in the defendant's offer to prove, as has been shown already.

It further appears from the record that the defendants, having first put in evidence that the plaintiff was frequently absent from the store between February and October, 1862, and that people frequently came to the store and asked for the plaintiff and left on finding him out, inquired of a witness as follows: "What effect had the plaintiff's absence during this time (between February and October, 1862,) to depreciate the business of the store—how much damage was it per month?" The question was objected to, but the objection was overruled. Thereupon the witness was asked: "What amount of additional business would have been done in the store of Treadwell & Co. between February and October, 1862, if the plaintiff had been there during the entire of the day attending to the business of the store as he had previously done in 1861?" This question was objected to on the ground that it was too general, that the defendants must prove specific acts. The objection was sustained by the Court. The defendants then offered to prove by the witness "the amount of sales per month in their hardware store in Sacramento from February, 1861, to October of that year, and the corresponding sales from February, 1862, to October, 1862; and to show further what the profits were upon said sales during the said intervals respectively with a view to estimate the damage per month that accrued to the defendants by reason of the absence of the plaintiff from the store and his neglect of their business."

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The plaintiff objected, on the ground that the testimony was incompetent and irrelevant and that the damages were too remote. The Court sustained the objection and the defendant excepted.

Neglect by plaintiff of his employer's business, consisting in frequent absences from the store, and a loss of custom as consequent thereon was the main ground of the counter claim set up in the answer. It was competent for the defendants to prove the neglect stated—that the business was lessened thereby—and the pecuniary loss resulting therefrom. The objection taken to one of the questions that it was too general, was not tenable. The question put the witness broadly upon his own resources. For aught that we can know to the contrary, the witness, if he had been permitted, could have stated directly the additional business that would have been done, if the plaintiff had not been guilty of the inattention alleged, and on cross examination the grounds of his estimate might have been brought out, if he failed to state them in chief. But the defendants, accepting the ruling of the Court that the question was too general, then offered to prove directly the amount of sales in 1861, as compared with the sales of 1862, showing a diminution of sales and profits during the latter year. The point of the objection was that the defendants could not claim for a loss of profits. As a general rule, loss of profits cannot enter into the estimate of damages, either in actions founded on tort or on contracts. But the rule has its well understood exceptions in both cases. To say that the defendants here cannot claim for a loss of profits involved in a diminution of business caused by the plaintiff's neglect, is to claim impunity for the neglect. Loss of profits, as an element of damage, here, is not remote, but the natural and first effect of the neglect alleged. (Sedg. on Dam. 72; *Masterton v. The Mayor of Brooklyn*, 7 Hill, 62; *Lawrence v. Wardwell*, 6 Barb. S. C. 423; *Brackett v. McNair*, 14 John. 170; Sedg. 337, 338.)

But it is said that the testimony was properly excluded for the reason that the defendants had fully paid the plaintiff for

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his services for all the months prior to the month of October, 1862, and that the defendants therefore had no right to offer proof as to the plaintiff's conduct, except during that month. No authorities are cited in support of this position, nor is any principle referred to supporting it. The obligation to serve was entire—the plaintiff engaging for five years at a round salary of three thousand dollars for the first three years, and of three thousand six hundred dollars for the last two. True, the salary was to be paid in monthly instalments; but still, the obligation of the defendant was to serve for five years, and it has no more reference to the months than it has to the weeks or days that go to make up the full period. If the entire salary had been made payable at the end of the service, and the defendants had then paid it, the payment would not have precluded them from bringing an action for plaintiff's neglect (*Barber v. Rose*, 5 Hill, 76), and if the plaintiff herein had recovered each one of the monthly instalments by action as fast as they accrued, and the defendants had refrained from interposing any counter claim for a breach by the plaintiff of his contract, they would still have had the right to proceed by action for their damages. On these grounds, we consider that the defendants were at liberty to charge the plaintiff with neglect to the full extent of their offer. The contrary view must go on the ground that the defendants, by paying a monthly instalment and permitting the plaintiff to remain in their service thereafter, waived the neglect that accrued during the month for which the payment was made. But an omission to assert a cross claim when a demand is presented for payment, does not involve a waiver of the counter claim; nor is a mere omission to discharge an unfaithful agent or servant before his time of service has expired, to be treated as a release of his transgressions. The employer in such case may discharge the servant as matter of right, but the servant cannot claim that the employer should either discharge him or absolve him on any known principles of fair dealing; for the servant always has it in his power to protect his own interests by simply doing his duty.

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Again: It is urged that the evidence was properly excluded for the reason that the cross claim was for unliquidated damages. This objection is not well taken. Counter claims are what the Practice Act has made them to be. Where the principal and cross claim are based upon the same contract both may be considered in the same action however the damages may be unliquidated; and if the jury find a balance in favor of the defendant, he may have judgment and execution therefor, (*Pattison v. Richards*, 22 Barb. 146; *Glason v. Moen*, 2 Duer, 689), unless the plaintiff came to the principal claim by assignment. We furthermore consider that the counter claim of the defendants may be opposed to the sum total of the five items of claim set up in the complaint. The sale of the goods, the promise to serve, and the correlative undertakings of the defendants are but parts of one contract. That contract is "the transaction set forth in the complaint as the foundation of the plaintiff's claim," and the counter claim pleaded "arises out of that transaction," and is "connected with the subject of the action." (*Spencer v. Babcock*, 22 Barb. 326.) But the rule of the Practice Act is broader still, and allows the defendants to oppose their claim for damages to all the plaintiff's items. The plaintiff's "action arises out of contract," not only as to the two larger items, but as to the three smaller ones also. The counter claim likewise "arises upon contract," and it "existed at the commencement of the action." The Practice Act enumerates these tests only, and all others are excluded by intendment. (*Lignot v. Redding*, 4 E. D. Smith, 162.)

Judgment reversed and cause remanded.

R. DEPUY AND JOSEPH MILTON *et als.* v. JOHN WILLIAMS AND PAUL NEWMAN *et als.*

ABANDONMENT OF MINING CLAIM.—The failure to perform the amount of work on a mining claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon may be occupied and appropriated by another.

Argument for Appellants.

COMPLAINT IN EJECTMENT.—A complaint in ejectment should not state the evidence, but only the ultimate facts constituting the cause of action.

EVIDENCE IN EJECTMENT.—Evidence offered by the plaintiff in an action of ejectment should not be rejected because not set forth in the complaint.

WHEN EJECTMENT DOES NOT LIE.—A party who has a right of entry upon lands, and who has entered by force or fraud, cannot be turned out of possession by an action of ejectment.

RIGHT OF ENTRY UPON LANDS.—Where one has the right of entry upon lands, that right cannot be impaired by any fraud, misrepresentation, or collusion, practiced by him to obtain possession.

EVIDENCE IN EJECTMENT.—In the trial of an action of ejectment it is not error for the Court to refuse to allow plaintiff to prove that defendants obtained possession of the land by collusion with one of plaintiffs, or with one who had no right of entry.

FRAUD.—An action founded upon a fraud cannot be maintained by a party to the fraud.

ADMISSION OF TESTIMONY.—If the ruling of the Court on the admission of testimony is right when made, it cannot be rendered erroneous by testimony afterwards introduced.

APPEAL from the District Court, Sixteenth Judicial District, Calaveras County.

This action was commenced May 18th, 1863. The complaint charges the ouster to have taken place February 28th, 1863. The property sued for was a mineral lode, alleged to contain gold, silver, and copper, eighteen hundred feet in length.

The mining laws of the district required a claim to be worked one day in thirty, from May 1st to November 1st of each year. Defendants set forth in their answer a copy of the mining laws, and plaintiffs also introduced a witness by whom they were proven. Defendants entered after plaintiffs had failed to fulfil this clause in the laws.

The other facts are stated in the opinion of the Court.

Caleb Dorsey, and H. P. Barber, for Appellants.

This is an action of ejectment, and it was not necessary, nor even proper (*Payne & Dewey v. Treadwell*, 16 Cal. 242) for plaintiffs to set forth anything more than that they were entitled to possession, and that defendants had wrongfully deprived them of it.

The complaint alleges that plaintiffs were the owners, and

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in possession of the claim until the 28th of February, 1863, "when the said defendants, against the will and consent of plaintiffs, entered into and upon said ground, and took possession thereof, and evicted plaintiffs therefrom, and have since continued to hold possession thereof, and refuse to surrender the same."

It was immaterial *how* defendants got into possession, if that possession were obtained wrongfully — *any* evidence tending to show a *wrongful* possession on their part was admissible, no matter *how* they obtained it. Milton was a tenant in common with the other plaintiffs, and if by fraud and collusion with him the defendants entered and *evicted* plaintiffs, it was a tortious ouster — the very gist of an action of ejectment.

The theory of defendants and that of the Court is, that it was necessary for us to set out all these special circumstances in pleading. This is directly contrary to the case of *Payne & Dewey*, and would involve us in the difficulty of *Egan v. Delaney*, 16 Cal. 85, where a party who *did* set forth his title specifically was not allowed to prove any other.

In the present case the mining laws required the claim to be worked once in thirty days from May 1st to November 1st. We proved a compliance with this by the witness Partosi, until about the first of September, when he left Milton, a co-tenant, in possession of the claim for plaintiffs.

We offered to prove that immediately after, Milton, instead of keeping up the claim for his co-tenants, or simply abandoning the same, by *fraud and collusion with defendants* permitted them to "jump," or take possession of the claim as their own, and *evict* plaintiffs. Had he simply abandoned the claim, of course defendants would have had the right to enter; but their alleged *collusion* with him for the purpose of thus fraudulently obtaining the claim and ousting plaintiffs, made their entry *wrongful*, and entitled us to a recovery, if the alleged collusion were proven. The law will not permit parties thus to obtain the property of others by fraud, which vitiates everything; and in ejectment all we were required to

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allege was their wrongful entry, and then, *as matter of evidence*, proving that entry wrongful, *because* fraudulent.

We are suing at common law for the possession of this ground. If the defendants obtained the possession fraudulently, they obtained it wrongfully; and any facts going to show a wrongful possession by them are admissible in evidence, without being specially set forth in the complaint. So the common count for money had and received, may be maintained for money obtained by fraud. (*Dana v. Kemble*, 17 Pick. 545.)

It is difficult to conceive how evidence of a collusion can have any bearing upon the case in any view that may be taken of it.

The fact that defendants were in the possession was admitted by the answer, while the complaint charges and the answer admits that defendants did not enter until the 28th of February, 1863, which was the date of their location. Whether they entered at this time with or without the consent of the plaintiffs, or either of them, could make no difference, because the possession is charged, admitted, and proved to be adverse; and because all the plaintiffs' right at this time, under the fifth article of the mining laws, had been forfeited by their failure to comply therewith, and the claim was open to entry by other parties; therefore, if at this time, (the 28th of February, 1863,) the right of plaintiffs had lapsed, ceased, and determined, neither one of them, by objecting to defendants' entry, could have restrained them. Neither could the consent that defendants might go into possession confer any right thereto, or impose any obligation upon them. It is beyond comprehension how the plaintiffs, without right to the claim on their part, could give anything by saying to the defendants, we have no objection; take this claim and do as you please with it.

In the case of *Copper Hill Company v. Spencer No. 2*, 25 Cal. 18, the same kind of a question was raised on the appeal from a judgment of *nonsuit* — that the defendants' possession was not adverse; but Mr. Justice Sawyer said: "The appel-

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lant insists that the question as to the adverse possession should have been submitted to the jury. The plaintiffs' testimony clearly shows that the possession was adverse. The motion for nonsuit was made upon the close of plaintiffs' testimony. It was not necessary to submit the question to the jury.

By the Court, RHODES, J.

Ejectment to recover a mining claim. The plaintiffs were in the actual possession up to about August, 1862. The defendants were in possession at the commencement of the action, and for their defense they rely mainly on the ground that the plaintiffs, before the entry of the defendants, abandoned the mining claim by failing to work it, according to the local mining laws. The Court below ordered a nonsuit of the plaintiffs on that ground.

The plaintiffs' counsel does not controvert the view of the Court below, that a failure to perform the amount of work on the mining claim that is required by the local mining laws or regulations, amounts to an abandonment of the claim, and that thereupon the claim may be occupied and appropriated by another. But he relies upon a single point for the reversal of the judgment, which is the refusal of the Court to permit him to prove "that plaintiff Milton colluded with the defendants to get possession of the claim in dispute, and that it was by such collusion that defendants got into possession of plaintiffs' claim." The respondents objected to the evidence, on the grounds, "1st. That the same parties cannot be shown to be plaintiffs and defendants in the same action; and 2d. That it is irrelevant and inadmissible under the pleadings, as the complaint charges no collusion between plaintiffs and defendants." If a plaintiff has in fact sued himself, we think it would be reasonable and proper, though we find no direct authority to the point, that he should be permitted to prove that he fills two of what Blackstone defines as the constituent parts of a Court — the *actor and reus* — for the purpose, if for no other,

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of satisfying the third constituent part of the Court — the *judex* — of a fact that would not be credited without the most ample proof. But, be this as it may, the objection is not relevant to the evidence offered. The learned Judge of the Court below was in error in sustaining the objection on the second ground, for it was not requisite that the fact of collusion should have been alleged in the complaint to entitle it to be proven. If it had been alleged, the complaint would have been liable to the objection, that it stated the evidence, instead of the ultimate facts of the cause of action. We can add nothing to the lucid opinion of Mr. Chief Justice Field, in *Payne & Dewey v. Treadwell*, 16 Cal. 242, that will serve more clearly to point out the allegations that are necessary in an action of ejectment.

But the decision excluding the evidence may be sustained on other grounds. A party who has a right of entry upon lands, and who has entered by force or fraud cannot be turned out of possession by the action of ejectment. If he possesses the right of entry, it is not impaired by any fraud, false representation or collusion practiced by him upon one having no right of possession. And so, if he is rightfully in possession, he will not be put out of possession, though he may have gained an entry by any species of collusion. The *wrongful* entry and the *wrongful* withholding of the possession, is, in ejectment, nothing more than the entry upon the possession of the plaintiff and the withholding the possession from him, *without lawful right* so to do. They are not made, in a legal sense, any more wrongful, in an action of ejectment, by superadding to them fraud or collusion. If the defendant has no right to the possession, as against the plaintiff, the plaintiff's cause of action is not, in the least degree, strengthened by proof of the fraudulent acts of the defendant in acquiring the possession. He may safely rest upon proof of his legal title to the possession, and the fraud or collusion of the defendant is immaterial. It is quite unusual, and we think unsustained by principle or authority, for a number of plaintiffs to found their claim to relief upon the fact that one of their number

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had combined and colluded with others to defraud his co-plaintiffs. An action founded upon such a state of facts, could not be maintained by a party to the fraud except in violation of the maxim of universal application, that a party cannot take advantage of his own fraud.

If Milton occupied such a relation to the claim, by agreement with his co-tenants, that he could, by his acts or neglect, divest them of the right of possession, then it might be material to inquire into his acts of fraudulent collusion with the defendants, by which an apparent abandonment of the claim resulted, for the purpose of showing that they had not voluntarily, or in fact, abandoned the claim.

At the time plaintiffs offered to prove that Milton colluded with the defendants, that they might get possession of the claim, no evidence had been offered tending to prove that any arrangement or agreement had been made between Milton and the other plaintiffs, by which he was to hold the claim, or do any act for them or on their account, nor did they propose to prove in connection with the testimony then offered, that any such arrangement or agreement had been made. Unless such proof had been made, or was proposed to be made, the fact of the collusion of Milton with the defendants was immaterial and the ruling of the Court was correct. The decision of the Court being correct at the time it was made, proof subsequently made, completely establishing an agreement, by which Milton was to hold the possession of the claim for the plaintiffs, and to perform the necessary amount of work, and do all the acts that were requisite under the mining laws, to enable them to continue to hold and own the claims, would not have the effect of rendering the decision erroneous. The decision was right when given, and therefore will be sustained on appeal.

Judgment affirmed.

Points decided.

A. GODCHAUX AND J. GODCHAUX v. D. L. MULFORD, *et als.*

STIPULATION WAIVING DEFECTS IN THE RECORD.—If the attorneys for appellant and respondent stipulate in writing that the statement contained in the record is a correct statement on motion for a new trial, and that the judgment roll, orders, and instructions, given and refused by the Court, the statement and stipulation constitute a true and correct statement on appeal to the Supreme Court, and may be used as such without further certificate or identification; all technical objections to the transcript are waived, and it will be presumed that a notice of motion for a new trial was regularly given, although none appear in the record.

EMPLOYMENT OF VENDOR BY VENDEE AFTER SALE OF CHATTELS.—In case of a sale of goods and chattels, the subsequent employment of the vendor by the vendee, in the subordinate capacity of a clerk or salesman of the same goods, is not absolutely incompatible with an absolute and continued change of possession, and is not of itself, regardless of all other facts and circumstances, conclusive evidence of fraud. Such employment is a circumstance tending to show that there has not been such a change of possession as the statute requires; but it is not *per se* a fraud which admits of no explanation.

SAME.—The vendor, if employed by the vendee as his clerk, cannot remain in the *apparently* sole possession of the goods after the sale; but if it be apparent to all the world that he has ceased to be the owner, and that another has become such, and that he is only a subordinate or clerk, the rule requiring an actual and continued change of possession is satisfied.

EVIDENCE OF EMPLOYMENT OF VENDOR BY VENDEE.—The employment of the vendor by the vendee after the sale, may be proved as a fact tending to show that there has been no actual or continued change of possession; but when proved it does not become conclusive of the question, but only an element of proof to be weighed by the jury.

EMPLOYMENT OF VENDOR BY VENDEE AS CLERK.—After a sale of goods and chattels, and an actual change of possession, the employment of the vendor by the vendee, in the capacity of a clerk or salesman, is not, *per se*, a conclusive evidence of fraud which admits of no explanation.

CHANGE OF POSSESSION OF GOODS AND CHATTELS.—After a sale of goods and chattels in good faith, and an actual and notorious change of possession, the employment of the vendor by the vendee as a mere clerk or salesman is not a fraud which vitiates the sale because the change of possession is not continued.

MORTGAGE ON GOODS AND CHATTELS NOT VOID.—A mortgage upon goods and chattels designed to give a creditor a lien upon the same as security for the payment of his debt, although it necessarily creates a trust as to the surplus, yet the trust is not the object of the assignment, nor is it such a trust as renders the conveyance void as against subsequent creditors of the vendor.

ELEVENTH SECTION OF STATUTE OF FRAUDS.—The eleventh section of the Statute of Frauds does not apply to mortgages, whether they contain the usual defeasance upon their face and thus create an open trust, or exist in the form of an absolute conveyance, with an understanding that they are intended as mortgages and thus create a secret trust.

THE TRUST MEANT BY THE ELEVENTH SECTION OF STATUTE OF FRAUDS.—The trust mentioned in the eleventh section of the Statute of Frauds arises where

Argument for Appellants.

the debtor places his property in the hands of a trustee having no beneficial interest therein, to hold for his benefit solely, and enable him to receive and enjoy its income to the prejudice of his creditors.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The defendants recovered judgment in the Court below, and plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Sloan & Provines, for Appellants.

The charge in question leaves *fraud in fact*, as a matter of inquiry, entirely out of view.

It goes upon the hypothesis that the employment of the vendor by the vendee, in a subordinate capacity, is absolutely incompatible with a continued change of possession.

The hired clerk or salesman is no more in the possession of the goods of his employer than the hired laborer is in possession of the farm on which he is engaged at work.

Our statute, it is true, makes the want of an immediate delivery and continued change of possession conclusive evidence of fraud; but it introduces no new rule touching what shall constitute such delivery and change of possession.

The charge of the Court took from the jury the power to pass upon the question whether there had been an immediate delivery, followed by a continued change of possession. In *Warner v. Carlton*, 22 Ill. 424, this point was fully considered. There, it seems that in the Court below an instruction similar to the one under discussion had been applied for and refused. (*Vide*, to the same point, *Hall v. Wheeler*, 18 Ind. 371, 372; *Forsyth v. Mathews*, 2 Harr. 103; *Jordan v. Frink*, 3 Barr. 443, 444; *Ludlow v. Hurd*, 19 J. R. 220; *Weller v. Wayland*, 17 J. R. 102; *Brown v. Wilmerding*, 5 Duer, 225.)

The object and intent of the eleventh section of the Statute of Frauds cannot be mistaken. Its object is to prevent the debtor from placing his property in such position that he may enjoy the use of it at pleasure, to the prejudice of his credit-

Argument for Appellants.

ors. The intent is to prohibit the debtor from putting his estate to nurse in the hands of a trustee who has no beneficial interest therein, so that the debtor himself might take and appropriate to his own use the income of it. The statute does not prohibit the making of chattel mortgages, nor render such mortgages void because the mortgagee stipulates to do what the law would compel him to do, viz: to restore the surplus, after selling so much as shall be sufficient to discharge the debt. (*Margenthau v. Harris*, 12 Cal. 245; *Abercrombie v. Bradford*, 16 Ala. 565; *Neally v. Ambrose*, 21 Pick. 18; *Stevens et al. v. Bell*, 6 Mass. 342; *Halsey v. Whitney*, 4 Mason, 222, 223; *Leith v. Hollister*, 4 Coms. 216.)

The same question was considered and determined in the New York Court of Appeals, in *Leith v. Hollister*, last above cited. It is there said: "The conveyance, whatever may be its form, is, in effect, a mortgage of the property transferred; a trust as to the surplus results from the nature of the security, and is not the object or one of the objects of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien on it. The residuary interest of the assignor may, according to its nature or that of the property, be reached by execution, or by bill in equity. The creditor attaches that interest as the property of the debtor, and is not obliged to postpone action until the determination of any trust. He is therefore neither delayed, hindered, or defrauded, in any legal sense."

In *Halsey v. Whitney*, 4 Mason, 222, Judge Story employs the same unanswerable reasoning. He says: "Another exception is, that there is a reservation of the ultimate surplus to the debtor, and this, it is contended, is fraudulent. But what is the nature of this surplus as it stands on the face of the assignment? It is not of any specific sum to the debtor, whether his debts are wholly paid or not; but of such surplus only as shall remain after indemnifying and paying fully all the creditors who shall come in under the assignment. There is

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no ground for saying that if all his debts were paid, the debtor may not honestly reserve the surplus to himself."

George Cadwalader, for Respondent, confined his argument to the motion to strike out the statement on motion for a new trial.

By the Court, SANDERSON, C. J.

Previous to the submission of this case upon its merits, counsel for respondents moved the Court to strike out the statement on motion for a new trial, upon the following grounds: First—Because no notice of plaintiffs' intention to move for a new trial was given. Second—Because the statement does not specifically set forth the grounds of the motion. Third—Because the statement is not such a statement as the Practice Act contemplates, either on appeal or on motion for new trial.

Whether any notice of motion for new trial was given does not appear, and the statement is somewhat contradictory and inartificial, but there is appended to it a stipulation made between the attorneys who tried the case in the Court below which we think is a complete answer to all the substantial objections made to the record. The stipulation is signed by the attorneys of both parties, and is in the following words: "It is hereby stipulated by and between the attorneys for the plaintiffs and defendants, in the above entitled action that the foregoing statement hereto annexed is a true and correct statement on motion for a new trial. That upon said statement the said Court did, on the first day of September, 1863, overrule the plaintiff's motion for a new trial and refuse to grant the said plaintiffs a new trial in said action, to which ruling the said plaintiffs then and there excepted. And it is hereby further stipulated, that the judgment roll, orders and instructions, given and refused by the Court, the aforesaid statement on motion for a new trial, and this stipulation, is a true and correct statement on appeal to the Supreme Court, and may be used as such without further certificate or identification."

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In the presence of the foregoing stipulation we will presume that notice of motion for a new trial was regularly given, and will further hold that all technical objections to the transcript are waived and the case submitted to us upon its merits. (*Weil v. Paul*, 22 Cal. 492.)

The plaintiffs sue the defendant, Mulford, late Sheriff of Calaveras County, and his sureties, for the alleged wrongful seizure and sale of certain goods belonging to them, under certain executions against one Kraft. The answer alleges that the goods so seized were the property of Kraft, and as such legally subject to the seizure and sale.

It appears from the evidence set forth in the statement that for some time anterior to the 16th of December, 1857, Kraft had been engaged in selling goods and merchandise at Mokelumne Hill, in Calaveras County, where he also resided with his family, his dwelling house being in the rear of the storeroom, toward the centre of the lot. On that day he made a sale of his goods and merchandise to plaintiffs, and a lease of the storeroom. A bill of sale of the goods and a lease of the tenement were executed in writing by Kraft and wife and delivered to plaintiffs at the same time. The validity of that sale seems to have been impeached on three different grounds:

First—That it was made with the intent to hinder, delay or defraud creditors, and therefore void under the provisions of section twenty of the statute concerning fraudulent conveyances.

Second—That it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, as required by section fifteen of the statute.

Third—That it was made in trust, for the use of the vendor, Kraft, contrary to the provisions of section eleven.

Upon the close of the testimony both parties presented certain instructions, which they respectively requested the Court to give to the jury, some of which were given and others refused, the parties respectively duly excepting.

It appears from the evidence set forth in the statement, that the negotiations for the sale of the goods were closed on

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the 16th of December, 1857, by the execution of a bill of sale and a lease of the storeroom. The door in the back end of the room, leading to the dwelling house of Kraft, was immediately closed up by nailing planks across it. Kraft's sign was removed, and that of Godchaux & Brother put over the front door of the storeroom. A person by the name of Blum, who seems to have had no connection with Kraft in any way, was employed by plaintiffs to take immediate possession for them. He did so take possession, and retain it until one Block was sent up by them from San Francisco, who remained there until the goods were seized by the Sheriff in February, 1858. After the sale Kraft was absent some three weeks in San Francisco, but at the time of the levy by the Sheriff he, together with one of the plaintiffs and Block, was in the store and was engaged arranging goods in a show-case.

It also appears from the testimony of Kraft, who was examined as a witness by the defendants, that there were certain conditions in the sale from him to plaintiffs not expressed in the bill of sale, to the effect that after twenty-four hours he was to go back to the store and sell the goods in the plaintiffs' firm name, and the plaintiffs were to keep the stock up by furnishing fresh goods; that he was to draw seventy dollars per month for family expenses, and eight dollars per month to pay interest on money owed by him, and that the remainder was to be sent to the plaintiffs at San Francisco; that the business was to be carried on for his benefit, and in the meantime the plaintiffs were to buy up all his debts at as low a figure as possible, and that after all the debts had been bought up, and the plaintiffs had received their advances, the stock was to be restored to him.

It is conceded by counsel for the plaintiffs that the question as to a fraudulent intent between vendor and vendee, as matter of fact, under the provisions of section twenty of the Statute of Frauds, was fairly submitted to the jury by the instructions of the Court upon that point; but it is insisted that the jury was not correctly instructed touching the law as found in the eleventh and fifteenth sections of the statute.

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The instructions which counsel claims are erroneous are as follows:

"If the jury believe from the evidence that Kraft was hired by the plaintiffs — Godchaux — and remained in possession of the goods he (Kraft) had sold to them as such hired man, the sale was void by the Statute of Frauds, and the jury will find a verdict for the defendants."

"If the jury believe from the evidence that the plaintiffs agreed with Kraft to return the balance of the goods, or the money which they brought, after paying themselves for the money due them, it raises a secret trust in favor of Kraft and the contract was void, and they will find a verdict for the defendants."

"Though the sale be absolute in terms, yet, if the jury believe from the evidence that it was made with the understanding between Kraft and plaintiffs that it was only to operate as a mortgage, then it is a secret trust as to the surplus and is void as to the defendants, and the jury will find a verdict for the defendants."

The first of the foregoing instructions was designed to apply to the facts in evidence the law as found in the fifteenth section of the Statute of Frauds. (Wood's Digest, 107.) That section reads as follows:

"Every sale made by a vendor of goods and chattels, in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith."

Whenever a case arises under the provisions of the foregoing section, the question of fact to be determined is whether the evidence shows an immediate delivery and an actual and continued change of possession, as contradistinguished from a mere formal, or pretended and temporary one; and is to be determined, like any other question of fact, by an inspection

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of all the circumstances of the case. The instruction under consideration was doubtless framed in view of the construction given to the statute in *Fitzgerald v. Gorham*, 4 Cal. 290, *Stewart v. Scannell*, 8 Cal. 80, and *Bacon v. Scannell*, 9 Cal. 271; but those cases were all substantially overruled by the case of *Stevens v. Irwin*, 15 Cal. 503, where, for the first time in this State, a true and rational exposition of the rule intended to be declared in the fifteenth section of our Statute of Frauds was given. In that case, after referring to the conflicting constructions by the Courts of the English and American Statutes of Frauds, some holding that a retention of the goods by the vendor was *per se* fraud, and others that it was only *prima facie* evidence of fraud, the former being the rule adopted by the Supreme Court of the United States, Mr. Justice Baldwin, delivering the opinion of the Court, said:

"In this controversy, as to what the true common law rule is, the Legislature wisely adopted, by statute, the construction given by the Supreme Court of the United States, for this course had at least the advantage of giving to the State one uniform rule in all Courts on this important subject. But we apprehend that the Legislature never intended, by this statute, to go beyond the extreme rule adopted by the Supreme Court of the United States, and the English cases on which that rule rests. There was no reason of policy for such extension; indeed, such extension might defeat, in some degree, the reason for adopting the Federal rule. The rule, as defined by our statute, is almost in the language of that given in the cases which establish the rule in England. It is true that some stress is laid on the words 'actual and continued change of possession,' but these words are suggested by the facts and principles of the decided cases referred to. The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon a penalty of a forfeiture of the goods, that the vendor should never have

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of satisfying the third constituent part of the Court — the *judez* — of a fact that would not be credited without the most ample proof. But, be this as it may, the objection is not relevant to the evidence offered. The learned Judge of the Court below was in error in sustaining the objection on the second ground, for it was not requisite that the fact of collusion should have been alleged in the complaint to entitle it to be proven. If it had been alleged, the complaint would have been liable to the objection, that it stated the evidence, instead of the ultimate facts of the cause of action. We can add nothing to the lucid opinion of Mr. Chief Justice Field, in *Payne & Dewey v. Treadwell*, 16 Cal. 242, that will serve more clearly to point out the allegations that are necessary in an action of ejectment.

But the decision excluding the evidence may be sustained on other grounds. A party who has a right of entry upon lands, and who has entered by force or fraud cannot be turned out of possession by the action of ejectment. If he possesses the right of entry, it is not impaired by any fraud, false representation or collusion practiced by him upon one having no right of possession. And so, if he is rightfully in possession, he will not be put out of possession, though he may have gained an entry by any species of collusion. The *wrongful* entry and the *wrongful* withholding of the possession, is, in ejectment, nothing more than the entry upon the possession of the plaintiff and the withholding the possession from him, *without lawful right* so to do. They are not made, in a legal sense, any more wrongful, in an action of ejectment, by superadding to them fraud or collusion. If the defendant has no right to the possession, as against the plaintiff, the plaintiff's cause of action is not, in the least degree, strengthened by proof of the fraudulent acts of the defendant in acquiring the possession. He may safely rest upon proof of his legal title to the possession, and the fraud or collusion of the defendant is immaterial. It is quite unusual, and we think unsustained by principle or authority, for a number of plaintiffs to found their claim to relief upon the fact that one of their number

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the statute requires, but it is not *per se* a fraud which admits of no explanation. As is well said by counsel for the plaintiffs: "A hired clerk or salesman is no more in the possession of the goods of his employer than a hired laborer is in possession of the farm on which he is employed at work." The employment of the vendor in a subordinate capacity is colorable only and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position; that he has ceased to be the principal in the charge and management of the concern and become only a subordinate, or clerk, the reason of the rule announced in the statute is satisfied. The immediate delivery and actual and continued change of possession are the ultimate facts by which, according as they are present or absent, the statute determines the legal character of the sale; but the instruction in question makes the bare employment of the vendor by the vendee in a subordinate capacity, regardless of the fact whether such subordinate capacity is open and notorious or not, the ultimate fact by which the statute determines the question of fraud; whereas it is only a probative fact to be taken into account in determining the ultimate facts mentioned in the statute and by which the question of fraud is determined. It was competent for the defendants to prove the fact as tending to show that there had been no actual and continued change of possession; but when proved, it did not become conclusive of that question, as declared by the Court below, but only an element of proof to be weighed by the jury. While our statute makes the want of an immediate delivery and an actual and continued change of possession conclusive evidence of fraud, it introduces no new rule as to what acts shall constitute such deliv-

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ery and change of possession. As the case went to the jury they were only allowed to pass upon the question whether Kraft, the vendor, had been hired by the plaintiffs and allowed to remain in possession (not exclusive) of the goods as clerk. Such, as we have seen, is not the question which the statute submits to their determination. By this instruction the jury were precluded from finding as they might have done, in view of all the facts, that the delivery was immediate and the change of possession actual and continued.

Speaking of a similar instruction, in *Warner v. Carlton*, 22 Ill. 424, the Supreme Court of Illinois said:

"It is based upon the hypothesis that the vendee had no right to employ the vendor as a clerk to sell the goods in connection with others. There is no doubt that it is a circumstance to be considered on the question of fraud, but undoubtedly may be explained. It is not *per se* a fraud that admits of no explanation. If the vendor, after the sale, without a delivery of the goods, were to remain in the sole and exclusive possession, it would amount to a fraud in law; but such is not the evidence in this case. No evidence showed that Carlton was in the sole and exclusive possession, but it tended to show that he was only acting as a clerk, and that Telfer was the person having charge of the concern and was the principal in its management. And, for aught that appears, the evidence may have been conclusive of that fact. This instruction, without modification, so as to leave it to the jury to determine from the evidence whether he had remained in the exclusive possession and control of the goods, without having ever delivered them to the purchaser, was erroneous and therefore properly refused."

That the two remaining instructions above quoted are erroneous does not admit of argument. If they declare the law correctly no mortgages of personal property can be legally made in this State, which we apprehend is not the case, for where the instrument is upon its face a mortgage, containing the usual defeasance, there is an open trust as to any excess; and where it contains no defeasance, but is in fact intended as

Opinion of Sawyer, J., concurring.

a mortgage, there is a secret trust as to such excess, yet neither is within the Statute of Frauds. These instructions were doubtless intended to declare the law as found in the eleventh section of the Statute of Frauds, which reads as follows:

"All deeds of gift, all conveyances, and all transfers, or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same shall be void as against the creditors existing or subsequent of such person."

It is not the intention of the statute to prohibit chattel mortgages, but to prevent a debtor from placing his property in the hands of a trustee having no beneficial interest therein to hold for his benefit solely and enable him to receive and enjoy its income at pleasure, to the prejudice of his creditors. The language of this statute is, "made in trust for the use of the person making the same." These words are not descriptive of a mortgage contract. A trust as to the surplus necessarily arises in the case of a mortgage growing out of the nature of the contract, but such trust is not the object, nor one of the objects of the assignment. Its object is to give the creditor a lien as security for the payment of his debt, and it does not convey to him the legal title subject to a trust in favor of the mortgagor. The other creditors are not in any legal sense hindered or delayed or defrauded by the transaction. They may sue, notwithstanding, and reach the residuary interest of the mortgagor by attachment and execution, or by bill in equity, according to circumstances. (*Leitch v. Hollister*, 4 N. Y. 216.)

We think all three of the instructions were erroneous, for the reasons for which we have briefly given.

Judgment reversed and new trial ordered.

SAWYER, J., concurring.

The instruction to the effect that if the sale was understood between the parties to be only a mortgage, then there was a secret trust within the meaning of the Statute of Frauds, and

Opinion of Sawyer, J., concurring.

the sale was therefore void as to creditors, is clearly erroneous. The first instruction discussed in the opinion of the Chief Justice is, I think, as an abstract legal proposition, correct. For, if Kraft remained in the "actual" possession as the hired man of his vendee, such possession would "be conclusive evidence of fraud, as against the creditors," even though such actual possession would be constructively the possession of his employer. But if other parties were placed in the store, having the direct charge and entire supervision and control of the goods, and Kraft was only employed in a subordinate capacity to assist in the sale of the goods, in the presence and under the immediate supervision and control of others, this relation would not necessarily constitute an actual possession in Kraft within the meaning of the Act. There is evidence tending to show that this was the relation that Kraft sustained. In view of the state of the evidence, the instruction required some qualification or explanation, otherwise the jury would be liable to be misled by it. The judgment should be reversed and a new trial had.

NICOLAS VALENCIA, CERILDO VALENCIA, AND
EUSEBIA VALENCIA DE CARTES v. AUGUSTIN
BERNAL, JUAN BERNAL, BRUNO BERNAL, AN-
TONIO BERNAL, AND FRANCISCO BERNAL.

ACTION FOR SETTLEMENT OF AN ESTATE, THERE BEING NO ADMINISTRATION.—

Where a party died intestate, while the Mexican law was in force, leaving surviving him a widow and children, and grandchildren, sons or daughters of a deceased child, and also personal property, and there was no administration on the estate, and the widow and children and grandchildren managed and disposed of the personal property in common for a long time, in an action brought by one or more for a settlement and division of the property, they should be treated as tenants in common of the property, and all, including the representatives of the widow after her death, are necessary parties.

EXECUTOR *de son tort*.—An heir, who in a subordinate capacity, managed the property of an intestate without administration, under the direction and control of another, while the Mexican law was in force, is not liable in a character analogous to that of an executor *de son tort* at common law.

Statement of Facts.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The complaint charged that José Joaquín Bernal departed this life in 1837, at the Rancho of Santa Teresa, in the present County of Santa Clara, leaving him surviving his heirs at law, his sons Augustin, Juan, and Bruno, the defendants, his daughters Jacoba, Zacharias, Petra, Pilar, Encarnacion, Dolores, and Magdalena, and his grandchildren, the plaintiffs, children of Marcelena, a deceased daughter, and that the grandchildren were entitled to one tenth of the estate.

The complaint further charged that said José Joaquín Bernal died seized of the Rancho Santa Teresa, and also possessed of ten thousand head of cattle, one hundred and fifty head of horses, mares and colts, running and grazing on and around the rancho; and that immediately after his death, the defendants Augustin, Bruno, and Juan, took possession for themselves and the other heirs, of said cattle, horses, and sheep, and have ever since retained the possession and control and management of the same, together with the natural increase of the same and the products of sales of portions thereof, except so far as they have settled and accounted with the heirs not made parties to the suit; and that at the time of the death of José Joaquín Bernal, plaintiffs were infants, and that their distributive share of the estate, to wit: one tenth, had remained in the possession and control of the defendants Augustin, Bruno, and Juan, who had never settled with plaintiffs or accounted to them therefor, and that they had demanded of them an accounting and settlement, which had been refused.

The complaint also charged that defendant Bruno Bernal, with the intent of defrauding plaintiffs, and without any consideration whatever, had conveyed the whole of that portion of the property remaining in his hands to his two sons, the defendants Antonio and Francisco.

The complaint prayed for an accounting and distribution of the property. The action was commenced March 20th, 1860.

The Court found the following facts:

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1st. That José Joaquin Bernal, now deceased, in his lifetime lived with his family on the Santa Clara Teresa Rancho, in Santa Clara County, and had on it a large number of Spanish cattle. The defendants, Juan Bernal, Augustin Bernal, and Bruno Bernal, three sons of the said José, lived on the same rancho, and each one had his separate house in which he lived with his family, and his separate flocks and herds, and used his separate brand. At the death of the said José, their father, Augustin was about thirty-eight or forty years of age, and owned of his own separate cattle about twelve or fourteen hundred head; Bruno, about thirty-five years old, and owned about the same number of cattle; and Juan was about twenty-five years old, and owned about one thousand head of cattle.

2nd. That the said José Joaquin Bernal died in the year 1837 possessed of five thousand head of cattle on said rancho, leaving surviving him his widow, Josepha; three sons, the defendants, Juan, Augustin, and Bruno; six daughters, Jacoba, Zacharias, Petra, Pilar, Encarnacion, and Dolores; and the grandchildren of two deceased daughters, Magdalena and Marcelena; the plaintiffs herein being the children of the deceased daughter, Marcelena.

3d. That the said José died without having made any last will and testament, but on his deathbed he gave oral direction that the property should be left in charge of his said widow, Josepha, and that his three sons, Juan, Augustin, and Bruno, should receive each two hundred head, and each of his daughters two hundred head, except those of them who had received a donation in his lifetime, and to each of said daughters who had received such donation, one hundred head were to be given, and the remainder were to be left the widow.

4th. That the said widow and the three sons, defendants herein, and the plaintiffs herein, the grandchildren of said deceased José Joaquin, and their father, Julio Valencia, lived on the Santa Teresa Ranch after the death of said José Joaquin, and the said property was principally managed and controlled

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by the said widow and the three sons until the time hereinafter stated under her advice and direction, but there was no administration had of said José Joaquin's estate by the defendants or either of them.

5th. That said cattle were thus taken care of and managed upon said ranch until the year 1839, when a division was had by the directions of the said widow through the said defendants, and in pursuance of the wishes of the deceased, José Joaquin. In that division two hundred head were allowed to each one of the three sons, and one hundred head to each one of the daughters living, and one hundred head each to the representatives of the two deceased daughters, Magdalena and Marcelena; each one of the sons and daughters also received his or her allowance, and expressed satisfaction therewith. Julio Valencia, the father of the plaintiffs, and the plaintiffs themselves, who were then minors under the age of twenty-one years, were present at the division, and the said Julio received for his said children the one hundred head allowed to them as the children of the deceased daughter, Marcelena.

6th. That in 1839 there were slaughtered, to pay debts, six hundred head of cattle on the Santa Teresa Rancho, and during the years, 1840, 1841, 1842, and 1843 there were slaughtered for the same purpose one hundred head per annum, one half of all which were of the fondo or rancho brand, and the said defendants each slaughtered fifty head of cattle each year for the use of their own household, one half of which was fondo.

7th. That this fondo brand was retained and used by the widow Josepha on said ranch after the death of the said José Joaquin.

8th. That in 1840 eight hundred and thirty-four head of cattle were taken from the Santa Teresa Ranch, by permission of the widow and the defendants, and were sold for them by their agent Sunol for nine thousand three hundred dollars, one-half of which were in the fondo brand; and that amount was paid to the widow and the defendants.

9th. That in 1843-4 the defendants Juan and Augustin left

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the Santa Teresa Ranch, and defendant Bruno several years thereafter, and went to reside with their families at their respective ranches in Alameda County, and they took with them at time of their removal from the Santa Teresa Ranch three thousand head of cattle, but how many, if any, were in the fondo brand does not appear.

10th. That after the defendants left the Santa Teresa Ranch, the widow and the plaintiffs continued to reside on said ranch, taking care of the cattle remaining there.

11th. That Nicholas Valencia, one of the plaintiffs, resided on said ranch with the said widow from the year 1847, taking charge of the cattle on the ranch, and the rodeo, and branded, and sold and killed, and managed by the advice and directions of the widow.

12th. That the said widow had from seventy to eighty grandchildren, and she occasionally presented them with cattle or money, and she died in 1857.

13th. That in 1853, while the said Nicholas was managing and controlling and taking care of the said cattle on the said ranch for the widow, he had on the ranch eight hundred head of cattle in his own brand.

14th. That in 1853 the said Nicholas drove away from the said ranch four hundred head of cattle, the proceeds of seventy-eight head which were given by the widow and Bruno to the tithe collector in 1851, and bought by Nicholas from the tithe collector.

15th. That the plaintiff, Cerildo Valencia, in 1843 or 1844, drove away from the said Santa Teresa Ranch the proceeds of the one hundred head of cattle allotted to the plaintiffs as the grandchildren of the deceased José Joaquin, to the Alviso Rancho, belonging to his father, Julio Valencia, and afterwards, in 1853, Cerildo took away from the Santa Teresa Ranch forty head given him by his grandmother, the widow Josepha.

16th. That the defendant Juan Bernal, in 1849, sold fifty head of said fondo cattle in the mines, of the average value of seventeen dollars and fifty cents per head, and the defendants, Augustin, Juan, and Bruno, each, occasionally, from 1837 to

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1859 exchanged some of the fondo cattle for horses and sheep, but how many does not appear.

17th. That the natural increase of cattle is at the rate of one hundred per cent. every three years.

E. W. F. Sloan, for Appellants.

A bill lies in such cases without the intervention of an administrator appointed by a Probate Court.

The Statute of Limitations does not bar the remedy sought by appellants, it being in the nature of a partition.

The rights of the heirs of José Joaquin Bernal, whatever they were, accrued to them under the Mexican law.

"In the Spanish code no distinction was made between the real and personal property of the succession. It descended in one mass to the heirs; was impressed with the like qualities, and was subjected to the same rules and dispositions." (10 Texas, 41, citing *Erische* — *Heredero*; also, Law 13, Title 9, Part 7.)

"Partition is a division which men make among them of the things which they have in common by inheritance, or by any other cause." (Law 1, Title 15, Part 6.)

"Either of the heirs may require partition of the property." (Law 2, Title 15, Part 6.)

In the case of *Blair v. Cisneros*, 10 Texas, 84, the ancestor died in 1833, (Texas being then part of Mexican territory,) owing no debts, and the heirs did not renounce the succession. Afterwards, in 1849, the widow took out letters of administration, and as administratrix brought trespass to try title. It was held that the grant of administration was a nullity; that where an estate was accepted under the Mexican laws, without the benefit of inventory, no administration was necessary; and that where there is no administration, the heirs may sue and recover the property of the estate.

But, even under the English law, it has been held that an executor *de son tort* is liable, like other executors, to legatees and distributees; and that for the purpose of restraining waste,

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or a sale of the property in his hands, a bill will lie at the suit of the distributee alone. (*Hansford v. Elliott*, 9 Leigh, 95.)

The remedy sought by appellants is not barred by the Statute of Limitations.

The statute does not run in favor of executors and administrators and against the distributees until final settlement or some equivalent proceeding. (*Webster v. Webster*, 10 Vesey, 93; *Decauche v. Sevetier*, 3 J. Ch. R. 215, 216.) Besides, any presumption arising from lapse of time is one of fact only, and may be overcome by circumstances. (*Arden's Executors v. Arden's Executors*, 1 J. Ch. R. 316, 317.)

Until there has been a full and final division of the estate amongst the co-heirs, they are considered in law as holding the property as tenants in common. Whilst they occupy that relation toward each other, there can be no prescription. (Vide an elaborate examination of the doctrine upon this point in *Gravier et al. v. Livingston*, 6 Marsh. 403, 404, 410, 411.)

L. Archer, for Respondents.

Neither of these defendants was ever administrator, executor, or guardian, or assumed to be, or acted as such.

If it were otherwise, the action would be barred by lapse of time, by presumption of settlement, by prescription. (See Storey's Eq. Jur. Vol. 2, Sec. 1520, and notes; Vesey's Prac. Rep. Sumner's ed. Vol. 2, p. 11, and note; Cowen & Hill's Notes to Phil. on Evidence, Vol. 3, p. 504, note 301, and cases there cited; 7 Johns. Ch. Rep. 89-113; 12 Vesey on Ev. 269, note; *Dominguez v. Dominguez*, 7 Cal. 427; 5 Leigh, 164; 1 J. J. Marshall, 594.)

The above considerations and authorities apply, even if the case were one of express trust. But the Statute of Limitations would bar this action for the reason that the plaintiffs had an action at law, and the further reason that in any point of view the case cannot be regarded as one of express trust.

Upon the death of José Joaquin Bernal the plaintiffs took

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at once their share of the property by succession. (*De La Guerra v. Pachara*, 17 Cal. 187.)

By the Court, SAWYER, J.

The plaintiffs, as heirs of José Joaquin Bernal, who died in 1837, brought this action to recover their distributive share of the decedent's estate. The complaint alleges that defendants, upon the death of Bernal, took possession of the estate, and that they have ever since managed and controlled it, and that they refuse to account to plaintiffs for their distributive share.

The Court, upon a finding of the facts, entered judgment dismissing the complaint, from which judgment plaintiffs appeal.

The facts found by the Court do not sustain the allegations of the complaint. It is manifest from the findings that if any one acted in such a manner as to become liable in a character analogous to that of an executor *de son tort* at common law, it was the widow of Bernal, and not the defendants, who only acted during the first few years after the death of Bernal, under and for her; after which they removed to their own ranchos, and the plaintiffs themselves took their places under the widow. The Court finds that from 1847 till the death of the widow in 1857 — a period of ten years — the plaintiffs resided on the rancho of decedent with the widow; and that the plaintiff Nicholas Valencia took charge of the stock on the rancho and managed it in connection with the widow's. It is not found that the possession and control of the property was changed subsequent to the death of the widow in 1857.

The facts found do not entitle plaintiffs to any relief upon the theory upon which the complaint is framed. The time when the plaintiffs attained their majority is not found, but it was evidently many years before the institution of this suit. If plaintiffs have any right of action not barred by the Statute of Limitations, it would seem from the facts disclosed in the finding that the remedy must be pursued upon the theory that the heirs and the widow were tenants in common of the estate

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of Bernal; and in an action for a settlement and division of the property, all the heirs, including the representatives of the widow, would seem to be necessary parties.

No appeal is taken from the order denying a new trial, and no questions are made in the briefs that do not arise out of the judgment roll. We think the judgment should be affirmed and it is so ordered.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex*
rel. NELSON PIERCE, NELSON PIERCE AND THE
DEAD WHALE ASPHALTUM MINING COMPANY
v. CHARLES MORRILL.

LANDS BELONGING TO THE STATE.—The lands belonging to the State are distinguishable into two general classes; First—Those which it owns by virtue of grants from the United States; Second—Those which it owns by reason of its sovereignty. The class of lands belonging to the State by reason of its sovereignty includes the shore of the sea, and of its bays and inlets, in the common law definition of the word "shore."

SWAMP LANDS.—Lands which are swampy or subject to such periodical overflows as to injure or destroy the crops, belong to the State by virtue of the Act of Congress of September 28th, 1850, commonly called the "Arkansas Act."

LANDS OFFERED FOR SALE BY ACT OF 1858.—The Act of April 21st, 1858, for the sale of "swamp and overflowed lands," does not provide for the sale of any lands except those which fall within the description of the Arkansas grant of 1850.

PROVISO TO FIRST SECTION OF SAID ACT.—The proviso to the first section of the Act of April 21st, 1858, for the sale of "swamp and overflowed lands," refers only to the narrow channels, within the ebb and flow of the tide, which thread the "swamp lands" known as "salt marsh."

PROVISO TO AN ACT.—The proviso to an Act is to be read in the light of the subject matter of the Act.

LANDS OFFERED FOR SALE BY ACT OF 1859.—The Act of April, 1859, amendatory of the Act of April 21st, 1858, for the sale of swamp and overflowed lands of this State, only refers to such lands as are offered for sale by the Act of April 21st, 1858, of which it is amendatory.

LANDS OFFERED FOR SALE BY ACT OF 1861.—The Act of May 13th, 1861, "for the reclamation and segregation of swamp and overflowed land," etc., provides only for purchases to be made after the passage of the Act, and the segregation of the lands in accordance with the nineteenth and twentieth sections of the Act.

SALES OF LANDS RATIFIED BY ACT OF MAY 14, 1861.—The word "tide lands," used in the Act of May 14th, 1861, entitled "an Act to provide for the sale

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of the marsh and tide lands of this State," only refers to such tide lands as are subject to periodical overflow, but are susceptible of reclamation, so as to be made valuable for agricultural purposes.

SALE OF LAND OVERFLOWED BY TIDES.—No provision has been made by law for the sale of the lands owned by this State by virtue of its sovereignty, on the shore of the sea and its bays and inlets, which are usually overflowed by the neap tides.

INJUNCTION TO PREVENT INJURY TO STATE LANDS.—In an action brought by the State to procure the cancellation of a patent for lands sold without authority of law, where the person claiming under the patent is engaged in removing mineral from the land, the State is entitled to an injunction restraining the defendant from removing the same.

PARTIES PLAINTIFF IN ACTION TO ANNUL A PATENT.—Parties who have a common interest in annulling a patent, although they have no joint interest in the land adverse to the patentee, may be joined as plaintiffs in action to procure its cancellation.

SAME.—In an action brought to annul a patent for land sold without authority of law, the State, and persons who have a right to mine on the land under the mining laws of this State, may be joined as plaintiffs.

DEMURRER TO ENTIRE BILL.—If a demurrer is to the whole bill, and is good as to a part, but bad as to part, it should be overruled.

DEMURRER TO BILL FOR MULTIFARIOUSNESS.—Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

This action was commenced in July, 1862. The complaint averred that on the 19th day of March, 1861, the relators Pierce, Massini, Trussell, and Mangard, in accordance with the general mining laws and customs of this State, took up as mining claims a certain parcel of land on the sea shore, between the lines of ordinary high and low water, a portion of which, a strip one thousand five hundred feet long, is embraced within the land described in the patent issued to defendant, and that the parcel of land taken up they designated as the Asphaltum Mining District; that they planted stakes to mark the limits of their claim, and placed written notices thereon, stating that the same had been taken up by them as a mining claim, and subscribed their names to the notices, and that they then and there adopted mining regulations for the government of the mines and miners in the district; that in August and September, 1861, Mangard sold his interest in the mining claim to

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Garcia, and Trussell sold his interest to Morton; that on the 21st day of October, 1861, Pierce, Massini, Morton, and Garcia, were duly incorporated under the laws of this State as a mining corporation, under the name of the Dead Whale Asphaltum Mining Company, for the purpose of working the asphaltum mines in said district, which company is one of the plaintiffs; that after taking up the claim, and prior to the incorporation, Pierce and the others worked the mines, taking the asphaltum therefrom, and afterwards the corporation continued to do the same; that October 1st, 1861, defendant Morrill commenced an action against Pierce and the others to recover possession of two hundred and fifty tons of asphaltum, of the value of three thousand seven hundred and fifty dollars, and for two thousand dollars damages, and October 30th, 1861, commenced another action against Pierce and the others to recover possession of one hundred other tons of asphaltum, of the value of fifteen hundred dollars, and five hundred dollars damages; that in December, 1861, Morrill commenced another action against the same parties to recover eight thousand five hundred dollars damages for the alleged wrongful taking and conversion of two other lots of asphaltum in April and June, 1861, from the land covered by the patent; that in the two first actions the defendants had answered, setting up that the corporation owned the asphaltum, and in the third, Pierce only had been served with process, and had answered, setting up that the asphaltum belonged to him, Morton, Garcia, and Massini; that November 8th, 1861, the Dead Whale Asphaltum Mining Company commenced an action against Johnson and Baker to recover possession of one hundred tons of asphaltum, alleged to have been wrongfully detained by them, and Johnson and Baker had answered, setting up that the asphaltum was the property of Morrill, and that they were his bailees; that in all of said actions said Morrill claimed that the asphaltum in question therein was taken from the beds or deposits within the limits of the land described in his patent, and that by virtue of the patent he was the owner thereof, and that the sole basis of his right of recovery was the patent.

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The complaint further averred that plaintiffs were advised and believed that relator Pierce and the Dead Whale Asphaltum Mining Company cannot avail themselves in said actions of the defense that the patent is void, or was issued without authority of law, and that defendant Morrill threatens and intends to force the said actions to trial at the earliest possible time.

The complaint prayed that the patent be cancelled and vacated, and that defendant Morrill and his attorneys be restrained by injunction from further prosecuting said actions until the matter could be determined, and that defendant Morrill, his agents and workmen, be enjoined from excavating or removing from the land embraced in said Dead Whale District any portion of the asphaltum therein lying and being.

A preliminary injunction was granted in accordance with the prayer of the complaint by the County Judge of San Francisco, on the 25th of July, 1862.

Defendant demurred to the complaint because relator Pierce and the Dead Whale Asphaltum Mining Company were improperly united as plaintiffs with the People, and because several causes of action were improperly united in the complaint.

Defendant moved in the District Court for a dissolution of the injunction, and on the 3d day of November, 1862, the same was dissolved.

From the order dissolving the injunction plaintiffs appealed.

Defendant's patent on its face purported to have been issued in pursuance of the Act of April 21st, 1858, entitled "An Act to provide for the sale and reclamation of the swamp and overflowed lands of this State," and in the patent the lands are called "State tide lands."

Defendant, in the affidavit attached to his application for the purchase of the patented land stated: "That to the best of his knowledge and belief, said tract was overflowed during the year 1850, and judging from the indications of overflow and the statements of others, every forty acre lot, or its equivalent legal subdivision, embraced in said tract, was the greater part swamp or swampy, or subject to inundation at the planting,

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growing, or harvesting season, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to 1850."

The other facts are stated in the opinion of the Court.

Eugene Casserly, for Appellants.

At the commencement of the proceedings of the respondent, March, 1861, which resulted in the issuing of the patent to him, the statutes in force were the Act of April 21, 1858, (Laws of 1858, p. 198), and the Act of April 18, 1859, (Laws of 1859, p. 340.) Pending the proceedings and after the making of the second or amended survey of April 9, and previous to the filing of respondent's amended affidavit in the office of the County Surveyor, May 20, a third Act was passed May 14, 1861, which took effect immediately, entitled, "An Act to provide for the sale of the marsh and tide lands of this State."

The question to be determined by this Court is, whether under these Acts there was any authority to sell and patent lands of the character of the premises here, and which, though denominated in the patent "State tide lands," are, as to a small part, the sea beach between high and low water mark, continually washed by a heavy surf — and as to the remainder, the bottom of the sea under the navigable waters of the Pacific Ocean, extending out to a depth of one hundred fathoms; the whole being utterly incapable of cultivation or of reclamation for any such purpose.

The title of the Act of April 21, 1858, is: "An Act to provide for the sale and reclamation of the swamp and overflowed lands of this State." Section one is as follows:

"The swamp and overflowed lands belonging to this State, or that may hereafter be granted to this State by Act of Congress entitled 'An Act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits,' passed September twenty-eighth, eighteen hundred and fifty, shall be sold at the rate of one dollar per acre, in manner

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prescribed by this Act, and the proceeds of the sales thereof, under this or any former Act, shall be paid into the Treasury of this State, as State revenues, and shall be credited to the account of a swamp land fund, to be appropriated for the reclamation of said lands, as the Legislature may hereafter direct; *provided*, that, if upon the survey of such lands, any portion thereof shall be found to be lands belonging to the State by right of her sovereignty, the moneys arising therefrom shall be paid into the Treasury of the State as other State revenues."

The "swamp and overflowed lands" mentioned in the beginning of this section are undoubtedly lands within the meaning of the Act of Congress of September 28, 1850. (Brightley Dig. 492, § 201, etc.) The peculiarity of the language used, "belonging to this State, or that may hereafter be granted to this State by Act of Congress," etc., was undoubtedly owing to an impression which seems to have been prevalent that some further legislation of Congress, or at least some proceeding by virtue of that Act, as the issuance of a patent, (Brightley Dig. 492, § 202,) was necessary to vest in this State the swamp and overflowed lands of the United States within her limits; an impression which was corrected for the first time in *Summers v. Dickinson*, 9 Cal. 555.

"Any person who may be entitled by the laws of this State to become a citizen thereof, wishing to purchase land under the provisions of this Act, shall file an affidavit in the Surveyor's office of the county in which the land sought, to be purchased, or the larger portion thereof, is situated, that he has not entered any other land under the provisions of this Act, or under the provisions of an Act passed April twenty-eighth, one thousand eight hundred and fifty-five, entitled 'An Act to provide for the sale of the swamp and overflowed lands belonging to this State,' which, with the land sought to be purchased, shall exceed three hundred and twenty acres; and that he does not know of any legal or equitable claim other than his own to the land sought to be purchased; that such purchase is sought for the purpose of settlement and reclamation by affiant;

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and that he has not directly nor indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he may acquire from the Government of the State should inure, in whole or in part, to the benefit of any person except himself. He shall then cause the land sought to be purchased to be surveyed; or, in case of a previous legal survey, shall cause the said survey to be approved and certified by the County Surveyor of the county in which such land, or the larger portion thereof, is situated."

The requirement that the affidavit shall set forth that "such purchase is sought for the purpose of settlement and reclamation," is in effect a provision that only those lands of either class which are susceptible of "settlement or reclamation," are within the Act, or liable to be sold by virtue thereof. So, as to the operation of similar requirements in the Practice Act, as to the affidavits necessary to be filed before issuing an attachment, or an order to the Sheriff for the claim and delivery of personal property. And the Act by its title is for the "sale and reclamation of the *swamp and overflowed* lands of this State."

By the Act of April 18, 1859, this section of the Act of 1858 was amended; one change being that the passage just quoted was stricken out, and, in lieu thereof, the affidavit was required to set forth that "every forty acre lot, or its equivalent subdivision of the land sought to be purchased, is the greater part swamp or swampy, or subject to inundation at the planting, growing, or harvesting seasons, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to the year one thousand eight hundred and fifty, as a rule of determination."

The effect of this amendment is obvious. It is to substitute for the general statement that the land was capable of "settlement and reclamation," in which too much was left to the opinion of the affiant, and too little was called for as to the specific character of the land in that respect—a much more particular description of it as to the greater part of every forty

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acre lot or its equivalent subdivision, with reference to its being "swampy, or subject to inundation at the planting, growing, or harvesting seasons, so as to endanger, injure, or destroy the crops," and hence to its capability for bearing crops, if reclaimed by drainage, or protected against inundation. The amendment therefore pointedly confirms and secures the leading principle of the Act of 1858—that only those lands of the State, whether belonging to it by Act of Congress, or by virtue of her sovereignty, which are susceptible of reclamation for purposes of cultivation, are within its provisions. Compare also Act of May 13, 1861, to provide "for the reclamation" etc., "of swamp" "lands," etc. (Laws of 1861, p. 355.) And this I think is so obviously the meaning and object of all the legislation of the State on the subject as to require only to be stated to this Court. In support of this view it may be observed that the language "every forty acre lot," etc., just quoted from section two, as amended by the Act of 1859, is a literal copy from the instructions of the Land Office at Washington to surveyors and others under the Arkansas Act. (Lester's Land Laws, 543.) Of course there will be no question as to the object of that Act of Congress—which was expressly to enable the State of Arkansas and the other new States subsequently admitted to reclaim for purposes of cultivation the swamp and overflowed lands within their borders respectively. (Brightley's Digest, p. 492, § 201, etc.) It is equally clear that the object of the Acts of 1858 and 1859, as well as that of 1855, was to give effect in this State to the provisions of the Arkansas Act. (See Laws of 1858, p. 198; of 1859, p. 340; of 1855, p. 189, § 18.)

The premises here being land at the bottom of the navigable waters of the sea, running out to a depth of one hundred fathoms, with a narrow selvedge along the beach between high and low water mark, averaging one hundred feet wide, and wholly incapable of reclamation for any purpose of cultivation—they were not within the scope of the Act of 1858, or the amendatory Act of 1859, and there was no authority to sell or patent them under those Acts. The only question is,

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whether the authority is found in the provisions of the Act of May 14th, 1861. The language of that Act, so far as it is material to this case, is as follows:

"The sales of all marsh and tide lands belonging to this State that have been made in accordance with the provisions of any of the Acts of the Legislature providing for the sale of the swamp and overflowed lands belonging to this State, are hereby ratified and confirmed; and any of said marsh and tide lands that remain unsold may be purchased under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this State; and all moneys derived from the sale of such lands shall be paid into the State swamp fund, to be used for the reclamation of the swamp and overflowed lands," etc.

We shall better understand the meaning of this validating Act, and indeed of the preceding Acts of 1858 and 1859, as well as that of 1855, (all of them being *in pari materia*.) if we stop to consider the different classes of lands embraced within this system of legislation.

The meaning of the words "swamp and overflowed lands," as originally used in the Arkansas Act, undoubtedly was lands inundated and converted into swamps by the rise of the fresh water streams and lakes of that State in certain seasons, entirely unaffected by the tides, which, as is well known, are not felt within the borders of that State on account of its distance from the sea and the strength of the current of the Mississippi. All such continued, of course, to be public lands of the United States after the admission of Arkansas into the Union. In this State, also, there is a large quantity of lands belonging strictly to the same class, upon the Sacramento and San Joaquin Rivers, and other watercourses above the ebb and flow of the tide. These constituted one class of lands, and the only one strictly within the scope of the Acts of 1855, or of 1858 and 1859, whether we regard their terms and manifest object, or those of the Arkansas Act, to give effect to which in this State they were passed.

Besides these, there is in this State a quantity of other lands

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which are flowed in part by the ordinary high tides of each twenty-four hours, and therefore as to that part belonging to the State by virtue of her sovereignty; and as to the far greater remaining part by the spring tides at each full moon, and as to that part belonging to the United States as portion of her public lands. Such are the flats and salt marshes, so common and so extensive in this State, bordering upon the harbors, bays, rivers, and watercourses within the ebb and flow of the tide. A very large (if not the larger) portion of these lands, as is well known, is capable of being reclaimed for cultivation, and may well be denominated "marsh and tide lands." Undoubtedly they are the lands intended by the Legislature under that denomination, as distinguished from the "swamp and overflowed lands," a distinction fully recognized in the session of 1861. (See "Act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands," etc., Laws of 1861, p. 355, Sec. 27.) They form another class of lands, and are for the first time distinctly specified in the legislation of 1861. As before observed, they fall strictly within the class of "swamp and overflowed lands" under the Acts of 1855, 1858, or 1859. Such lands differ in the utmost degree as to capability of reclamation from the premises in question here, being in part a narrow strip of sea beach between high and low water mark, and as to the far greater remaining part the bottom of the sea under the navigable waters of the Pacific Ocean, extending out to a depth of one hundred fathoms. It is impossible to hold that the provisions in any of these statutes as to "marsh and tide lands" could comprehend the premises, or in any way be invoked to aid the respondent.

Both by the civil and the common law the sea shore is deemed to be public property existing for the free and common use of all, and the king cannot divert it from this purpose by alienation or otherwise. (Hale de jure Maris, Part 1, Chap. V; Angel on Tide Waters, 23-25; *Commonwealth v. Charleston*, 1 Pick. 182; *Corfield v. Coryell*, 4 Wash. 379; *Pollard's Lessee v. Hagan*, 3 How. 230.)

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Ought it to be assumed that the State of California has, in her legislation for the sale of her swamp and overflowed lands, established a system which violates this great principle of universal law, and surrendered her sea coast, except as to a few enumerated portions, to private acquisition, ownership, and control?

The occupation by the relator and his associates of that portion of the premises between ordinary high and low water mark for mining purposes, and their actual use thereof for that purpose, gave them an equitable claim to the same as the licensees of the State. They were not mere trespassers, but favored possessors, and had a right to be protected in the possession of their selected locality.

It is well established that when a patent has been obtained by means of fraudulent or false suggestions or representations, it will be vacated. (*King v. Vernon*, 371-373; *Seward's Lessee v. Hicks*, 1 Harris and McH. 23-25; *Lord Proprietary v. Jennings*, Ib. 92, 100, 102, 144; *Carroll's Lessee v. Llewellyn*, Ib. 165-168; Opinion of Attorney-General Daniel Dulany upon case stated, Ib. 554-556; *Smith v. State of Maryland*, 2 Harris and McH. 244, 252; *Norwood v. Attorney-General*, Ib. 201, 210; *Jackson v. Lawton*, 10 Johns. 23-25; *State v. Reed*, 4 Harris and McH. 6, 10.)

The State may sue to annul a patent for any proper cause, although it had ceased to have any right in the land, and the same had already passed into the ownership, inchoate or perfected, of third persons.

Upon the argument below, it was contended by the respondent that if the relator and the Dead Whale Asphaltum Company have any right to the possession of the premises between ordinary high and low water mark, or to work the mines under the license of the State, then the State has no interest in the controversy, and cannot maintain the action.

We understand the law to be settled that the State always has an interest to annul a patent outstanding in derogation of its own rights, or those of any of its citizens. (*Jackson v. Lawton*, 10 Johns. *25.)

J. B. Crockett, for Respondent.

The Act of 1858 (Sec. 13) makes a distinction between ordinary *fresh water* swamp land and "*salt marsh* land," in this, to wit: that the latter were not to be subject to sale until six months after the passage of the Act, except to parties owning or occupying the adjoining arable lands. But subject to this restriction, "*salt marsh*" lands were certainly subject to sale. It becomes material, then, to inquire what are "*salt marsh*" lands? I claim them to be all lands which at certain stages of the tide, whether of the neap tides or spring tides, are covered with water, and at other stages are not covered. If they are covered by the daily high tides, and are above the water at low tide, they are as much "*salt marsh*" lands as if they were covered at the spring tides only. But if "*salt marsh*" lands are covered by the daily ordinary high tide, then they are lands which belong to the State by virtue of its sovereignty. This will not be denied. Nor can it be denied that such lands were subject to purchase under the Act of 1858. It is obvious, then, that by that Act, lands which belonged to the State by virtue of her sovereignty, could be purchased. But as a condition to the purchase, the applicant was required to make oath that he desired the lands for the purpose of settlement and cultivation. This restriction was removed by the Act of 1859, after which such lands were subject to purchase without any qualifications as to the purpose to which they were to be applied. It appears, then, that some lands, below ordinary high tide, and which belonged to the State by virtue of her sovereignty, were liable to purchase, and without any obligation on the purchaser to reclaim or cultivate them. In such case must the purchaser stop at the *beach*? or may he not take all the land down to low tide or beyond it, if he wishes? why allow him to purchase a *part* of the land, below the usual high tide, and exclude him from other portions? Where could the line be drawn in such a case? If the beach shelve up gradually from low water mark and extend back for half a mile, creating a salt marsh, could not

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such land be purchased down to low water mark? If not, at what point could the line be drawn?

The point I make, therefore, on this clause of the statute is, that *all* salt marsh land, whether below neap or spring tides, is subject to purchase down to low water mark; from which it is evident the Legislature did not intend to reserve the beach from sale.

But subsequent legislation indicates distinctly the policy of the State in respect to these lands. By the Act of May 13th, 1861, a Commission was organized for the reclamation and sale of swamp and overflowed, salt marsh, and *tide* lands. It does not repeal the Act of 1859, except that it modifies the affidavit to be made by the claimant, and all the above named lands are placed on the same footing, (Sec. 27.) They are all to be surveyed, segregated, and sold. By another Act passed on the next day, (14th May, 1861, Session Acts 1861, p. 363,) the sales of all marsh and *tide* lands belonging to this State, that had been made "in accordance with the provisions of any of the Acts of the Legislature providing for the sale of the swamp and overflowed lands belonging to this State," were ratified and confirmed; and it was further provided, that all such lands remaining unsold "may be purchased under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this State."

This Act recognizes the fact that tide lands had been sold *in accordance* with previous Acts, and ratifies such sales. But it is said that if the previous Acts authorized the sale, and if the sales had been made *in accordance* with those Acts, what need was there of a confirmatory Act? A ready answer is found in the fact that doubts existed as to the validity of such sales, and the Act was passed simply to remove these doubts. Hence, it provides that where sales had been made "*in accordance with*," that is to say, according to the forms prescribed by former Acts, the sales shall be deemed valid. It was simply a legislative interpretation of the former Acts, and in order to remove all doubt for the future, it provides that all such lands remaining unsold may be purchased under the provisions of

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the laws then in force. It also changes the destination of the funds to be derived from such sales, and appropriates them to the swamp land fund. This Act indicates, unmistakably, the policy of the Legislature in respect to tide lands. It confirms all sales that had been made, and authorizes future sales.

But this Act has an important bearing on the case at bar in another respect. The first affidavit made by the respondent with a view to the purchase of the land in contest, was made on the 2d March, 1861, and was filed with the County Surveyor on the 8th March, and the first survey was made on the 14th March. An amended affidavit was made on the 20th April, 1861, and filed with the County Surveyor on the 20th May, 1861. The last named affidavit was therefore made a few days *before* the passage of the Act of the 14th May, 1861, but was filed with the Surveyor *after* the Act passed and whilst it was in force. The patent was issued October 4th, 1861. The survey was approved by the Surveyor-General, July 30th, 1861. The Act of May 14th was therefore in force when the amended affidavit was filed, when the survey was approved, and when the patent issued. On these facts I insist that the patent is valid as coming within the provisions of that Act. All the proceedings which give validity to the title occurred *after* the passage of the Act, and are governed by it. It is wholly immaterial that the affidavit was sworn to before the passage of the Act. It took effect as an affidavit from the time of its delivery to the Surveyor, and the survey founded upon it being approved *after* the passage of the Act, must be governed by it. The question to be decided is whether or not, at the date of the survey and patent, the land in contest was subject to be so conveyed. If the land was then subject to sale, it does not follow that any slight irregularity in the preliminary proceedings would vitiate the patent. When the State asks the Court to vacate its own patent, it must establish either fraud or mistake, or that the patent was issued in violation of law. I am now considering the latter ground, and think I have shown that the land was subject to purchase under the Act of May 14, 1861, when all the essential steps were taken,

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to wit: when the surveyor received the affidavit, when the survey was approved, and when the patent issued, and these are all that were necessary to establish the power of the Governor to issue the patent. In the absence of fraud, so solemn an instrument as a patent for lands ought not to be disturbed on the purely technical ground that an affidavit was sworn to a few days before it was delivered to the proper officers. The State has been paid for this land, and ought not to be allowed to avoid its deed on the dryest possible technicality, which in no manner affects the intrinsic merits or justice of the respondent's title to the land.

In entering or pre-empting lands under the land system of the United States, certain forms are prescribed and certain acts to be done before and by the Register and Receiver. If a slight informality occurs in the proceedings, if an affidavit is sworn to a few days too late or too soon, or before the wrong officer, or if the surveyor in sectionizing the land has committed a small mistake, and the claimant in good faith has paid his money and received his patent, would any Court tolerate an application from the Government to vacate the patent for such reasons? If so, there would be no repose in titles. No man would be safe in buying patented lands if his title was at any time liable to be overthrown by proceedings to vacate the patent because of trifling defects of form in the preliminary steps. Every principle of public policy demands that patents shall not be disturbed for trivial causes.

My argument on this branch of the case may therefore be summed up as follows, to wit:

1st. That by the Act of 1855 tide lands were expressly excepted from sale.

2d. That by the Act of 1858 the reservation was removed, and said lands were authorized to be sold.

3d. That it was not a condition of such sale that the lands were to be reclaimed or cultivated, or that they were fit for cultivation.

4th. That the Act of May 14, 1861, is a legislative interpre-

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tation of the preceding Acts, and was intended only to remove existing doubts as to the validity of such sales.

5th. That the patent is valid under the last named Act, and is protected by it.

6th. That slight irregularities, if any existed in the preliminary steps, will not vitiate the patent.

The appellants claim that even though the beach itself was subject to purchase, the land *below* low water mark was not, and that as the patent embraces lands covered with the water of the ocean at all times, the whole patent is void.

Their position is that if a patent embrace some lands which were grantable and others which were not, the whole patent is void, that it cannot be good in part and bad in part, but will be set aside *in toto* if it embrace *any* lands which could not be granted. The District Court held the patent to be good for the beach, but void as to the land below low water mark.

For the purposes of this argument it is not material whether the lands below low water mark could be granted or not, provided the Court was right in the position that the whole patent is not void because it embraced some lands not subject to grant. I shall therefore first address myself to the latter proposition.

The law on this point is too well settled to admit of serious debate.

The leading case on this point in the Supreme Court of the United States is *Danforth v. Wear*, 9 Wheat. 673, in which the Court held the patent to be valid for a part of the land and void as to the residue. The case of *Patterson v. Jenks' Lessee*, 2 Peters, 216, is directly in point. The Court in its opinion uses this emphatic language: "In the nature of the thing we perceive no reason why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract for the granting of which the office had not been opened. It is every day's practice to make grants for lands which have in fact been granted to others. It has never been suggested that the whole grant is void because a part of the

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land was not grantable." The opinion was delivered by Mr. Chief Justice Marshall.

This was followed by the case of *Winn v. Patterson*, 9 Peters, 663, in which the opinion was delivered by Judge Storey, and in which occurs the following passage. Referring to one of the instructions he says: "It contains a proposition absolutely universal in its terms, and that a grant of land is an entirety, and that a grant void in part is void for the whole. If this proposition were true, then a grant of ten thousand acres which was void for any cause as a conveyance of one acre, although it might be for want of title in the grantor, would be void in the remaining nine thousand nine hundred and ninety-nine acres."

The same principle is held in *People v. Mansan*, 5 Denio, 389; *People v. Livingston*, 8 Barb. 253-283; S. C. 6 Taunt. 369.

I invite attention also to the case of *The People v. Van Rensselaer*, 5 Seld. 291, in which the principle is discussed at some length, and the authorities are collated on pages 323, 324. (See also, *Little v. Bishop*, 9 B. Monroe, 246; *Janet v. West*, 1 Har. & John. 501; *Hough v. Dumas*, 4 Dev. & Bat. 328.)

These authorities are a sufficient response to the argument of appellants' counsel on this point. They establish the principle too firmly to admit of debate that a patent is not void because it embraces some land not grantable, but is good for all the land which it properly includes.

By the Court, SHAFTER, J.

This suit was brought to set aside a patent issued by the State to the respondent on the 4th of October, 1861. The lands covered by the patent are described therein as "one hundred and sixty acres of State tide lands, situated in the County of Santa Barbara." It appears further from the record that the lands lie immediately upon the sea beach, composed of rock and sand, upon which a heavy surf runs at ordinary high tide; and that the remaining portion of the land is cov-

ered by the waters of the ocean to a depth, at ten chains from the shore, sufficient for any class of vessels, and beyond that to a depth of from sixty to one hundred fathoms. That the average width of that portion between ordinary high and low tide is about one hundred feet, and at ten or twelve feet from ordinary high water mark, without the boundaries of the tract, there is a range of perpendicular cliffs, averaging two hundred and fifty feet in height, running along the whole length of the land, the base of which at the high tides is washed by the surf, and in which, and in and along which said last portions of land, are large and valuable deposits and beds of asphaltum. No part of the tract is fit for cultivation or capable of producing a crop or vegetable growth of any kind. It appears by one of the recitals in the patent that the land was taken up by the respondent under the Act of April 21, 1858. The prayer of the complaint is to the effect that the patent may be vacated on the ground of fraud, and on the further ground that lands of the character included in the patent have never been offered for sale by the State. We shall have occasion to discuss only the point last named.

1. The public lands of the State are distinguishable into two general classes: First, those which it holds by virtue of grants from the United States; second, those which it owns by reason of its sovereignty. The first class includes the grant of five hundred thousand acres, September 4, 1851; the grant of the sixteenth and thirty-sixth sections in each township for the use of schools therein; of seventy-two sections for the use of a seminary of learning, and of ten sections for public buildings, March 3, 1853; the grant of one hundred and fifty thousand acres for an agricultural college, July 2, 1862, and the grant of all the swamp and overflowed lands in the State belonging to the Government, September 28, 1850. The second class of lands, belonging to the State by reason of its sovereignty, includes the shore of the sea and of its bays and inlets, in the common law definition of the word "shore;" that is, the land usually overflowed by the neap or ordinary tides. (*Pollard's Lessee v. Hagan*, 3 How. 212; *Goodtitle v.*

Kibbe, 9 How. 471; 13 How. 25; *Teschemacher v. Thompson*, 18 Cal. 21; Act of 1850 adopting the common law, Wood's Digest, 168.) In the Act of 1855 (page 189) there is a direct expression of legislative opinion as to the character of the land owned by the State by virtue of her sovereignty. The Act is entitled "An Act to provide for the sale of the swamp and overflowed lands belonging to this State," but it is provided in the eighteenth section that the Act "shall not apply to or in any manner affect any lands belonging to this State by virtue of its sovereignty; below the line of ordinary high tide water, or the sea shore and the shores of the harbors on the coast of this State." In so far as the lands held by grant are "swampy or subject to such periodical overflows as to injure or destroy the crops" (see circular of General Land Office, March 8, 1864, Wood's Digest, p. 746,) the State became the owner of them by reason of the Act of September 28, 1850, commonly known as the "Arkansas Act."

From this examination it appears that the lands included in the defendant's patent are lands that became the property of the State by reason of its sovereignty.

2. None of the lands belonging to the State by reason of her sovereignty were offered for sale by the Act of 1855, as we have already seen. This Act was repealed by the Act of April 21, 1858. (Acts 1858, p. 198.) That Act by its title provides for the sale of "swamp and overflowed lands," but the first section not only describes the lands offered for sale as "swampy and overflowed," but indicates their character still more precisely by referring to them as lands comprehended in the grant by Congress of September 28, 1850. By section thirteen all swamp and overflowed lands, situated in certain localities named, are permanently excepted out of the operation of the Act, and in so far as the State's swamp and overflowed land may be made up of "salt marsh," a right to pre-empt is reserved for six months to the owners of the adjoining arable land. The result is that nothing was offered for sale by the Act of 1858, except the lands falling within the description of the Arkansas grant of 1850; and as the land included

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in the defendant's patent is not within that description, it follows that the groundwork of defendant's purchase must be sought for and found, if at all, in subsequent legislation.

It is urged, however, on the part of the respondent, that it appears from the proviso to the first section of the Act of 1858 that the State by that Act offered for sale its lands situate below ordinary high tide. The proviso is as follows: "*Provided*, that if upon the survey of such lands any portion thereof shall be found to be lands belonging to the State by right of her sovereignty, the moneys arising therefrom shall be paid into the Treasury of the State as other State revenues." This proviso is to be read in the light of the subject matter. It is well known that that portion of the swamp lands of the State known as "salt marsh" are threaded by channels of greater or less width within the ebb and flow of the tide, which channels are of little or no use either in the way of fishing or navigation. They are but extensions of the "mud flats," and like them belong to the State by right of its sovereignty. While the principal purpose of the Act was to sell the swamp and overflowed lands, which the State held by grant, still it was considered that that purpose could be best subserved by allowing purchasers of salt marsh to include such channels, when reasonably necessary, within their surveys. To that extent and under such or kindred circumstances it is true that the lands belonging to the State by reason of her sovereignty were offered for sale by the Act of 1858. But none of these circumstances connect themselves with the lands included in the defendant's patent. The words "if any portion thereof shall be found," etc., show very clearly that the Legislature considered the proviso as but a relaxation of the general rule in favor of a case which it regarded as exceptional.

3. The Act of April, 1859, is amendatory of the Act of 1858, but we do not consider that it enlarges the scope of the offer to sell contained in that Act. It applies to "persons who wish to purchase under this Act," (the Act of 1858) to land that is "swamp or swampy for the greater part," or "that is

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subject to inundation at the planting, growing or harvesting seasons, so as to endanger or destroy the crops, taking the average seasons for a reasonable number of years prior to the year 1850 as a rule of determination." If the Legislature had intended to offer all the lands for sale owned by the State by virtue of its sovereignty, it is not to be supposed that a description so labored and so inapposite would have been adopted. The lands of the defendant's patent are neither swamp or swampy, nor is there any sensible connection between them and the "seasons" named, nor between them and "crops;" and the "average" stated might very well have been spared in view of the fact that a state of "inundation" recurring with the regularity of the tides is the normal condition of those lands.

But reference is also made to the second proviso of the fourth section of the Act of 1859, and it is claimed that it appears from that proviso that the Legislature intended to offer for sale indiscriminately all the lands which the State owned by reason of its sovereignty. The proviso is as follows: "*Provided*, further, that the said claim shall not exceed six hundred and forty acres, or measure more than one half mile front, by legal subdivision, on any bay, lake, or navigable stream." The lands included in the patent have in fact no relation to any bay or lake or navigable stream, and, therefore, if they should be considered as without the Act, the just operation of the proviso would be in no manner interfered with. The swamp and overflowed lands offered for sale and claimed by grant, border to a great extent on bays, lakes or navigable streams, as matter of fact. They extend down to the line of ordinary high water, and the lands claimed by the State by right of sovereignty extend up to the same line, and the only purpose of the proviso was to limit the number of acres which the citizen could buy landward from that line, and to limit also the extent of the frontage upon it. A conveyance by the State bounding upon the sea, or upon a bay, or navigable stream, would extend to high water mark. The

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proviso is then entirely reconcilable with the views which we entertain as to the real purpose of the Act.

4. The Act of May 13, 1861, (Acts of 1861, p. 355,) entitled "An Act to provide for the reclamation and segregation of swamp and overflowed land, and salt marsh and tide lands donated to this State by Act of Congress," has no bearing upon the question of the validity of the defendant's purchase, for the only purchases it provides for not only lie in the future, but are to be made after the segregation contemplated by the Act (Sections 19, 27); and it may be added that the record shows that defendant did not purchase with any reference to that Act, nor does the argument of counsel claim that he did.

5. The only question remaining to be considered is, whether the purchase of defendant was authorized by the Act of May 14, 1861. (Acts 1861, p. 363.) The Act ratifies a class of purchases previously made, and authorizes purchases thereafter; but as the purchase of the defendant was not only consummated but initiated after the passage of the Act, it does not fall within the class of purchases which the Act was intended to "ratify."

The Act is entitled "An Act to provide for the sale of the marsh and tide lands of this State," and is as follows:

"The sales of all marsh and tide lands belonging to this State that have been made in accordance with the provisions of any of the Acts of the Legislature providing for the sale of the swamp and overflowed lands belonging to this State are hereby ratified and confirmed, and any of said marsh and tide lands that remain unsold may be purchased under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this State, and all moneys derived from the sale of such lands shall be paid into the State swamp land fund, to be used for the reclamation of the swamp and overflowed lands; *provided*, no marsh or tide lands located within five miles of the City of San Francisco or of the City of Oakland, or within one mile and one half of the State Prison grounds at Point San Quentin, shall be

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sold or purchased by authority of this Act; and, *provided*, further, that no sales of lands, either tide or marsh, excepting Alcalde grants, which are hereby ratified and confirmed, within five miles of said cities, or within one mile and one half of the State Prison grounds aforesaid, shall be confirmed by this Act."

For all the purposes of the present discussion we shall assume that the word "tide" is used in contradistinction to the word "marsh," and that it is applicable to all the lands which the State owns by reason of its sovereignty, lying below ordinary high water mark, unless it appears that the meaning of the word, or rather the words, "tide lands," is limited to lands of that character that are capable of reclamation.

It is to be noticed, in the first place, that the purchase moneys of the lands intended to be sold are, by the Act, to be paid into the "State swamp land fund," and are "to be used for the reclamation of the swamp and overflowed lands." The grant to this State of the swamp and overflowed lands contained a provision that the proceeds of sales should be devoted by the State, so far as should be necessary, to their reclamation; and the policy of the State, as shown by the general current of its legislation, has been to make those lands pay for their own reclamation; and so rigorously was that policy adhered to in 1858 that by the Act of that year, if any land claimed by the State by right of sovereignty "should be found to be included in a survey of swamp and overflowed lands," it was required that the moneys arising therefrom should be paid into the Treasury of the State as other State revenues. If the Legislature intended by the Act of May 14, 1861, to secure the reclamation of the public lands, except by sales of such as were themselves reclaimable, then it must be held to have abandoned a policy not only sensible in itself, but one which had become traditional also.

But, further, the Act in question requires that purchases "should be under the provisions of the laws now in force, providing for the sale of swamp and overflowed lands of this

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State." The Acts then in force were the Act of 1858, as amended in 1859, and the Act of May 31, 1861. The former Act was passed for the purpose of "reclamation," as stated in the title, and all purchase moneys are required to be credited, when paid in, to the swamp land fund, to be appropriated to the work of reclamation as the Legislature shall thereafter direct. The Act of 1859 is but amendatory of the Act of 1858, and therefore in effect bears its title, and it does not vary the disposition to be made of the purchase moneys.

Though the Act of 1859 presents a form of affidavit differing in some respects from that prescribed by the Act that preceded it, yet in our judgment the Acts agree in this, that the lands to which they both relate are lands susceptible of reclamation; and as to the Act of May 13, 1861, "reclamation" is one of the objects avowed in its title, and one to which its provisions steadily refer.

From the foregoing examination it appears then that one of the leading "provisions" subject to which tide lands were offered for sale, under the Act of May 14, 1861, required that they should be reclaimable in their character. It is no misuse of terms to hold that the very subject matter of an enactment is within its "provisions," and it is difficult to see how the respondent could purchase a kind of land "under" the "provisions," referred to in the Act of 1861, to which lands those provisions had no just application. It is at least indisputable that the provisions under which lands are to be bought by the Act in question include all matters of procedure, nor can it be doubted that the affidavit required by the Act of 1859 is a part of the procedure. But the nature of the facts to be set forth in the affidavit fix the character of the land to which the affidavit was intended to apply, and the land to which the affidavit was intended to apply must be the land, and the only land, which the Legislature intended should be sold. It may be true, as the counsel of the respondent contends, that one of the purposes of the affidavit (and counsel insists that it was the sole purpose) was to distinguish between the lower lands and uplands; but to our minds it is equally clear that the pur-

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pose was to distinguish also between tide lands that were reclaimable on the one hand and those that were irreclaimable on the other. The "facts" of the affidavit are to be regarded as tests of character, and while the words "swamp" and "swampy," and the reference to "planting, growing or harvesting seasons," etc., and to "crops," very clearly exclude uplands from the offer to sell, they are in our judgment no less efficient to exclude lands of the quality covered by the respondent's patent.

7. As to the demurrer for misjoinder of parties plaintiff.

It is not denied that the State is interested in the principal purpose of the bill—the cancellation of the respondent's patent; and, as owner of the land, it could properly claim an injunction restraining the defendant from removing the asphaltum.

The asphaltum company claims an interest in the lands under the mining laws of this State; but over and beyond that, it is a party to an action of replevin that cannot be determined upon its merits so long as the respondent's patent shall be outstanding; and Pierce is interested in the cancellation of the patent for a similar reason. While it is true that there is, in strictness, no joint interest vested in the plaintiffs adverse to the respondent, still they all have a common interest in annulling the patent—and that is enough. (Storey's Eq. Pl. § 278a, 279, 279a; *Fellows v. Fellows*, 4 Cow. 682; *Owen v. Frink et al.* 24 Cal. 171.)

But admitting that the plaintiffs have a common interest to the intent of cancellation, it is still insisted that the people have no interest in the temporary injunction granted in the first instance, except in so far as it restrains the defendant from excavating and removing the asphaltum. That Pierce and the company having no interests in the land, nor in the asphaltum deposits, are interested in the injunction only in so far as it restrains the prosecution of the personal actions before referred to, pending this litigation. Assuming that there is a misjoinder in this aspect of the complaint, still there being no misjoinder of parties so far as the question of the validity of the patent

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and the relief of cancellation is concerned, the demurrer should be overruled on the ground that it is too general. If a demurrer is too general, that is, if it covers, or is applied to the whole bill, when it is good as to part only it will be overruled; for a demurrer cannot be good as to a part which it covers and bad as to the rest, and therefore it must stand or fall together. But again, the objection of multifariousness, comprehending to some extent the case of misjoinder of parties and causes, is in many cases a matter of discretion, and no general rule can be laid down on the subject. (Storey's Eq. Pl. § 284a, 533.) As matter of discretion, we consider that in this case there is no misjoinder of parties or of causes of actions. The parties are all interested in the principal question raised by the complaint; the issues tendered are simple and foreshadow no embarrassment to a convenient and orderly trial; and by the joinder objected to a multiplicity of suits has been avoided. We add further, that no question upon the demurrer is properly before us, but as the parties have argued it we have concluded to give our opinion upon it.

The order dissolving the injunction is reversed.

Mr. Justice SAWYER expressed no opinion.

**MORTIMER LENT v. WILLIAM SHEAR, ALEXANDER
B. GROGAN, ANTHONY LUDLUM, AND JOHN A.
CARDINELLI.**

MORTGAGES — STATUTE OF LIMITATIONS.—If one who has a mortgage upon a tract of land leaves the same with another who has a subsequent mortgage upon the same land, and makes him his attorney in fact, with knowledge of such subsequent mortgage, with power to demand, collect, and receive the monthly interest, but without any power or any instructions to enforce the collection of the mortgage, and without the attorney in fact undertaking the trust of enforcing the collection of the mortgage, and while in the hands of the attorney in fact the mortgage becomes barred by the Statute of Limitations, the attorney in fact has not been guilty of such fraud as will preclude him, when made a party to a suit afterwards brought to foreclose the mortgage, from taking advantage of the Statute of Limitations to prevent the same from having priority over his subsequent mortgage. Had the attorney in

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fact undertaken the trust and assumed the duty of enforcing the mortgage by legal proceedings, and failed to do so until it was barred by the Statute of Limitations, he would have been precluded from availing himself of the statute as a defense in a suit afterwards brought to foreclose it, and the same would still be entitled to priority over his own mortgage.

Lord v. Morris, 18 Cal. 484, and *McCarthy v. White*, 21 Cal. 501, affirmed as to the right of a subsequent mortgagee or purchaser to plead the Statute of Limitations to defeat the enforcement of the lien of a prior mortgage.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

The finding admits that, as matter of *law*, the statute would bar the plaintiff as against Grogan; but it is said that in *equity* the defendant Grogan shall not avail himself of the defense of the statute. This is supposed to rest upon some *misconduct* of Grogan in relation to the notes and mortgages of Lent, by which they were permitted to become barred.

The Court below finds as a fact that Grogan was the agent by parol of Lent for the foreclosure of these mortgages. That finding is alike unsustained by *proof* or *law*.

The record shows that the defendant Grogan held a special letter or authority from Lent to *collect interest only*. Would a payment to him of the *principal* by Shear have been a valid payment under that power? Certainly not; the power being *special*, as contradistinguished in law from *general*, is *strictly construed*.

"Indeed, all written powers, such as letters of attorney or letters of instruction, receive a strict interpretation, the authority never extending beyond that which is *given in terms*, or is absolutely necessary for carrying the authority so given into effect." (Dunlap's Paley's Agency, 192.) Now, upon this general strict construction of *all* powers of attorney, is *super-added* another and yet more strict rule of *construction*, when a special or particular power is under consideration.

"There is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the

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case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted for a *particular* purpose, and with a *limited* and *circumscribed* authority, cannot bind the principal by any act in which he exceeds his authority," etc. (Dunlap's Paley's Agency, 203.) "But a *special* agent who is employed about one specific act, or *certain specific acts only*, does not bind his employer unless his authority be strictly pursued," etc. (Id. 201.)

But the provisions of this written power are *so special*, (being confined absolutely to the *collection of interest only*,) that there is no room for construction, and there are not presented here the *general words* which usually give rise to *difficulties in construing the instrument*.

If, then, the debtor Shear *could not safely* have paid to Grogan the *principal debt* (as contradistinguished from the interest) owing by him to Lent, then it was not the *duty* of Grogan to collect it. Could Grogan, under that power, have released or discharged the Lent mortgages upon the records, under Articles 374 or 2,993, Wood's Digest? Certainly not; nor had he any authority to foreclose these mortgages. If he had, where did he get it? If he had attempted it, and *expenses had been incurred*, Grogan would have been called upon to *produce his authority* to incur those expenses, and the inquiry would at once have arisen — Can an agent, authorized to collect *interest only*, collect *principal* also? Can he *enforce* its collection?

If an agent is expressly empowered to collect *monthly accruing interest*, does it not amount to a positive negative upon his power to collect principal? ("*Expressio unius est exclusio alterius.*")

Shafter & Gould, for Respondents.

Independent of any direct and express power to foreclose in terms, it is indisputable that the power was given, and in writing, to collect the interest. This power to collect necessarily involves the power to enforce collection in any mode which the agent may choose to employ. One of these modes

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was by the foreclosure of the mortgages, and although that might involve the collection of more than the interest, it would only be an unavoidable incident arising from the nature of the power and the rule of law which, in such cases, would compel the Court to give complete relief, and not to dole it out by piecemeal.

But as a mere question of power, it must be undeniable that:

1st. The power to collect the interest confers the power to enforce collection.

2d. That the power to enforce collection implies the power to foreclose.

3d. The power to foreclose necessarily carries the incident of collecting the whole amount, both principal and interest.

The rule laid down by writers on agency is, that the power given in terms will be extended to whatever is necessary and proper for carrying the authority so given into full effect. (Story on Agency, § 68.)

Nor can Grogan escape the charge of constructive fraud upon another ground. It was his duty, as agent, to conserve the debt; out of the debt arose the interest, of which he had especial charge; if he permitted the debt to be destroyed, the interest was destroyed with it; his power over the one necessarily implied sufficient power over the other to preserve the one which was the subject of his agency. His remedy was simple and easy without resorting to suit at law. He had only to apply to the debtor for a renewal in writing of the promise to pay, and we have shown that his mere request to the debtor would have been sufficient to accomplish that object. His failure to do this is a fraudulent neglect, if ever there was one, and will certainly be so adjudged in a case where he is personally and the only one to be benefited by the fraud.

The diligence here insisted on is only ordinary diligence, such as a prudent man would always exercise in carrying on his own business. (Story on Agency, § 183, *et seq.*; Story on Bailment, § 186, *et seq.*)

In the relation of principal and agent, the rule of the law

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demands "*uberrima fides*" in all transactions between the parties. (1 Story Eq. J. §§ 218, 315.)

By the Court, SAWYER, J.

Appellant relies principally upon the cases of *Lord v. Morris*, 18 Cal. 484, and *McCarthy v. White*, 21 Cal. 501. Respondents insist that there are elements in this case which distinguish it from the cases cited, and withdraw it from the operation of the Statute of Limitations as construed in those cases. If mistaken in this, respondents' counsel then earnestly insist that those decisions are erroneous, and urge the Court to re-examine the questions decided, and if found to be so, to overrule the cases.

Mr. Justice Norton, in *McCarthy v. White*, said: "I concur in the decision of this case upon the ground that both the questions upon which there could be any argument upon principle have been decided by this Court in the case of *Lord v. Morris*, and that these are questions of that character that, once deliberately decided, and after having stood for several years as rules to govern transactions, they should not be opened merely to consider again the weight of conflicting decisions and opposing reasons." These considerations operate with still greater force now. The questions arise upon the construction of a statute of very extended and general application, and frequently set up as a defense in this State. *Lord v. Morris* was decided three years ago. Three sessions of the Legislature have been held since the announcement of the decision, and no amendment of the Act upon the point decided has been made. Both the Courts and the Legislature have acquiesced in the principles announced in the decision. Important rights may in many instances have accrued under it, and for this reason we should not feel at liberty to overrule the case, even if we should arrive at a different conclusion from that attained by the learned Justices who decided it. Entertaining these views, we do not feel it incumbent on us to re-examine the reasons upon which the decisions are based.

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The right of action as to defendant Grogan was barred by the statute, as construed in *Lord v. Morris*, and *McCarthy v. White*, before referred to, and in *Low v. Allen*, *ante*, 141. The only question is whether the statute was allowed to run till the action was barred in consequence of a breach of trust on the part of Grogan, by which such a fraud was practiced by him upon the rights of Lent, as to render it inequitable to permit him to avail himself of the fruits of his breach of trust and fraud by setting up the bar as a defense. The facts are as follows:

On the 30th of July, 1853, defendant Shear executed to Hadder a note for two thousand dollars, payable three months after date, and secured it by a mortgage on the lands described in the complaint, which note and mortgage were assigned to plaintiff on the 30th of May, 1854.

On the 22d of August, 1853, said Shear executed to defendant Grogan a note for four thousand dollars, payable six months after date, and secured it by a mortgage on the same land.

On the 1st of April, 1854, said Shear executed to plaintiff another note for two thousand five hundred dollars, payable one year after date, also secured by a mortgage on the land.

Soon after the purchase of the Hadder note and mortgage, plaintiff left California for New York, his permanent residence. Before his departure for New York he placed the two notes and mortgages in the hands of the defendant Grogan, together with a power of attorney authorizing Grogan to collect the interest on said mortgages. The Court finds that soon afterwards, to wit: before the 16th day of October, 1854, plaintiff "gave him (Grogan) power by parol to enforce the collection of said notes by foreclosure of the mortgages," to which latter finding appellants except, as not being supported by evidence. Defendant Grogan retained the notes in his possession till February, 1858, collecting interest from time to time and remitting it as collected, charging commissions. But no interest appears from the evidence to have been collected or received by Grogan after the spring of 1855. No suit had been commenced to foreclose the Hadder mortgage, and no

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written acknowledgment by Shear had been obtained or requested by Grogan when the four years had elapsed after the note fell due. Grogan, without giving notice to plaintiff, commenced suit to foreclose his own mortgage, on the 7th of December, 1857, before it was barred, but after the bar of the statute had attached to the Hadder note and mortgage. In February, 1860, Shear paid to plaintiff, on the Hadder note, one hundred dollars, and fifty dollars more on the 5th of March, 1863, and on the latter date gave a written acknowledgment of such payments, signed by him.

Upon these facts found by the Court, the conclusion of law was deduced, "that, in equity, the defendant, Grogan is not permitted to set up the Statute of Limitations against the plaintiff," and that plaintiff is entitled to have the amount due on the Hadder mortgage first satisfied out of the proceeds of the sale of the mortgaged premises, before the payment of the mortgage of defendant Grogan; and a decree was entered in accordance with this conclusion, from which decree and the order denying a new trial Grogan appeals.

There is no finding as a fact that Grogan intentionally allowed the plaintiff's cause of action to be barred for the purpose of enabling himself to take advantage of the bar to acquire the first lien on the property, or that he acted in any respect with a fraudulent motive; nor does the testimony appear to us to justify such a finding.

We cannot perceive that the facts of this case present a stronger case against defendant, Grogan, than that of *McCarthy v. White et al.* presented against Kelly. In some respects the case presented stronger equities in favor of the plaintiff than this; for in that case the plaintiff was ignorant of the adverse interest of his agent, Kelly, whereas in this, the plaintiff was perfectly aware of the mortgage of Grogan, and that not only the principal, but the interest, was longer in arrears than on his own. Besides, there is nothing in the findings, or even in the evidence to show that any discretion was given to Grogan as to bringing suit or enforcing payment, or that he had any instructions, or made any promise to bring suit with-

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out further consulting with plaintiff. The finding only extends to the power to collect. On the contrary, upon looking at the evidence, which is all in the record, to see its bearing upon points not embraced in the finding, we find from the letters of the plaintiff, and evidence in which there is no conflict, that plaintiff had himself the question of the expediency of foreclosing under consideration. In a letter to Grogan, plaintiff stated that he would express his views upon the question in his next, and suggested that Grogan should urge the prompt payment of his own (Grogan's) interest. This is the last that is heard of him in the evidence. It is not found, nor does the evidence show, that plaintiff relied upon Grogan to take legal measures to enforce the collection of the notes, or that it was incumbent on Grogan to do so. The note was some seven months overdue when plaintiff purchased it and when it was left with Grogan. Although long overdue, it was evidently purchased with an intent to allow it to run at interest. It was not left with Grogan for immediate collection. He was not an attorney at law. But the object, as expressed in the power of attorney, was "to demand, collect and receive the monthly interest as the same shall become due and payable." Had plaintiff expected Grogan to institute suit, he would scarcely have tolerated a delay of years, without taking the matter out of his hands—certainly not without remonstrance. It would seem from the evidence that whatever "power" Grogan may have been invested with, plaintiff exercised his own judgment as to whether payment should be enforced or not. He had been in California, purchased the note and mortgage while here, and he must be presumed to know the law with reference to the limitation of actions. Like the case of *McCarthy v. White*, there is no finding as to the duties or undertakings of Grogan; the finding is limited to the fact that he had "power in writing" to collect the interest, and "power by parol" to collect the principal; but it is not clear upon what evidence the latter finding was based, unless it was inferred from the acts of Grogan. There is no direct evidence to support it, while there is the positive testimony of Grogan

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to the contrary; and soon after giving the written power he left the State and does not appear to have ever returned. The case is clearly within the principle of *McCarthy v. White*, on the question growing out of the agency.

But there is another view which seems to be entitled to weight. The plaintiff has sustained no injury in consequence of the neglect of defendant Grogan to commence suit against Shear. Shear has not set up the Statute of Limitations, and the plaintiff has obtained, by his decree foreclosing the mortgage as to Shear, precisely the same relief as against Shear, and Shear's interest in the land, that he would have obtained had the suit been commenced within four years after the right of action accrued. The postponement of the Hadder mortgage to Grogan's, by reason of the bar of the Statute of Limitations, results from the failure of Grogan to commence suit against himself, and not his failure to commence suit against Shear, or to procure a written acknowledgment of indebtedness from Shear. Upon the principles of the decision of *Lord v. Morris*, 18 Cal. 484, and *Low v. Allen*, (*ante*,) neither an acknowledgment of the indebtedness in writing by Shear, nor the commencement of a suit to foreclose the Hadder mortgage against Shear would have prevented the running of the statute as against Grogan, unless he also should be made a party. The Hadder mortgage was due on the 3d of November, 1853, and a right of action to foreclose the mortgage against Grogan — whose mortgage bears date August 22, 1853 — accrued on that day. A suit against Shear would not prevent the statute from running upon a cause of action against Grogan, even if dependent upon the same instrument. The mortgage is not a conveyance under our system; it gives no estate in the land, or interest available otherwise than by suit of foreclosure, judgment and sale. In other words, it only creates a lien, a cause of action to be enforced against the land. Under the decisions in *Lord v. Morris*, and *Low v. Allen*, the mortgage is an instrument within the meaning of the Statute of Limitations, distinct from the instrument constituting the evidence of the debt; and under the nineteenth section of the

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Statute of Limitations, if not under the fourteenth, the cause of action founded upon the mortgage is barred in four years, the same time as the cause of action founded upon the note. On the theory of these cases, when the mortgagor conveys the equity of redemption, (if, indeed, this term may be used under our system to designate the estate of his mortgagor) the debt and the security, and consequently the causes of action founded on them, respectively, became separated — the cause of action upon the note continuing against the maker and mortgagor, and the cause of action upon the mortgage against the property following the property, and attaching itself to the grantee. Henceforth no act of the mortgagor, and no proceeding against him alone, can affect the cause of action following the land conveyed and attaching itself to the grantee, or can affect such grantee. And upon this theory defendant, Grogan, set up the bar to the cause of action existing against himself, and not the bar to the cause of action existing against Shear, even though the action may be barred as to both.

Obtaining a written acknowledgment of the indebtedness from Shear, or commencing suit against him would, therefore, have been of no avail to prevent the bar of the statute as to Grogan, without Grogan himself becoming a party to the renewal of the contract, or to the proceedings for foreclosure. Unless it was clearly the duty of Grogan, as agent of Lent, to commence suit against himself to foreclose the Hadder mortgage, there was no such fraud on his part as would preclude him from availing himself of the defense set up. Undoubtedly, if he undertook the trust and assumed the duty of enforcing the demand against himself, or even generally, and the plaintiff relied on him to do it, he was bound to execute the trust in good faith. But the Court has not found, and in our opinion the evidence would not justify a finding, as a fact, that he assumed this duty, or that plaintiff relied on him to enforce collection at all, either as against Shear or himself, or that there was any fraud. We are not satisfied, from the evidence, which is all in the record, that the discretion was left with Grogan. To our minds, the contrary is the more reason-

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able inference from the evidence. Shear was a cousin of plaintiff, and this may be the reason of his leniency. The interest on the note due him was payable monthly, and more than two years had elapsed since the last payment of interest before the bar of the statute attached. He was informed by Grogan of the exact condition of affairs—knew of Grogan's mortgage, and that the interest on it was longer in arrears than on his own—never gave any instructions to foreclose, but on the contrary had the expediency of foreclosing himself under advisement the last time he was heard from, so far as is shown by the evidence. It seems impossible to come to any other conclusion from the evidence in the record, than that Lent exercised his own discretion and did not expect or rely upon Grogan to commence suit even against Shear, and much less against himself without special instructions. But the Court has not passed upon these points, or found that there was, in fact, any fraud on the part of Grogan. Without a direct finding upon points, then, and without some evidence more satisfactory than is found in the record, we cannot conclude that there was a fraudulent neglect on the part of Grogan. The presumption will not be lightly indulged, that the plaintiff, under the circumstances disclosed by the record, and knowing, as he did, the adverse interest of Grogan, would employ Grogan as agent to prosecute a suit against himself, or that Grogan would accept such a trust, or that plaintiff would rely upon him to perform such service without specific instructions, or a special agreement to do so.

The case of *McCarthy v. White* was not decided till after the judgment was entered in this case, consequently the Judge who tried it did not have that decision before him.

The judgment must be reversed, but that the question as to fraudulent neglect of duty on the part of Grogan may be more fully investigated, we think there should be a new trial—and it is so ordered.

Mr. Justice SHAFTER, having been of counsel, did not participate in the decision of this case.

Argument for Appellant.

JOHN PERRY v. JOHN AMES.

EFFECT OF EXCEPTION IN A STATUTE.—The exception by name of certain counties of the State from the operation of certain provisions of the General Road Law of 1861, limits the exception, by implication, to the counties specified.

COUNTY WARRANT ISSUED WITHOUT AUTHORITY.—If a contract entered into on behalf of a county is unauthorized by law and void, a warrant drawn by the Auditor on the Treasurer, in pursuance of an order of the Board of Supervisors, for work performed under the contract, is also unauthorized and void, and the Treasurer cannot be compelled to pay the same.

SAN MATEO COUNTY.—The provisions of the Act of 1861, entitled "An Act to provide for the establishment, maintenance, and protection of public and private roads," apply to the County of San Mateo.

SAN MATEO COUNTY ROAD FUND — ACTS OF 1857 AND 1861.—The prohibitory provisions of the ninth and tenth sections of the Act of April 18th, 1857, entitled "An Act to reorganize and establish the County of San Mateo," are inconsistent with and repugnant to the fifteenth section of the Act of 1861, entitled "An Act to provide for the establishment, maintenance, and protection of public and private roads," and are repealed by it as to the subject matter of the Act of 1861.

JURISDICTION OF DISTRICT COURTS.—The fourth section of the Sixth Article of the Constitution of this State, as amended in 1863, confers upon the District Courts original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Horace Hawes, for Appellant.

The claim which in this case the County of San Mateo resists is a debt attempted to be contracted by the Board of Supervisors in contravention of sections nine and ten of the Act entitled an Act to reorganize San Mateo County, passed in 1857. (Laws 1857, p. 224.)

The present controversy is reduced to a single point of inquiry, namely: *Were* the foregoing provisions the law in San Mateo County at the time when respondent's claim accrued? for it is conceded that the claim accrued and was contracted in contravention of the sections of the Act referred to, and that it was and is absolutely void, if they were then in force.

The position of respondent's counsel is, that these sections were repealed by the General Road Law of 1861. If wrong

Argument for Appellant.

in this, their claim is invalid, and the judgment in this case should be reversed.

The object of the law of 1857 was, that each year's expenditures should be limited to its income. That law did not contemplate that all contracts, operations, and expenditures of the county government should cease, but only that they should be limited to the revenue. In short, the restriction does not relate to the power to contract generally, but only to the power to *contract a debt*, and to apply the moneys of one year to pay the expenses of a preceding year. By the tenth section of the Act of 1857, no tax can be levied to pay any debt that may be contracted, and as a *necessary consequence*, as well as by the *express provisions* of the ninth section, no part of the money collected in one year can be applied to pay any expenses or liability incurred during any preceding year. In the two sections are three prohibitions, each of which, when stated in its order, is involved in the preceding one as a logical and necessary consequence of it. I will state them in this logical order:

1. No officer or authority shall have power to contract any debt.
2. No tax shall be levied to provide for the payment of any debt.
3. No part of the money collected in one year shall ever be applied to pay any expenses or liability incurred during any preceding year.

Now, the first prohibition includes the second; for, to use the precise language of this Court in *Nouques v. Douglas*, 7 Cal. 81, "all debts contracted in violation of it are utterly void, and there is *no power to levy a tax or appropriate money for the payment thereof*." The prohibition in the law of 1857 is also expressed in stronger and more efficacious terms than those contained in the Seventh Article of the State Constitution, which was the subject of construction in the case just cited. The language of the *Constitution* is, that the Legislature *shall not create a debt*, etc. But in the *law of 1857* it is declared that neither the Supervisors nor any officer or citizen

Argument for Appellant.

shall have power to contract a debt against the county, etc. Implications are also in favor of the acts of the Legislature, as that body has all legislative authority, except what is prohibited. No implications can favor the acts of Boards of Supervisors, for they have *no power* but what is expressly granted by statute.

The third prohibition is likewise a logical result of the second, for if no tax can be levied to pay a debt, it is clear that the money raised by taxation cannot be applied to that purpose; that the money raised in one year "cannot be applied towards the payment of any expenses or liability incurred during any preceding year."

All the cases cited by respondent's counsel tend only to establish a point which is undisputed, that a subsequent statute repeals a former one in respect to such provisions as are so repugnant to the latter that the two cannot stand together. But they have failed to show either that the power to contract for work on roads given by the Road Law is repugnant to the Act of 1857, or that the Act of 1857 is repugnant to the same power conferred by prior laws, and the exercise of which was continued under and subject to the limitation of the Act of 1857. In the case of *Brown v. The County Commissioners*, 21 Penn. 48, it is said: "Whenever two Acts can be made to stand together, it is the duty of the Judge to give full effect to both of them. Even where they are seemingly repugnant, they must, if possible, have such a construction that one may not be a repeal of the other, unless the latter one contain negative words, or the intention to repeal is made manifest by some intelligible form of expression."

Now, there is between the Road Law of 1857 and the limitations of the Act of 1861 no such repugnance. The Board of Supervisors may do all that they are *required* to do under the latter Act, and pay the expense thereof out of the revenues of the year in which the expense is incurred — pay as they go. In other words, they may limit their expenditures to their income.

Argument for Respondent.

Taylor & Hastings, for Respondent.

To determine whether the Road Law of 1861 is repugnant to and in conflict with sections nine and ten of the organic law of San Mateo County, we have only to look at the provisions of the two Acts.

Sections nine and ten expressly prohibit the Board of Supervisors or *any* officer from entering into any contract or creating any liability against the county whatever, and declare that no property shall be taxed to liquidate any such liability or to perform any such contract, nor shall the money collected for one year be applied to the payment of debts or expenses of the preceding year.

Now, the Road Law of 1861 does away with these limitations of power, so far as concerns roads. It will be seen that sections three, five, six, and twelve, of the General Act of 1861, authorize acts which cannot but create debts against the county. Section fifteen *permits the roadmaster, with the consent of the Board of Supervisors, to make contracts in behalf of the county without any limitation as to the amount of the liability to be incurred, and without any consideration as to whether, at the time of entering into such contract, there is money in the Treasury, or likely to be.* In section fifteen alone, the word *contract* occurs no less than three times, and always in the permissive sense as touching the rights of the officers to contract in behalf of their county. The roadmaster, of his own motion, must maintain the roads in good repair, and when any bridge, culvert, etc., shall become injured, or render the way impassable or dangerous, *then* he is to incur the necessary expense in its repair or alteration.

We take it, therefore, to be clear that the organic law of San Mateo County is repealed, *so far as roads* are in question, by the General Road Law of the State, the two being directly hostile and repugnant. Section twenty-two, of the law of 1861, repeals "all Acts or *parts* of Acts in conflict with the provisions of this Act," while section twenty-one particularly designates those *counties* and certain incorporated towns which

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"are excepted from the provisions of this Act," among which San Mateo County finds no place, and therefore, by a well known rule, is specially included within the Act.

In short, the principle invoked here is that declared in the *State v. Conkling*, 19 Cal. 512: "That when the Legislature makes a revision of particular statutes, and frames a general statute upon the subject matter, and from the framework of the Act it is apparent that the Legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored."

This view is rendered conclusive from the fact that in 1859 a Special Road Act was passed for San Mateo County, (Laws of 1859, p. 229, *et seq.*) which was anxiously framed to keep within the organic Act of 1857.

The word *contract* in the Road Law of 1859, is never once used. No one will pretend that the Road Law of 1859 is the Road Law of San Mateo County since the General Law of 1861. In respect to roads, the County of San Mateo is governed by the same law as the County of Alameda. In Alameda this claim would not be questioned; by San Mateo it cannot be resisted.

By the Court, CURREY, J.

In December, 1863, the plaintiff, who had become the owner and holder of certain county warrants of the County of San Mateo, applied by petition to the District Court of the Twelfth Judicial District, for a writ of mandamus to be directed to the defendant, as Treasurer of said county, requiring him to pay the amount due thereon upon their presentation to him for that purpose. The defendant appeared and filed an answer setting forth the grounds why the petition should not be granted, and thereupon the matters in controversy were submitted to the Court, and a judgment was rendered directing a writ of mandamus to be issued in accordance

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with the prayer of the plaintiff. From this judgment the defendant has appealed.

In April, 1862, the roadmaster of one of the road districts in the County of San Mateo, with the consent of the Board of Supervisors, after having first given the notice required by law, entered into a contract with one Lloyd, to build a bridge over one of the highways in such district, for a price stipulated; and in due time the bridge was constructed by Lloyd, and the work was approved by the proper authority, when the Auditor of the county, in pursuance of an order before then made by the Board of Supervisors, drew two warrants or drafts, each of which was dated August 2, 1862, and directed to the Treasurer of San Mateo County, requesting him to pay to the order of the said Lloyd two hundred and fifty dollars out of the road fund, for the building of the bridge. On the same day, Lloyd presented these warrants to the Treasurer for payment, and, there being no funds in the Treasury with which to pay them, the Treasurer registered the same and indorsed them "Not paid for want of funds," and signed his name thereto as County Treasurer. After the plaintiff became the owner of the warrants, he presented them for payment to the Treasurer, in whose hands there was at the time sufficient money applicable to the payment of the warrants, to pay the same with the interest that had accrued thereon. The Treasurer refused and still refuses to pay the warrants, on the ground that the contract with Lloyd was not authorized by the Act of the Legislature of this State, passed in 1857, entitled "An Act to reorganize and establish the County of San Mateo;" and that therefore the warrants were issued without authority and are void. (Laws 1857, p. 222.)

The decision of the case depends upon the effect of this Act of 1857, and the Act of 1861, entitled "An Act to provide for the establishment, maintenance and protection of public and private roads." (Laws of 1861, p. 389.) If the Act of 1857, so far as it applies to the question involved in this case, is to control, then it is admitted, on the part of the plaintiff,

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the writ ought not to have been granted, and the judgment cannot stand.

The defendant relies upon the ninth and tenth sections of this Act in justification of his refusal to pay the amount alleged to be due by these warrants. These sections read as follows:

“SEC. 9. The Board of Supervisors shall also have powers to levy and collect an annual tax in the manner prescribed by law, not exceeding fifty cents on each one hundred dollars of taxable property in said county, to provide for the current expenses of the county; but no part of the money so collected shall be applied toward the payment of any expenses, debt or liability incurred during any preceding year.

“SEC. 10. Neither the Board of Supervisors, nor any officer or citizen of said county, shall have power to contract any debt or liability against the said county; and no person or property therein shall ever be liable or subject to be taxed for any debt whatever hereafter contracted against the said county by the Board of Supervisors; *provided*, the provisions of this section shall not be held to prevent the paying out of money actually in the Treasury, to the objects contemplated by law.”

The plaintiff's counsel contends that these sections of the Act of 1857 are necessarily repealed by the Act of 1861.

The Act of 1861 is a law general in its nature, and was evidently designed to have application to the whole State, except in so far as certain counties and portions of counties are exempted from its operation. The twenty-first section excepts certain counties by name, and all incorporated cities and towns from its provisions, and the Counties of Sonoma and Marin are exempted from the provisions of certain of its sections; from which it is plainly to be inferred that the Act applies to those counties not excepted in terms. The exceptions made operate as a limitation of the exempted counties. *Expressio unius est exclusio alterius* is a maxim of general application in the construction of statutes.

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By the fifteenth section of the Act of 1861 it is provided, that the roadmaster may, with the consent of the Board of Supervisors, make contracts for the purchase of lumber or other material for building bridges or culverts, for grading roads or any other necessary work upon the highways within his district, etc., and subsequently in the same section it is provided that "All payments for the fulfilment of any contract for the purposes heretofore specified, shall be made by drafts drawn on the county road fund by order of the Board of Supervisors."

The process and mode by which the county road fund is to be created, is provided in the thirteenth section of the Act. It consists of a poll tax of two dollars upon all able bodied men of a particular description, and a road tax upon all taxable property in the county, not to exceed twenty-five cents on the hundred dollars.

That it was designed by the Legislature that the provisions of the Act of 1861 should be extended to the County of San Mateo, we see no reason to doubt; nor do we understand the counsel for the appellant to maintain in argument, that the Act was wholly inoperative as to that county, but rather that a promise to pay for services rendered and performed under and in pursuance of the contract made in 1862, could not be enforced, except in the contingency that the road fund of that year was sufficient for the purpose of paying the debt or liability thus created; the result of which would be that the person who had rendered his services upon the faith of the contract and in confidence that the officers of the county, having the matter in charge, would provide the means to pay him the price stipulated, would be entirely without remedy, for the reason that the fund of the designated year proved inadequate for the payment. Thus while the creditor might have the right to compensation for the work performed and accepted on the part of the county, he would be without remedy to enforce his right.

It must be admitted that if the contract entered into between the roadmaster and Lloyd was unauthorized, and therefore void,

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then it would follow that the subsequent act of issuing the warrants for the work performed in pursuance of that contract was also unauthorized and void; and in such case the assignee of Lloyd would be without remedy, because of the want of a right that the law could respect. But does it follow that the contract entered into was rendered void, or proved to be so *ab initio*, because the road fund of 1862 was not sufficient to pay the price agreed upon for building the bridge?

It is maintained on the part of the appellant that the direct object of the Act of 1857 was that each year's expenditures should be limited to its income, and that no part of the money collected in any one year can be applied toward the payment of any expenses, debt or liability incurred during any preceding year. This may be so as to the matters within the purview of the Act of 1857, in respect to which the inhibitions of the ninth and tenth sections of that Act had reference. The Act of 1861 conferred upon the Supervisors and the roadmaster additional duties, and the powers to perform those duties as therein prescribed; and so far as such additional duties and the powers to perform them are repugnant to the restrictions contained in the ninth and tenth sections of the organic Act of the county, to that extent such restrictions were repealed by the Act of 1861, the last section of which repeals "all Acts or parts of Acts in conflict with the provisions of this Act."

The Act of 1857, as already seen, prohibits the application of money collected in one year to the payment of any expenses, debt or liability incurred during any preceding year, and also declares that neither the Board of Supervisors, nor any officer or citizen of the county shall have power to contract any debt or liability against the county; and it further declares that no person or property in the county "shall ever be liable or subject to be taxed for any debt whatsoever hereafter contracted against said county by the Board of Supervisors." But the Act of 1861 authorizes the roadmaster, with the consent of the Board of Supervisors, to make contracts for the purchase of lumber or other material for building bridges or culverts, for grading roads, or any other necessary work upon

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the highways within his district. Here is authority for contracting a debt or liability against the county; and the Act provides for the payment of the debt thus created. The power granted by the Act of 1861, could not be exercised in respect to the subjects of the Act, if the prohibitions of the Act of 1857 be of binding authority; hence the prohibitory provisions of that Act must be regarded as inconsistent with and repugnant to the provisions of the Act of 1861, and to have been repealed by it, as to the subject matter of the latter Act. The conflict between these Acts in respect to the objects contemplated by the last of the two, is manifest; and this fact being ascertained and determined, the repeal of so much of the organic Act of the county, as is repugnant to, or in conflict with the Act of 1861, is expressly declared in the final section of the last Act. The views we entertain of the question considered render it unnecessary to refer to the doctrines of the law on the subject of repeals by implication.

The judgment is affirmed.

[After the above opinion was pronounced, a re-argument was granted on the petition of the appellant, and the following opinion delivered:]

By the Court, CUREWY, J.

The point discussed on the re-argument of this case is as to whether the Act of 1861 is repugnant to the Act of 1857. In the consideration of the question suggested, the Act of 1861 is to be examined, in the first instance, without reference to the senior Act, in order to ascertain its meaning and the extent of the powers of the officers therein named in relation to the matters committed to their charge. This Act, as may be seen by reference to it, gives to the roadmaster authority to make certain contracts, subject to one condition only, to wit: the consent of the Board of Supervisors. The Act does not limit the amount of debt which may be incurred for the objects contemplated; hence it follows that the roadmaster,

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having the consent of the Board of Supervisors, may enter into the contracts named in the Act, unrestricted by the Act itself as to the amount of the debt to be thereby created.

The Act of 1857 denies to all officers the power to contract any debt or liability against the county. The Act of 1861 empowers the roadmaster to contract debts or liabilities against the county, and fixes no limit as to their amount. It is obvious that both of these Acts cannot be operative. If the Act of 1857 is to have effect in the particular mentioned, then a roadmaster in San Mateo County can have no authority, with the consent of the Supervisors or otherwise, to enter into any contract specified in the Act of 1861. In *Bowen v. Lease*, 5 Hill, 221, the Court say: "As all laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable." This authority, cited on the part of the appellant, we concede states the rule clearly and correctly, and the inquiry is reduced to the point as to whether the Acts under consideration are irreconcilably repugnant to each other. That they are so, we think is manifest upon first impression. The first Act says no officer shall have power to contract any debt against the county, and the last says the roadmaster shall have the power, provided he first obtains the consent of the Board of Supervisors to the exercise of it.

Upon the theory that both Acts cannot have full and entire effect, it is argued on behalf of appellant that the powers granted by the Act of 1861 can be exercised in a limited and restricted degree in subordination to the law of 1857, and if so, then the power so conferred is to be construed as granted with the intention that its exercise shall be thus limited and restricted; and thus it is sought to give effect to the former law as a limitation upon the power of the roadmaster under the latter to making contracts by which the county could only become liable to the extent of the income to the road

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fund of the year. But this limitation necessarily withholds from the officer, *pro tanto*, the power given in terms by the junior law, and to that extent is an abrogation of the power granted. We deem it unnecessary to extend the discussion further. We see no reason to change our former opinion in the case, and the judgment must be allowed to stand, unless it be erroneous for some other cause.

The appellant has made an objection to the jurisdiction of the Court below on constitutional grounds, which, if tenable, demands a reversal of the judgment. The objection is that the Court below had no power to render the judgment in the case, on the ground that the Supreme Court only, had, at the time, jurisdiction in cases of mandamus.

In the enumeration of the powers of the Supreme Court, the fourth section of the Sixth Article of the Constitution as amended, among other things, declares, that "the Court shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." By virtue of this provision this Court has exercised original jurisdiction in the cases enumerated; but until now we have not had occasion to determine the question as to the jurisdiction of the District Courts of the State in the same class of cases. By the sixth section of the same Article of the Constitution as amended, it is provided that "the District Courts shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars." The power to issue writs of mandamus, certiorari and prohibition, was not granted in terms to the Supreme Court by the old Constitution. The power to issue all writs and process necessary to the exercise of its appellate jurisdiction was granted, and beyond this the Court never pretended to exercise jurisdiction by the use of this class of writs. Nor did the old Constitution confer upon the Dis

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trict Courts, by terms of enumeration, power to issue these writs, but it granted to them "original jurisdiction in law and equity, in all civil cases, when the amount in dispute exceeded two hundred dollars, exclusive of interest." Under this general grant of jurisdiction, the District Courts exercised the power to issue writs of mandamus and certiorari, and heard and determined controversies between parties in the mode provided by law in this species of actions or proceedings. The Constitution as amended contains a more specific enumeration of certain powers of the District Courts than did the old Constitution, but it is quite as comprehensive in its general jurisdictional provisions as it was before it was amended. The old Constitution, as already appears, conferred on these Courts original jurisdiction in law and equity, in all civil cases where the amount in dispute exceeded two hundred dollars, exclusive of interest. The new Constitution confers like jurisdiction in all cases in equity, and also in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, toll or municipal fine, and in all cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars. That the District Courts rightfully exercised jurisdiction in this kind of cases under the old Constitution, has never been questioned. Their warrant for it was found in the provision of the Constitution to which we have referred — and that provision, as we have seen, is not more comprehensive than the general provision in the same section of the Constitution as amended. Then upon what ground can it be maintained that the District Courts have not the same jurisdiction in these cases now as under the old Constitution? It cannot be said that those who framed the amendments and the people who adopted them intended to withhold from the District Courts jurisdiction in this class of cases, for the palpable reason that the language of the section as amended embraces the subject as fully and completely as it was embodied in the Constitution before the change. If it had been intended the District Courts should not have this jurisdiction under the amended Constitution, it

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is fair to presume that language would have been employed relieving the question of the embarrassment of reasonable doubt. Nor can it fairly be intended that the District Courts should be deprived of jurisdiction in cases of mandamus and certiorari because the like jurisdiction was conferred in express language upon the Supreme Court. Before then the jurisdiction of the Supreme Court on the subject was limited to the issuing of such writs and process as were necessary to the exercise of their appellate jurisdiction, and by the alteration made, it was designed to clothe the Court, which before then was a purely appellate tribunal, except as to a single subject, with original jurisdiction in cases of mandamus, certiorari and prohibition. There was a reason for conferring power on the Supreme Court to issue these writs. Without a change of the Constitution in this respect, instances of the failure of justice for want of a remedy for the redress of injuries were liable to happen, because of the want of a competent tribunal to issue such writs. To provide against contingencies of the kind suggested, it is just to presume the power was granted to the Supreme Court by the Constitution as amended to issue such writs otherwise than in aid of its appellate jurisdiction alone.

When the Constitution as amended was adopted by the people, it must be presumed they knew what were the provisions of the old Constitution as to the subject of the powers of the Supreme Court and the District Courts, respectively, and were informed as to the extent and effect of the changes made, and also that it was not designed that the general language of the sixth section of the Sixth Article of the Constitution as it was amended, should be of less comprehensive import than the same or equivalent words were in the original instrument.

At the time of the adoption of the amended Constitution it had been decided in effect that the constitutional provisions which conferred appellate jurisdiction on the Supreme Court, in all cases where the matter in dispute exceeded two hundred dollars, exclusive of interest, and which conferred in substantially the same language, original jurisdiction on the District

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Courts, were not to be understood as restricting the jurisdiction of such Courts only to those cases involving questions of property, or the legality of a tax, toll, impost or municipal fine. (*Conant v. Conant*, 10 Cal. 253.) In the case here referred to, Mr. Justice Field said: "It could never have been the intention of the framers of the Constitution to deny to the higher Courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation—such as suits to prevent threatened injury—respecting the guardianship of children—honorary offices, to which no salary is attached, and the like." Here we have a decision upon the text of the Constitution which contained no grant in express terms of the power to hear and determine the action, (which was divorce,) and which, we are satisfied, conformed to the exposition of the Constitution upon the subject, not only of the Courts in the administration of remedies in all that large class of cases where the relief sought was not susceptible of pecuniary estimation, but also of the legislative department from the time of the State's organization. Were we now to deny that under the provisions of the sixth section of the Sixth Article, as amended, the District Courts have not the authority to issue writs of mandamus and certiorari, we of consequence would have to decide, when the case might be presented, that they have no jurisdiction in cases of divorce, and further than this our judgment would be in effect a declaration that all judgments rendered in such large class of cases, since the Courts of this State were organized, were null and void, for the reason that they were *coram non judice*. Whatever might be our views of the subject, were it *res integra*, would not warrant us at this day in disregarding the exposition given to this provision of the Constitution by the Courts and the Legislature, and also by the people in the adoption of the amendments to the Constitution, without changing it in any essential particular as to the point under consideration.

In examining the constitutional question raised, we have considered not only the Constitution as amended, but also the

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Constitution as it was before it was changed; as likewise the judgments of the highest Court in the State pronounced in subordination to its provisions, in order to discover the objects contemplated by the amendments of the organic law, and the extent and effect of the changes made; and we are of opinion that, while the Supreme Court is invested with original jurisdiction in the class of cases enumerated, the District Courts have the same powers over and respecting this species of remedy, as they possessed in like cases, under the original Constitution, and therefore we hold the objection of the appellant to the jurisdiction of the Court below to be invalid.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion on the rehearing.

WILLIAM T. WALLACE v. VOLNEY D. MOODY.

RECORDS WHICH IMPART CONSTRUCTIVE NOTICE.—The record of a deed acknowledged by an officer not authorized by the laws of this State to take and certify acknowledgments of conveyances, copied into the proper book of record of the office of the County Recorder, prior to the passage of the Act of April 30th, 1860, entitled "An Act supplementary to an Act entitled an Act concerning conveyances," imparts constructive notice of its contents, so far as they are copied, to purchasers and incumbrancers subsequent to the passage of said Act.

SAME.—The Act of April 30th, 1860, entitled "An Act supplementary to an Act entitled an Act concerning conveyances," applies to all instruments in writing then copied into the proper books of record of the proper county, and is not limited to such as by reason of non-compliance with some provision of the Registry Act failed to impart notice.

REMEDIAL ACTS.—An Act of a remedial character should receive, having due regard to the language in which it is expressed, a liberal construction, which will bring within its scope every case which comes clearly within its spirit and policy.

APPEAL from the District Court, Third Judicial District, County of Santa Clara.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

Constructive notice by recording, etc., is a creation of the statute (*Mesick v. Sunderland*, 6 Cal. 315; *Dennis v. Burritt*,

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6 Cal. 672); and it was as competent for the lawmaker to say that an unacknowledged deed might be recorded, and that the record should *impart notice*, as that it must be acknowledged before a certain officer, and in a prescribed manner, etc., to do so. By force of the statute all persons are deemed to have notice, though in fact they have not read the record, nor had their attention called to it, or had even been assured by the grantee of a recorded conveyance that no such conveyance had been *made to him*, or, as was held by this Court in *Ricketson v. Richardson*, when the record of the mortgage informed the purchaser that the mortgage was given to secure certain promissory notes *with interest* (the rate of interest not being specified) that it imparted notice of the rate of interest provided for in the notes, viz.: greater than the legal rate.

For similar legislation to that under consideration, see Act of April 11th, 1859, Laws of 1859; Act of April 16, 1852; Wood's Digest, 110, § 1, Art. 424; (*Watson et al. v. Mercer*, 8 Peters, 90; *Satterlee v. Mathews*, 2 Id. 380; see a similar statute, Laws of Missouri, 1847, p. 95.)

S. O. Houghton, for Respondent.

It is conceded by our opponents that the Mayor of Baltimore had no authority to take or certify the acknowledgment of a deed so as to entitle it to record, or to make it admissible as evidence.

That deed, then, was not admissible to record, and the act of the Recorder in copying it upon a book of records in his office was unauthorized and void. (Wood's Digest, Art. 362, Sec. 25.)

The record being void, it imparted no notice whatever; and the effect of that record as notice, if notice at all, is by force of the Act in question.

It is contended by counsel for appellant that by force of that Act, all instruments copied into the books of record in the Recorder's office at the date of the passage of the Act, thereafter imparted notice to subsequent purchasers just as fully, and to the same extent, as though such instruments had been

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properly executed, acknowledged, and certified, by an officer authorized by law to take and certify acknowledgments.

If the Legislature had intended the Act to have any such effect, they could easily have said so. But the language used to express the legislative will falls far short of expressing any such intention.

The Act provides that all instruments of writing now copied into the proper books of record, shall be deemed to impart to subsequent purchasers notice, *so far as and to the extent* that the same may be found recorded, copied, or noted, in the said books of record—not absolutely, however, but qualifiedly.

If it had been intended to make them impart notice without any qualification, the subsequent qualifying words would have been omitted. That such was not the intention is shown by the addition of the qualifying words, to wit: “Notwithstanding any defect, omission, or informality existing in the execution, acknowledgment, certificate of acknowledgment,” etc.

That language means that by reason of any defect, omission, or informality that may appear from the record in the execution of any deed, it shall nevertheless be deemed to impart notice. That notwithstanding any defect, omission, or informality appearing in the acknowledgment, the certificate of acknowledgment, etc., it shall nevertheless be deemed to impart notice.

That, however, is not to say that notwithstanding the instrument has no signature it shall impart notice, nor is it to say that if it has never been acknowledged it shall be deemed to impart notice.

We submit that there is nothing in the Act which dispenses with an acknowledgment any more than it dispenses with a signature.

The language used in the Act, if it can be said to have any clear or definite meaning, indicates that it was only intended to operate upon instruments which had been executed or acknowledged; for if an instrument never was executed, or never was acknowledged, it is clear there was no defect, omission, or informality in the execution or acknowledgment. In

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other words, there could be no such thing as a defect, omission, or informality in a thing, unless it has an existence.

By the Court, SANDERSON, C. J.

This action was brought to recover certain lands in the City of San José, in the County of Santa Clara. The plaintiff alleges seizin in fee on the 7th of July, 1863, and entry and ouster by defendant on the same day. The answer denies the seizin of the plaintiff, but admits the possession of the defendant. The case was tried by the Court without a jury, and after the findings of fact and conclusions of law had been filed, the plaintiff moved the Court to set aside the conclusions of law (they being in favor of the defendant) and substitute conclusions in favor of the plaintiff. This motion was denied by the Court, and the plaintiff duly excepted. And immediately thereafter the plaintiff moved the Court for judgment upon the pleadings and facts, as found by the Court, in his favor as prayed in the complaint. This motion was also denied, and the plaintiff duly excepted. And thereafter the Court rendered a judgment in favor of the defendant.

It appears from the findings that on the 10th day of July, 1849, one Laban Coffin was seized in fee as owner of the premises in controversy, and that on that day he conveyed the same to one Richard B. Fitzgerald; and that before the institution of this action the plaintiff had, by mesne conveyances, acquired all the estate in said premises which passed by the deed from Coffin to Fitzgerald. This deed was executed in the City of Baltimore, in the State of Maryland, and was acknowledged before the then Mayor of that city, who was not authorized by the laws of this State to take the acknowledgments of deeds. The deed, however, was recorded, or copied into the records of Santa Clara County, on the 25th day of November, 1850, and has remained so copied from that time to the present. After this action was commenced, and after the defendant had filed his answer, he obtained a deed of the premises from Coffin, paying therefor the sum of one hundred dollars.

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The only questions presented for our determination are: First—Did the recording of the deed from Coffin to Fitzgerald impart constructive notice of its existence to the defendant at or before the date of his purchase from Coffin? Second—If not, had the defendant actual notice? We have not stated the facts bearing upon the latter question, because the conclusion to which we have come upon the former renders its consideration immaterial.

The only reason assigned why the recording of the deed from Coffin to Fitzgerald does not impart notice to subsequent purchasers, is found in the fact that the acknowledgment was not taken and certified by an officer authorized to do so under the laws of this State. And it is argued that this defect is not cured by the Act of the 30th of April, 1860, entitled "An Act supplementary to an Act entitled an Act concerning conveyances." (Statutes of 1860, p. 357.) The first section of that Act provides as follows:

"All instruments of writing now copied into the proper books of record of the office of the County Recorders of the several counties of this State shall, after the passage of this Act, be deemed to impart to subsequent purchasers and incumbrancers, and all other persons whomsoever, notice of all deeds, mortgages, powers of attorney, contracts, conveyances or other instruments, so far as and to the extent that the same may be found recorded, copied or noted in the said books of record, notwithstanding any defect, omission, or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording, or certificate of recording the same; *provided*, that nothing herein contained shall be construed to affect any rights heretofore acquired in the hands of subsequent grantees or assignees."

The foregoing statute was, and had been for more than three years, in force at the time the defendant obtained his deed from Coffin, and if the deed from Coffin to Fitzgerald can be fairly classed among the instruments mentioned and described therein, it is clear that the defendant took his deed with constructive notice of the prior deed to Fitzgerald.

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The Act in question is of a remedial character, and should receive, having due regard to the language in which it is expressed, a liberal construction, which will bring within its scope every case which comes clearly within its spirit and policy. We are not to hold that the Legislature intended to discriminate between instruments which had been recorded, but which, by reason of a non-compliance with some provision of the Registry Act, failed to impart notice to the world of their contents, but rather that they intended to place all such instruments upon a common footing, unless such discrimination is made to appear by language too clear to admit of doubt. There can be no reason why the Legislature should say that a recorded instrument having a certain defect shall hereafter impart notice, and that another recorded instrument having some other defect shall not. For such a distinction no reason can be assigned, and counsel for the respondent, although insisting that the distinction has been made, is unable to suggest any consideration of policy which could have induced its creation by the Legislature. The language is broad and comprehensive. It includes "all instruments of writing now copied," etc., * * * "notwithstanding any defect, omission or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording or certificate of recording the same." This latter language is not used for the purpose of narrowing and restricting the meaning of the former, and creating, by implication, an exception, as counsel for the respondent contends; but it was used, on the contrary, by way of enlargement and emphasis, and in effect it declares that there shall be no exception to the rule, but that every instrument "now copied," etc., shall impart notice to all the world of its contents, so far as they are copied, and no further.

That the record of the deed from Coffin to Fitzgerald, by virtue of the provision of the foregoing Act, imparted constructive notice of the sale and conveyance by the former to the latter, we have no doubt. To hold otherwise would be to defeat the obvious intent of the Legislature.

Points decided.

It follows that the Court below erred in its conclusions of law, and that the plaintiff was entitled to judgment upon the facts as found.

Judgment reversed, and the Court below directed to render judgment for the plaintiff as prayed for in the complaint.

Mr. Justice RHODES, having been of counsel, did not participate in the decision of this case.

**JAMES LANDERS, AND SARAH LANDERS HIS WIFE,
v. JAMES R. BOLTON.**

CONVEYANCES NOT ACKNOWLEDGED.—Conveyances of real estate, (except such as are required to be executed by married women,) as between the parties to them, are valid and pass the title without being acknowledged or recorded.

SAME.—Such conveyances, if acknowledged as required by law, are admissible in evidence without further proof; but if not so acknowledged, must be proved according to the ordinary rules of law applicable to the subject.

CONVEYANCES BY MARRIED WOMEN.—Conveyances required to be executed by married women are not valid, nor do they pass any title, nor can they be used in evidence, unless acknowledged in the manner prescribed by law.

SUBSCRIBING WITNESSES TO A CONVEYANCE.—Where a conveyance, not acknowledged, is offered in evidence, and it is proved that it was executed by the grantor and witnessed by subscribing witnesses out of the State, and there is no evidence to show that the subscribing witnesses were ever in the State, a sufficient presumption is raised that the subscribing witnesses are not within the jurisdiction of the Court to let in secondary evidence of its execution by the grantor.

HANDWRITING OF SUBSCRIBING WITNESS.—When the subscribing witness to a written instrument is beyond the jurisdiction of the Court, such instrument is admissible in evidence upon proof of the signature of the grantor or obligor, without proving the handwriting of the subscribing witness, unless the instrument is one which the law requires to be attested by witnesses, in which case proof of the handwriting of both parties and subscribing witnesses might be necessary.

COPIES OF INSTRUMENTS RECORDED AS EVIDENCE.—Copies of instruments of those classes entitled to record, duly certified by the Recorder, which were copied into the proper books of record of the proper county, prior to April 30th, 1860, are admissible in evidence under the statute, after proof that the originals are not under the control of the party offering such certified copies, or are lost, and that the originals were genuine instruments, and were in truth executed by the grantor or grantors therein named, notwithstanding such instruments were irregularly recorded by reason of some defect, omission, or informality existing in the acknowledgment or certificate of acknowledgment of the same.

RECORD OF INSTRUMENTS AS NOTICE.—Instruments, in the acknowledgment or certificate of acknowledgment to which there was a defect or omission, and

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which were copied into the proper book of record in the proper county prior to the 30th day of April, 1860, impart to purchasers and incumbrancers becoming such after said date, notice of their contents, the same as though the acknowledgment and certificate had been in due form of law.

ERROR NOT PRESUMED.—The presumptions of law are all in favor of the correctness of the judgment of the Court below. Error will not be presumed, but must be shown affirmatively.

DENIAL OF ALLEGATION IN SWORN PLEADINGS.—An allegation in a sworn answer that "on the 24th day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged, and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial is a mere denial that French and Robinson conveyed the premises, without denying the facts which constitute the conveyance; besides, it does not deny the conveyance—the material fact—but only a conveyance *for a consideration*. Under such denial the party making the averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute.

POSSESSION UNDER UNRECORDED DEED NOTICE OF TITLE.—One who purchases and obtains a conveyance of land, at the time in the open and notorious possession of another who has a prior deed not acknowledged or recorded, executed by the same grantor, is not a *bona fide* purchaser. The possession of the one having the older unrecorded deed is notice of his title.

JUNIOR PURCHASER MUST BUY IN GOOD FAITH AND WITHOUT NOTICE.—In a suit to try the title to land between two who are purchasers from the same grantor, where the oldest deed is neither acknowledged or recorded, the one claiming under the prior unacknowledged and unrecorded deed will prevail, unless the fact appears that the second purchaser bought without notice for a valuable consideration. It is not sufficient for the second purchaser that there is no finding of fact or evidence on the subject, but the fact must be made to appear affirmatively.

POSSESSION OF TENANT.—The possession of a tenant is notice of the title of his landlord.

DEED TO MARRIED WOMAN.—A deed of land to a married woman which shows upon its face the payment of a money consideration is *prima facie* evidence that the land conveyed thereby is the common property of the husband and wife, and subject to the absolute control and disposition of the husband.

EVIDENCE OF TITLE IN A PERSON NOT A PARTY TO THE ACTION.—In an action in which plaintiff claims title to land under a deed executed by a married woman to him, if the deed to such married woman, the grantor, shows upon its face the payment of a money consideration for the land, the defendant may introduce in evidence a prior deed made by the husband of said married woman, the grantor, to a person not a party to the action, to show that nothing passed by the deed from the wife to plaintiff.

Query?—Does the record of a deed, executed by the grantor by his attorney in fact, which is duly acknowledged and recorded, impart notice without a record of the power of attorney?

Argument for Appellants.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Bennett & Love, for Appellants.

A possessory title alone is sufficient to sustain this action. Possession alone is required by the statute. (Sec. 254 of Prac. Act.) This the plaintiffs had, and this is sufficient to give them a standing in Court.

Unless, then, the defendant Bolton has shown some superior title, the plaintiffs ought to maintain their action. The only way in which Bolton could show a superior title was by deducing from Maria B. Gimmy to himself a better right than the plaintiffs possess; for Maria B. Gimmy is admitted to have been the owner in fee in the year 1850.

The defendant claims through a power of attorney pretended to have been executed by Maria B. Gimmy, who is admitted to have been the owner of the lot, to John G. Gimmy.

In relation to this power of attorney, we say: First — The power of attorney, even though it had been proved to have been executed, is a nullity.

It is not acknowledged as required by statute. (Wood's Dig. p. 100, Arts. 238, 340-344, 347, 358, 361, 363, 364.)

Our statute respecting conveyances and their acknowledgment is essentially different from the statutory provisions of those States in which it has been held that a deed was good between the parties, though insufficiently acknowledged.

The statute of New York (1 R. S. 731, Sec. 137,) provides that "every grant in fee, or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent."

Now the language of the New York statute, in respect to "signing and sealing," is no stronger than our statute in respect to "acknowledgment;" and yet no one would doubt

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that under the New York statute, both signing and sealing are indispensable requisites to a deed conveying real estate.

By parity of reasoning, equally indispensable is an acknowledgment under the statute of this State.

The statute of our own State, like the statutes of all the States, requires certain formalities to be complied with in the conveyance of real estate by married women — such as an acknowledgment separate and apart from their husbands, etc.

It is unnecessary to cite authorities to establish the position that, as a general proposition, an instrument executed by a married woman would not operate as a conveyance, unless the requirements of the statute are strictly complied with. The very point is decided in *Selover v. American Russian Com. Co.*, 7 Cal. 266; *Kendall v. Miller*, 9 Cal. 591; *Pease v. Barbiers*, 10 Cal. 436; *Morrison v. Wilson and Wife*, 13 Cal. 494; *Mott v. Smith*, 16 Cal. 556.

All these decisions go to this one point: that where a statute requires any particular formality in the execution of an instrument conveying real estate, or where the statute requires the acknowledgment of a deed to be taken before a particular officer, the instrument does not pass the title to the real estate sought to be conveyed, unless, in the one case, the formality be complied with, and in the other case, the acknowledgment be taken before the proper officer.

Now, no statute can be expressed in stronger language than is used in section three of the Act concerning conveyances: "Every conveyance in writing, *whereby any real estate is conveyed or may be affected, shall be acknowledged or proved, and certified in the manner hereinafter provided.*"

And all the other sections of the same Act, by the language used, go to corroborate the construction of section three for which we contend.

In corroboration of our position, we cite the cases of *The Lessee of Christian Good v. Elizabeth Zercher*, 12 Ohio, 364, *Meddock v. Williams*, Id. 377, and 13 Ohio, 143, and 14 Ohio, 431.

The authorities all sustain, in unequivocal language, the

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position which we occupy; that is, they insist, when a statute is peremptory, it must be obeyed—that when it says a thing “shall” be done, it must be done; that when it says “every conveyance * * * whereby any real estate is conveyed or may be affected, shall be acknowledged * * * in the manner prescribed,” such conveyance must be acknowledged in the manner required, and if it be *not* so acknowledged, then no title passes.

The counsel opposed cited Swan’s Digest of the Ohio Statutes, and the citation only confirms our position. For the language of that statute is by no means so positive and imperative as the language of our own statute; and yet the Ohio decisions hold that unless the statute be strictly *complied* with, *no title passes*.

The Court well understands that at common law all conveyances of real estate were made without writing. Livery of seizin was then the only formality to be observed. Real estate, like personal property, was transferred by parol. But, it was found that this laxity of proceeding opened the door to fraud, and other inconveniences; rendered the titles to real estate insecure and difficult to be ascertained, and had a tendency to prevent the transfer of real property from man to man, and therefore the Legislature interfered for the purpose of compelling transfers of land to be made in the regular and formal manner pointed out by statute.

At first, the English Parliament simply required deeds conveying real estate to be signed and sealed. Our statutes, as well as the statutes of all the other States, and even of England at the present day, have gone much further, and required a conveyance of real estate, not only to be in writing and under seal as a general thing, but also to be acknowledged before some competent officer. And we might as well say that we can waive the statute entirely, and go back to the old common law mode of transferring land by parol and livery of seizin, as to contend that we can waive any one part of the express and positive requirements of the statute.

The counsel opposed has said that every contract is good

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and valid between the parties. We say it is not, when the statute requires in precise terms that such contract shall be executed in a particular way, or before a given officer, and it is not executed in such way or before such officer.

In illustration of our position we have cited *Mayham v. Coombs et al.*, 14 Ohio, 428, 431. The case last cited arose upon the construction of the Ohio statute, which uses the same imperative language with our own. The language of the Ohio statute is that "mortgages shall take effect from the time they are recorded." The Court holds that a mortgage has no effect even as between the parties, until the same shall have been recorded — just as we claim that a deed or power of attorney has no effect unless it has been acknowledged before the officer prescribed by the statute.

We have been unable to find any decisions in our State which have settled this point in opposition to our views. There are some dicta looking that way, but nothing which can be considered as binding on this Court on the principle of *stare decisis*, or which ought to preclude the Court from taking it up and determining it as a new question. (*Selover v. Am. Russ. Co.* 7 Cal. 266; *Kendall v. Miller*, 9 Id. 591; *Pease v. Barbiers*, 10 Id. 436; *Morrison v. Wilson and Wife*, 13 Id. 494; *Mott v. Smith*, 16 Id. 556.)

But even conceding that we are wrong on this point, we then contend further: That no power of attorney from Maria B. Gimmy to John G. Gimmy was *proved*.

The original was not produced. It became necessary, then, to prove it, if at all, according to the established rules of proving documents by secondary evidence. The counsel endeavored to prove it by secondary evidence, but signally failed.

The rules are well settled that where there is a subscribing witness to a *sealed instrument*, the order of evidence is as follows, to wit:

1st. The witness must be produced if practicable.

2d. If he cannot be produced it must be proved that he is

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dead, or out of the State, or that vigorous and zealous efforts have been made to find him.

3d. After the above proof has been given, then his handwriting may be proved.

4th. If proof cannot be given of his handwriting, it must be shown that due diligence has been used to procure such proof.

5th. After all these stages have been gone through with, then, and not till then, may proof be given of the handwriting of the party.

The above rules will be found in *Jackson v. Waldron*, 13 Wend. 178, 180, 183, 196-200. And see particularly the opinion of Senator Tracy, commencing on page one hundred and ninety-six; and the opinion of the Chancellor in the same case agrees with Senator Tracy. (See also *Pelletreau v. Jackson*, 11 Wend. 111, 123-4.)

Losee v. Losee, 2 Hill, 609, *et seq.*, shows the reason of the rule—which is, that evidence may be given of subscribing witness' bad character, to overcome the legal conclusions deducible from the fact of his being a subscribing witness.

Jackson v. Wager, 5 Cow. 283, shows that both subscribing witnesses must be accounted for. (See, also, to same point, *Jackson v. Cady*, 9 Cow. 140.)

The counsel opposed may cite in connection with his answer to this branch of our argument, *Greenleaf's Evidence*, 575. But *Greenleaf* cites no authority whatever for one portion of the question under consideration, and for the rest nothing but a case in 22 Pickering, p. 90. *Greenleaf's* law may possibly be Massachusetts law, though that is very doubtful. But in this State we have adopted the common law, and that is the law which the New York cases cited are based upon and enforce. The question, then, comes down to this: Which set of authorities are the best and most accurate exponents of the common law of England—the case in 22 Pickering, and *Greenleaf*, or the well considered cases in the New York Reports above cited by us? We say, by all means, the latter. Besides,

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the case in *Pickering*, on which *Greenleaf* relies, is altogether different from ours, and is not a case in point.

We claim that the proof of the power of attorney was defective in the following respects:

1st. The non-production of the witnesses was not accounted for. Showing that they were out of the State ten or twelve years ago, was wholly insufficient under the circumstances of this case. Inquiries should have been made for them here, within the jurisdiction of the Court.

2d. No effort was made to prove the handwriting of either of the subscribing witnesses. This is absolutely necessary, as the authorities cited prove beyond question.

3d. A tenant may show not only that his landlord's title has terminated, but that his attornment was made through mistake or fraud. Landers' agreement with Mead and Robinson, by which he undertook to pay rent to them, was made through mistake, at least, if not through fraud. The mistake was that Landers supposed that Mead and Robinson were the real and legal owners of the premises, when, in truth, they had no right, title, or interest in or to such premises.

The following authorities illustrate our position: *Taylor's Landlord and Tenant*, pp. 493-496, Secs. 705-707; *McDevitt v. Sullivan*, 8 Cal. 596; 8 Barn. & Cres. 471; 15 Eng. C. L. 234; *Chitty on Contracts*, 295, 296; 6 Taunton, 202; 11 Vt. 323, and note; 1 Bing. 38, 390; 6 Tenn. 682; *Jackson v. Newton*, 18 J. R. 355; *Jackson v. Cureder*, 1 Johns. 353.

Daniel Rogers, for Respondents.

Before the tenant can set up any claim to the premises, he must first surrender the possession. This cannot be avoided by the fact that the appellants were in possession at the time they accepted the lease. If the tenant was not induced by fraud or mistake to accept the lease, he cannot resist a recovery of the premises, much less avail himself of such a possession to support an action to quiet title. Without proof of fraud or mistake, the lease, although made to the lessee while

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in possession of the premises, is followed by all the incidents of a lease under which the lessee goes into possession. This rule, than which none is better established, which prevents the tenant controverting the title of his landlord, applies as well when that title is legal or equitable, perfect or imperfect. (*McKune v. Montgomery*, 9 Cal. 576; *Cooper v. Smith*, 8 Watts, 540; *Tendro v. Cushman*, 5 Wis. 279; *Ingraham v. Baldwin*, 5 Sel. 45; *Thayer v. The Society of United Brethren*, 8 Harris, 60.)

The appellants are also estopped from denying the respondent's title, by reason of their being parties to the foreclosure proceedings instituted by the vendors of the respondent.

The appellants cannot now, in a suit brought to recover the property by the vendee of the purchaser under a decree of foreclosure and sale of mortgaged premises, set up defenses which they failed to urge in the original suit. Having submitted to those proceedings in silence, the parties defendants (the appellants here to that suit cannot now be heard to impeach the title which resulted from them. Landers being the mortgagor, in an action for the recovery of the premises would be estopped from denying that he had title at the time of the execution of the mortgage, nor could he be permitted to set up title in a stranger. (*Redman v. Bellamy*, 4 Cal. 247; *Jackson v. Hoffman*, 9 Cow. 271; *Barber v. Harris*, 15 Wend. 615.)

After foreclosure and sale under a decree for that purpose, the mortgagor is estopped setting up an after acquired title against the purchaser who was the mortgagee, and those claiming under him. In the present case, the mortgage given by appellant was not upon any particular estate, nor on any right thereto, but was upon the property. This Court has decided, in *Clark v. Baker*, 14 Cal. 609, that the thirty-third section of the Act concerning conveyances applies to mortgages equally as to conveyances.

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Sharp & Lloyd, also for Respondents.

Suppose Maria B. Gimmy had the title when she made the deed to Anna M. Gimmy, then whatever passed by that deed, having been acquired by purchase during coverture, would have vested as the common property of Anna M. Gimmy and her husband John G. Gimmy, and he would have had a right to dispose of it as he did to McCarty on the 1st of March, 1861. This would have left nothing to pass by the subsequent deed from Anna M. Gimmy, April 8th, 1862, to Sarah Landers. (*Mott v. Smith*, 16 Cal. 533; *Pixley v. Higgins*, 15 Cal. 127.)

But, say appellants, this cannot avail respondent unless he connects himself with McCarty's title. We reply, that the question here is not who has the best title, appellants or respondent, but simply whether appellants have the legal title and should be quieted; whether, in fact, the allegations of their complaint are true.

Moreover, if McCarty became entitled, and nothing passed to Sarah Landers, neither she nor her husband have any right to complain or seek any relief, and thus, having no privity with the title, cannot question the mesne conveyances under which respondent claims. (*Rix v. Reed*, 19 Cal. 576.)

Appellants are not in position to question the title of respondent to the premises in controversy, but are forever estopped to deny the same.

First — Because of the tenancy; the law is so plain and well settled we deem it unnecessary to cite authorities to the effect that the tenant cannot dispute the title of his landlord.

As before observed, there is nothing in the record tending to show any fraud or imposition by any person upon appellants, or either of them, in connection with the lease or tenancy, or that the title had passed out of respondent. They both occupied the premises under it, and according to their sworn allegations in the complaint, made improvements upon the property with their joint funds. Besides, the leasehold interest they held was their common property, and she, equally with her

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husband, was bound by the lease as tenant, and, equally with him, estopped from disputing the title of respondent.

Second — Appellants are estopped by the decree of foreclosure and the Sheriff's deed in execution thereof.

That both are estopped from setting up an outstanding title during the life of the mortgage, we think has been well settled in this State. (*Clark v. Baker*, 14 Cal. 626.)

By the Court, SAWYER, J.

This appeal is from a judgment dismissing the complaint in an action to quiet title, and from the order denying a new trial. The facts found by the Court below are amply sufficient to justify the judgment, and, unless some error appears from the statement to have been committed, which entitles the plaintiff to a new trial on the issues of fact, the judgment must be affirmed.

The plaintiffs claim title in the wife. It was admitted by the parties that on December 6, 1850, title in fee simple to the premises in question was in one Maria B. Gimmy. Plaintiffs proved occupancy by themselves since 1852; that they erected the improvements on the land; that the value of the premises is from twenty thousand dollars to twenty-five thousand dollars; that Maria B. Gimmy on the 23d of January, 1857, executed a conveyance of the premises to Anna M. Gimmy, who was then the wife of John G. Gimmy, for the consideration, as expressed in the deed, of one thousand dollars; that on the 10th day of March, 1862, (about a month before the commencement of this suit,) said Anna M. Gimmy (who had then been divorced from her husband, John G. Gimmy,) executed in favor of the plaintiff, Sarah Landers, a conveyance of the said premises, purporting to be a gift, and then rested. The defendant offered testimony to show, and the Court found the following facts: First, title in Maria B. Gimmy, as before stated; Second, the execution of a power of attorney by Maria B. Gimmy, in the State of Pennsylvania, on the 3d of February, 1852, to her son, John G. Gimmy,

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authorizing him to sell and convey said lands—said power of attorney being witnessed, but not duly acknowledged or proved so as to entitle it to record; Third, a sale and conveyance on July 15, 1852, from Maria B. Gimmy by her said attorney, John G. Gimmy, under said power to Joseph L. Reed for twelve hundred dollars; Fourth, an attachment suit in the Superior Court of San Francisco, commenced August 6, 1852, by John W. Robinson and Stephen Mead against said Reed; Fifth, a judgment in said suit August 17, 1852, for seven hundred and seventy-six dollars; Sixth, execution on said judgment and sale of said premises thereon to said Robinson and Mead, and March 12, 1853, a Sheriff's deed to Robinson and Mead in pursuance of said sale; Seventh, March 15, 1853, a sale and conveyance by Robinson and Mead for two thousand dollars to said James Landers, one of the plaintiffs, who (Eighth,) at the time of said sale was, and who had been for a year prior thereto, in the actual occupanay of said premises; Ninth, at same time a mortgage back by said Landers to said Robinson and Mead to secure said two thousand dollars purchase money; Tenth, December 30, 1856, a suit commenced in the Twelfth District Court by said Robinson and Mead against said plaintiffs and others (Maria B. Gimmy not being made a party) to foreclose said mortgage, and a decree for foreclosure and sale entered therein January 5, 1858, for three thousand seven hundred and ninety-six dollars; Eleventh, January 30, 1858, a sale of said lands by the Sheriff under the decree to Robinson and Mead for four thousand three hundred dollars, and a Sheriff's deed thereon to Robinson and Mead September 2, 1858; Twelfth, a continued occupancy by Landers of said premises till the execution of said Sheriff's deed last named, at which time he entered into an agreement with Robinson and Mead at a specified monthly rent, to occupy thereafter as their tenant, and under such agreement continued to occupy said premises as tenant of said Robinson and Mead, and their grantees paying the stipulated rent till about the month of March, 1862, when said Landers for the first time repudiated the title of said Robinson and Mead and set up title in said Sarah Lan-

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ders; Thirteenth, November 1, 1861, a conveyance by said Mead of his undivided half to Joseph M. French, and on March 20, 1862, a conveyance by said French and Robinson to defendant, Bolton; Fourteenth, March 6, 1861, a conveyance of said premises by John G. Gimmy, still the husband of Anna M. Gimmy, but pending a suit for divorce, to William McCarty for a consideration expressed of three thousand dollars.

Upon these facts the title is clearly in defendant Bolton. We do not understand that this proposition is seriously controverted. But it is insisted that the testimony upon which the second finding is based was improperly admitted, and if admissible, that it is insufficient to sustain the finding. The power of attorney from Maria B. Gimmy to John G. Gimmy was not acknowledged before a proper officer, and for that reason it was not regularly recorded. The acknowledgment being void, it is contended that the instrument is a nullity, and conferred no power whatever on John G. Gimmy to convey the land, and various provisions of the "Act concerning conveyances" are cited to sustain this view.

We have carefully examined the several sections of the Act, and are satisfied that a conveyance, as between the parties to it, is valid, and passes the title without acknowledgment or record. And this was the opinion of the Court in *Ricks v. Reed*, 19 Cal. 553. The acknowledgment is only the mode provided by law for authenticating the act of the parties, so as to entitle the instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence. By sections ten, eleven, fourteen, and other sections of the Act, the execution of the conveyance may be proved by the subscribing witnesses, and when the subscribing witnesses are dead or cannot be had, the end may be accomplished by proving the handwriting of the party and of the

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subscribing witnesses by other witnesses; and upon such proof the officer may make his certificate thereof, and the instrument thereafter becomes entitled to record and to be read in evidence without further proof; and this may be done years after the actual making of the deed, and even after the parties and witnesses to it are dead. If the theory of the appellant is correct, the instrument is an absolute nullity until it is proved, but upon proof *ex parte* by witnesses, without any further act of the party, and wholly independent of his volition, and even against his will, a conveyance is created. And a conveyance may be created for him, by a proper officer and competent witnesses, long after he is dead, out of a paper void when it passed beyond his control. So also a party might call the subscribing witnesses and fully prove an unacknowledged deed in Court, and the Court would, upon the appellant's theory, be compelled to rule out the deed on the ground that it was a nullity; but the Judge, having heard the testimony, might annex his certificate thereto, and it would at once become a deed, and upon such certificate be admissible in evidence without further proof. It seems to us that the appellant's construction would lead to absurd results.

Section thirty-one provides that neither the certificate of acknowledgment, or of proof, shall be conclusive, but may be rebutted; and section thirty-two, that if it shall be made to appear "that any such proof was taken upon the oath of an incompetent witness, neither such conveyance or instrument, nor the record thereof, shall be received in evidence *until established by other competent proof.*"

In such a case the certificate of acknowledgment or proof upon rebutting the *prima facie* case becomes a nullity, as being false or unauthorized, and the deed stands as if there was no certificate. But the deed is nevertheless good under the Act, and when "established by other competent proof," is authorized to be received. It is apparent from these several provisions of the Act, that the deed exists as a valid instrument without any acknowledgment or proof; but to entitle it to record, or to be read in evidence without further proof, it must

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be authenticated in the mode prescribed. (See, also, Sections 18, 29.) It would be singular indeed if the Legislature should provide that certain proofs made *ex parte* and certified by any one of a large number of officers, should be sufficient to authorize an instrument in writing to be read as evidence of a conveyance of land, while the same proofs made in open Court on the trial of a cause, with the benefit of cross examination, should be insufficient. The question, in our opinion, is one of preliminary proof. If acknowledged or proved in pursuance of the statute, the instrument is admissible without further proof. If not, it must be proved according to the ordinary rules of law applicable to the subject.

The view we have taken accords with the legislative construction of the Act, as manifested in the supplementary Acts of 1860 and 1863. (Laws of 1860, p. 357; Laws of 1863, p. 760.) The Act of 1860, section one, provides, that "all instruments of writing now copied into the proper books of record of the office of the County Recorders of the several counties of this State shall, after the passage of this Act, be deemed to impart to subsequent purchasers and incumbrancers, and all other persons whomsoever, notice of all deeds, mortgages, powers of attorney, contracts, conveyances, or other instruments, so far as, and to the extent that, the same may be found recorded, copied or noted, in the said books of record, notwithstanding any defect, omission or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording, or certificate of recording the same; *provided*, that nothing herein contained shall be construed to affect any rights heretofore acquired in the hands of subsequent grantees or assignees."

Here the Legislature assume that the instruments referred to are valid as between the parties to them, notwithstanding their defects, and provide that the records of such defective instruments shall, nevertheless, thereafter impart notice to all other persons whomsoever of their contents. And section two provides, that certified copies shall be admissible in evidence upon the same terms as other instruments duly executed

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and recorded, upon proof being made that the originals "were genuine instruments and were in truth executed by the grantor or grantors therein named."

With respect to the conveyances by married women in this and other States, referred to by counsel, a different policy prevails. For the purpose of protecting her against fraud, coercion and undue influence of any kind, the acknowledgment of the wife is made a part of the deed itself, or perhaps more properly speaking, an indispensable part of the evidence of its execution. To secure perfect freedom of action, the wife must be examined separate and apart from her husband, and even at the last moment the right of retracting is secured to her. It must appear in the certificate of acknowledgment that she stated that she did not wish to retract. In her case, the certificate cannot be made, as in others, upon proof by subscribing, or other witnesses. The acknowledgment in person before the proper officer, and his certificate in the form prescribed by law is the only evidence admissible that she ever executed the instrument. All other proof in Court or out is incompetent. For these reasons the cases cited by appellants' counsel relating to conveyances by married women are inapplicable.

The next objection is that the execution of the power of attorney from Maria B. to John G. Gimmy was not legally proved. The original was not produced. It appeared from the testimony that there were two subscribing witnesses, neither of whom was produced. It is contended that no sufficient diligence was shown to find and produce the subscribing witnesses — or, if the non-production of the witnesses is sufficiently accounted for, that it was necessary to prove their signatures, or show that it was impracticable to do so, before it was competent to prove the signature of the party to the power of attorney by other witnesses. John G. Gimmy testifies that Maria B. Gimmy, the grantor in the power, is his mother; that at the time of the execution of the instrument, in 1852, she resided at Bethlehem, in the State of Pennsylvania; that he had the power of attorney drawn up by Mr. Moore, an attorney in San Francisco, and sent it to her for

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execution, at Bethlehem, by mail; that it was returned to him by mail, executed; that it had two subscribing witnesses; that one of them was known to him to be a citizen of Bethlehem, Pennsylvania, who had never lived in this State, but he did not know his signature; that the other was unknown to him; that he did not know that either of them had ever been in California; that there was but one power of attorney, and that he gave it to Joseph L. Reed. Moore testified that he drew a power of attorney for Gimmy, to be sent to his mother for execution; and Reed that he received such an instrument from Gimmy, and had it recorded in the Recorder's office. It appeared from the record of a similar instrument produced from the Recorder's office that the instrument purported to have been executed and acknowledged before a Justice of the Peace at Bethlehem, Pennsylvania; that there were two subscribing witnesses, the Justice himself being one; that it also had the certificate of the Prothonotary of the County of Northampton, under seal, to the official character of the Justice. It did not appear that any subpoena had been issued for these witnesses, or that any effort had been made to find them in San Francisco, where the trial took place, or that any effort, aside from the testimony of Gimmy, had been made to prove their handwriting.

The instrument having been apparently executed and witnessed out of the State, by parties shown to have resided at the time in Pennsylvania, and there being no evidence to show that they were ever in this State, a sufficient presumption is raised that the subscribing witnesses were not within the jurisdiction of the Court to let in secondary evidence of its execution. (*Valentine v. Piper*, 22 Pick. 89; *Newsom v. Luster et al.*, 13 Ill. 181.) Other cases to the same effect might be cited.

But it is said, that, in the absence of the subscribing witnesses, their signatures must be proved, or it must be shown that, after the exercise of due diligence to procure it, proof of their signatures is unattainable before it is admissible to prove the signature of the party. Conceding this to be so, no greater

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efforts or diligence should be exacted in endeavoring to prove the handwriting of the witnesses, than is required to find and procure the witnesses themselves. The place to look for evidence to prove the handwriting of a witness would naturally be in the neighborhood of his residence; certainly not three thousand miles away in a distant State, where he has never been. The defendant could not well be expected to go to Pennsylvania for witnesses to prove the handwriting of the witnesses to the power of attorney. He might as well go there for the witnesses themselves. Nor could he be expected to start out on a random search in California, which would almost necessarily be fruitless. In *Woodman v. Segar*, 25 Main, 90, the Court admitted a deed in evidence, upon proof of the handwriting of the grantor, it being shown *prima facie* that the subscribing witnesses did not reside in the State, and it not appearing affirmatively that there was any one in the State who could prove their handwriting. So also, in *Newsom v. Luster et al.*, 13 Ill. 182, a case almost precisely like the one in hand, as to the point in question, only the evidence of non-residence was not so clear as in this case, a similar ruling was sustained. The Court in that case, by Mr. Justice Trumbull, say: "Upon the principle settled by the cases of *Pelletreau v. Jackson*, 11 Wend. 123, *Clarke v. Saunderson*, 3 Bin. 192, and *Woodman v. Segar*, it was clearly unnecessary to go to Cincinnati in search of evidence to prove the handwriting of the subscribing witnesses. To have made such a requirement would have been exacting greater diligence to prove the handwriting of the subscribing witness than to procure his personal attendance, which is not to be required. The subscribing witness had never been in this State, and how was his handwriting to be proved here? Where should a party begin to hunt up the evidence, to prove in this State the handwriting of a person who resided in Cincinnati some twenty years ago, and who, so far as is known, had never been in Illinois? The thing is almost impossible, and it would be by the merest accident, if such a person could be found in hunting the State over. It would be a fruitless

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effort to attempt to prove negatively that there was not evidence to be found within the jurisdiction of the handwriting of an attesting witness, who, it appears, was never within the State. The law will not exact so unreasonable a thing." These remarks apply with equal force to the case in hand, in which the witnesses to the instrument, some thirteen years before the trial, resided in the interior of Pennsylvania, and are not shown to have ever been in California. We are satisfied of the soundness of these views, and tested by the principles laid down, the circumstances appearing in proof in this case show a sufficient excuse for a failure to prove the handwriting of the subscribing witnesses to the power of attorney.

But we are by no means satisfied with the rule which requires the handwriting of the subscribing witness to be proved rather than that of the party. Such seems to have been the rule in England, and it was followed in the early cases by a number of the States; but generally, where the question has arisen during the last fifty years, the Judges have expressed great dissatisfaction with it, and only followed it because they deemed it established. (*Clarke v. Saunderson*, 3 Bin. 194-199; 6 Bin. 50; 10 S. & R. 199; 4 Rand. 328; *Jackson v. Waldron*, 13 Wend. 183, 197.)

In New York and other States it seems to have been, latterly at least, restricted to sealed instruments. The reasons attempted to be given for the rule are, to our minds, wholly unsatisfactory. And this seems to be the almost united voice of Judges who have had occasion to refer to it. Witnesses to instruments have no interest in the matter, and rarely, as every one is aware who has had much to do with the execution of documents, know or care anything about the transaction. The person who happens to be nearest is called in and requested to write his name under the word witness, and he does so and departs, often without knowing or caring what the paper is, or who the parties are. When called upon as a witness years afterwards, as every lawyer who has had occasion to prove signatures in Court knows, he rarely remembers anything about the matter. He recognizes his signature, perhaps,

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and that is all he knows in regard to it. The proof of his signature raises a presumption, but it is only a presumption, that he actually saw or knew of its execution. But the party's interests are at stake, and he is not likely to put his name to a paper as a party without knowing what it is. Proof of his handwriting is necessarily positive evidence that he did in fact execute the instrument. It is difficult to account for its being there on any other hypothesis. It is obviously more satisfactory proof of the execution of the instrument than proof of the handwriting of the subscribing witness. In the language of Mr. Justice Trumbull, in the case last cited, "It is difficult to account for the signature of a party to a writing which he did not execute; but it is easy to imagine how a forged instrument might be established against him, when it is only necessary to procure the name of a person as subscribing witness to such an instrument, and then establish it by proof of the handwriting of the witness."

But the rule is a technical one, originally adopted by Judges, independent of legislative action, and the tendency of modern decisions where Courts are untrammelled by prior adjudications is, to adopt the more reasonable rule, and in the other Courts to restrict the application of the more unreasonable rule to instruments under seal. The rule of allowing proof of the handwriting of the party when the witnesses cannot be produced without requiring proof of that of the witnesses, has been adopted by many Courts of the highest authority; and it has the sanction of Mr Greenleaf, as the following citations will show: (Greenleaf Ev. 575 and Note 1; *Valentine v. Piper*, 22 Pick. 90; *Woodman v. Segar*, 25 Maine, 90; *Yocum v. Barnes*, 8 B. Monroe, 496; *Sentney v. Overton*, 4 Bibb. 445; *Mardis v. Shackelford*, 4 Ala. 503; *Cox v. Davis*, 17 Ala. 717; *Newsom v. Luster*, 13 Ill. 185; *Homer v. Wallis*, 11 Mass. 311.)

The question, so far as we are aware, now arises for the first time in this State. Supported by the foregoing authorities, and, as we conceive, by sound reasons and good sense, we have no hesitation in holding with the Supreme Court of Illinois in the case cited, that, "As a general rule, whenever the sub-

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scribing witnesses to an instrument are beyond the jurisdiction of the Court, its execution may be proved by proof of the handwriting of the grantor or obligor."

This rule might not apply to instruments which the law requires to be attested by witnesses. In such cases proof of the handwriting of both parties and witnesses might be necessary.

It is further objected that the loss of the power of attorney was not sufficiently proved to let in secondary evidence of its contents, and that the contents were not sufficiently proved. Both objections will be considered together. The Act of 1857 modifying the common law rule as to proving the loss of instruments, provides that "duly certified copies, regularly recorded * * shall be received in evidence; * * provided it be shown that the originals are not under the control of the party offering said copies, or are lost." (Laws 1857, p. 317, Sec. 2.) And the Act of 1860, before cited in this opinion, places duly certified copies of all instruments in writing, actually recorded in the Recorder's office before the passage of the Act, notwithstanding defective execution, acknowledgment, etc., upon the same footing as evidence as certified copies of instruments duly recorded; "provided, that proof shall first be made that the instruments, copies of which it is proposed to use, were genuine instruments, and were, in truth, executed by the grantor, or grantors, therein named." (Laws 1860, pp. 357, 358, Secs. 1 and 2.) The affidavit of defendant, Bolton, was read, showing that the original power of attorney was not in his possession, or under his control. Gimmy testified that he gave it to Reed, and Reed that he had it recorded, took it away from the Recorder's office, and afterward, in 1853 or 1854, saw it in the hands of an attorney since dead. It was sufficiently shown not to be under the control of the party under the Act of 1857, as was held in *Skinker v. Flohr*, 13 Cal. 638, and *Hicks v. Coleman*, 25 Cal. 122.) John G. Gimmy testified that an attorney named Moore drew the original power of attorney, and that *there was but one*—that he sent it to his mother in Pennsylvania to be exe-

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cuted, and it was returned to him by mail, executed; that he had seen her write and knew her handwriting; that the signature was her genuine signature; that he could not state its contents, but that he supposed at the time it authorized him to convey land, but he does not know; that he acted under it and executed a conveyance to Reed under it; that he loaned the original power of attorney to Reed; that he conveyed to Reed, July or August, 1852, and handed him the power before the conveyance. Moore testified that he drew a power of attorney for Gimmy to send to his mother for execution; that he was confident that it contained a power to lease and convey lands, but he could not state the language; that he took the form from the Clerk's Assistant; that there was *but one* power of attorney. Reed testified that he received from Gimmy the power of attorney; that it had two subscribing witnesses; that he had it recorded; that he received a conveyance executed under the power of attorney. A record of a power of attorney from Maria B. Gimmy to John G. Gimmy, dated February 3, 1852, containing full power to sell and convey lands, and answering the description given by the witness so far as it was described, was produced from the Recorder's office. We think, therefore, conceding the credibility of the witnesses, that the execution and genuineness of the original was sufficiently proved under the Act of 1860 to render the copy admissible, and that the identity and contents were clearly established. If not it would be difficult to establish such matters by satisfactory evidence.

The next point we shall notice is, that there was no evidence of a conveyance from Maria B. Gimmy to Joseph L. Reed.

The transcript states, that "defendant's counsel offered a deed from Maria B. Gimmy, executed under the power of attorney to Joseph L. Reed for the premises in question, dated July 15, 1852. Witness (Reed) continues: 'I received same conveyance for the exchange of some property; I have not the conveyance; it was executed under the power of attorney.' Defendant's counsel offered and read an affidavit of James R.

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Bolton, the defendant, showing that he had not in his possession, nor under his control, the above mentioned power of attorney nor the deed."

It is insisted that "offering a deed is not giving it in evidence," and that it could not be in evidence, because Bolton's affidavit shows that it was not under his control. The fact of putting the deed in evidence is rather loosely stated, it is true. But the reason is manifest. When it was offered, no objection was made to its introduction. The contest was over the power of attorney, which was a necessary link in the chain of title, and as this was not duly recorded, it was the weak point in the chain. The deed could avail nothing if admitted without the power of attorney. No objection being made to the deed, nothing more was necessary to be said about it. As the foundation was laid for introducing a copy, doubtless the record of the deed, or a certified copy, was used, though it is called in the statement a deed. Something called a deed in the statement was offered in evidence, and no objection to its introduction was made, and we must presume it was received and regarded by the Court as being in evidence, for the Court in its third finding expressly finds, "that under the power, contained in said letter of attorney, the said John G. Gimmy, in the name of said Maria B. Gimmy, on the 15th day of July, 1852, sold and conveyed the said lands to one Joseph L. Reed for the consideration, as expressed in the deed, of twelve hundred dollars — which was duly acknowledged and recorded."

The deed described in the finding corresponds exactly with the one stated in the transcript to have been offered in evidence, and it is inconceivable that the Court should have made the finding unless the deed or a record copy of it was in evidence. The necessary inference from the record is, that it was in evidence in some form, and the presumptions are all in favor of the correctness of the judgment of the Court below. Error must be affirmatively shown. No objection to the introduction of the evidence below having been made, probably the attention of the attorneys was not directed to the loose form in which the introduction of the deed was stated in the

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transcript. The statement was made before the amendment of the Practice Act, and only specifies in general terms that insufficiency of the evidence to support the finding will be one of the grounds relied on.

It is further objected, that the attachment proceedings in the case of *Robinson and Mead v. Joseph L. Reed* were improperly admitted, for the reason that no bond or affidavit was shown as a basis for issuing an attachment. It is wholly immaterial whether the attachment was valid or not. There was a judgment against Reed in the case — an execution was issued on the judgment and levied on the property; and the premises were sold under it, no other parties having acquired rights before the judgment lien attached, or before the levy under the execution.

Another point is, that there is no evidence to support that part of the thirteenth finding, which finds that French and Robinson (Mead having conveyed to French) conveyed to the defendant, Bolton. At the time the pleadings were filed a replication was necessary, and the statute provided that every material allegation of the answer not specifically controverted by the replication should, for the purposes of the action, be taken as true. The defendants are not shown by the statement to have introduced any deed from French and Robinson to Bolton, and assuming that none was introduced, the question is whether there was an issue on that point. The allegation of the answer is as follows:

“And the defendant further says, that, on the 24th day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars.” Now, this is a distinct allegation that there was a deed duly executed, acknowledged and recorded, and that it conveyed the premises in question for a specified consideration.

The following is the only denial in the replication by which issue is claimed by appellants to have been taken on the allegation: “And the plaintiffs further deny that said French and

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Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum; though they admit that an instrument purporting to be a deed was pretended to be made and executed by the said French and Robinson on or about the 24th day of March, A. D. 1862, purporting to transfer the said premises to said defendant."

The fact that there was a deed by French and Robinson — that it was duly executed, acknowledged and recorded, is not specifically denied, and is, therefore, under the statute, admitted for the purposes of the trial — as much so as if it were admitted in express terms. And it is in express terms admitted that one was pretended to be made by French and Robinson on the day specified, and that it purported to transfer the said premises to said defendant. Now, if the title to the premises in question was in French and Robinson, and a deed was by them duly executed, acknowledged and recorded, purporting to transfer the said premises to said defendant, it certainly did convey the premises. The mere denial that they conveyed the premises, without denying the facts which constitute a conveyance, is only to deny the effect of the instrument — the conclusion to be drawn from the facts — and not the facts themselves. It is perfectly apparent, also, from an examination of the context of this portion of the replication, that this was all that was intended to be denied. The whole theory of the replication was, not that no deed was executed and delivered by French and Robinson to Bolton, but that they had no title to convey, and, therefore, nothing passed by the deed. And the whole strain of the contest at the trial was upon the issue as to whether Robinson and Mead had any title whatever. But to give the denial its broadest signification, still it does not deny that French and Robinson conveyed the premises. It merely denies that they conveyed them *for a sum of money*. It puts in issue not the conveyance, but the conveyance *for money — for a particular consideration*. If they conveyed, it does not matter whether it was for a money consideration or not, and issue is not taken on the material part of the allega-

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tion. (*Burke v. Table Mountain Water Company*, 12 Cal. 407; *Woodworth v. Knowlton*, 22 Cal. 168; *Kuhland v. Sedgwick*, 17 Cal. 126; *Morrill v. Morrill*, ante, 288; *Castro v. Wetmore*, 16 Cal. 380; *Buseinas v. Coffee*, 14 Cal. 93; *Ghirardelli v. McDermott*, 22 Cal. 539.)

The pleadings were verified by the oaths of the parties, and it was therefore necessary to shape their allegations and denials so as to correspond with at least the admitted facts. The allegations of a pleading are to be taken most strongly against the pleader — the presumption being that he will state his case as strongly in his own favor as the facts will justify. Hence it is necessary that he should make his allegations and denials of matters which he desires to put in issue with distinctness and precision, and without evasion. If this denial is sufficient to raise an issue of fact, the law requiring the verification of an answer to a verified pleading will be of little utility. We think upon the pleadings the defendant was not called upon to put his deed from French and Robinson in evidence.

Assuming the views thus far expressed to be correct, no error intervened to affect the finding as to any of the facts material to the determination of the rights of the parties in this action. From the facts found it appears that the title was in Robinson and Mead at the time they conveyed to Landers, on the 15th of March, 1853, and that Landers obtained a good title at that time, subject only to be defeated by a subsequent conveyance from Maria B. Gimmy to some party for a valuable consideration, without notice of his title. At that time she had made no conveyance other than that to Reed. Landers then received a valid consideration for his note and mortgage to Robinson and Mead. The subsequent foreclosure of the mortgage and sale of the premises revested the title in Robinson and Mead, under whom and their grantees, Landers became tenant, and held possession as such, paying rent till March, 1862, at which time a conveyance having been received by Mrs. Landers from Anna M. Gimmy, he repudiated the title of his landlord, and soon after commenced this suit.

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Maria B. Gimmy conveyed to Anna M. Gimmy on the 23d of January, 1857. At this time Landers was the owner and in the actual occupation of the premises, and this occupation afforded notice to Anna M. Gimmy of his title. (*Hunter v. Watson*, 12 Cal. 363; *Lestrade v. Barth*, 19 Cal. 675-6; *Dutton v. Warschauer*, 21 Cal. 628.) She was, therefore, not a *bona fide* purchaser. Besides, there is no finding or evidence in the record that she was a purchaser without notice for a valuable consideration, and until such fact appears the title must be deemed to be in the first grantees of Maria B. Gimmy, to whom it passed as against everybody except a subsequent purchaser for a valuable consideration without notice.

The deed of Maria B. Gimmy by her attorney to Reed was duly acknowledged and recorded. It may, perhaps, be doubted whether that of itself did not impart notice without a record of the power of attorney. But the point was not made and it is not necessary to decide it.

On March 1st, 1861, when John G. Gimmy conveyed to McCarty, and on March 10th, 1862, when Anna M. Gimmy conveyed to plaintiff Sarah Landers, plaintiff James Landers was in the actual occupation of the premises as tenant of Robinson and Mead and their grantees, and this occupation was notice of the title of his landlord. (*Dutton v. Warschauer*, 21 Cal. 628.) Besides, at each of those dates, under the provisions of the Act of 1860, before cited, the record of the power of attorney from Maria B. to John G. Gimmy was constructive notice to said purchasers of the title of the first grantees. (Laws 1860, p. 358.)

The other views expressed as to the conveyance to Anna M. Gimmy, apply also to these two conveyances. So, also, Mrs. Landers paid no consideration, the deed to her being a gift. Besides, she was a party to the foreclosure suit and necessarily had notice of the title that was affected by the decree. It is clear, therefore, that neither McCarty nor Mrs. Landers was a purchaser for a valuable consideration without notice of the title now held by defendant Bolton.

Under no view of the facts are the plaintiffs in a position to

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maintain this action; for conceding that Anna M. Gimmy was a *bona fide* purchaser, the conveyance to her appears upon the face of the deed to have been for a money consideration, and *prima facie* it was common property. Being common property, it was subject to the absolute control and disposition of her husband, John G. Gimmy, and whatever interest passed by the deed of Maria B. to Anna M. Gimmy was conveyed by John G. Gimmy to McCarty. Such is the settled doctrine in this State. (*Pixley v. Huggins*, 15 Cal. 127; *Meyer v. Kinzer and Wife*, 12 Cal. 251; *Tustin v. Faught*, 23 Cal. 241; *Burton v. Lies*, 21 Cal. 87.) There was, then, no interest left in Anna M. Gimmy at the time she executed her deed of gift to defendant, Sarah Landers, and nothing passed by it. Whatever title defendants had other than that derived from the deed of Anna M. Gimmy to Mrs. Landers, had passed to defendant, Bolton, through the foreclosure proceedings and subsequent conveyances. As between plaintiffs and defendant, the title was in defendant and derived through plaintiff, James Landers. The plaintiff did not, and of course could not, set up title in McCarty as a basis to support this action. It will be time enough for defendant to litigate the title with McCarty, when he and McCarty become parties to a suit involving the question. But the deed from John G. Gimmy to McCarty was properly introduced in evidence to show that nothing passed to Sarah Landers by the subsequent deed of Anna M. Gimmy, introduced by plaintiffs as evidence of their title.

Entertaining these views, it is unnecessary to notice the various other points discussed in the briefs. It follows that the judgment must be affirmed, and it is so ordered.

Mr. Justice RHODES expressed no opinion.

HENRY S. MAGRAW v. JOHN A. McGLYNN.

PLEA OF TENDER.—If, by the laws of the United States, there is more than one kind of lawful money a legal tender in payment of debts, and the

Statement of Facts.

plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive.

How EXECUTOR HOLDS MONEY OF ESTATE.—An executor holds the money received by him from the proceeds of the estate in a fiduciary capacity for the use of those interested in the estate, and it is his duty to retain the money thus received until it can be distributed in the manner provided by law.

ACCOUNT OF EXECUTOR.—The Probate Court may require an executor, in his account, to state the kind of money received by him from the proceeds of the estate.

EFFECT OF ALLOWANCE OF CLAIM AGAINST AN ESTATE.—The allowance of a claim against an estate by the executor and Probate Judge is a judgment in no other sense than a judicial determination of the estates' indebtedness in a specified sum to a particular person. Before such claim passes into a final judgment, there must be a decree of the Probate Court directing it to be paid.

JUDGMENT IN PROBATE COURT.—A proceeding commenced by a creditor of an estate in the Probate Court to compel an executor to render an account, and to obtain a decree requiring the executor to pay the claim of the creditor, is in the nature of an action for the recovery of the money which the executor has in his hands, and to which the creditor is entitled, and a decree in such proceeding against the executor is a judgment.

DECREE REQUIRING EXECUTOR TO PAY OVER MONEY.—A decree made by the Probate Court, requiring an executor to pay over to creditors or legatees money in his hands, may compel the payment of the kind of money received by the executor.

APPEAL from the Probate Court of the City and County of San Francisco.

Henry S. Magraw, the respondent, one of the creditors of the estate of D. C. Broderick, deceased, presented his claim to the executor and the Probate Judge, and it was allowed August 28th, 1861. His claim was based upon the following promissory note, viz:

"\$10,500.

NEW YORK, July 1st, 1858.

"Ten months after date, I promise to pay to the order of A. Welch, at the 'Chemical Bank,' ten thousand five hundred dollars, without defalcation, for value received.

"D. C. BRODERICK.

"Indorsed: Washington, December 22d, 1858.

"Received on the within, three thousand five hundred dollars.

"\$3,500.

"A. WELCH.

"Pay to the order of H. S. Magraw.

"A. WELCH."

Argument for Appellant.

The other facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellant.

We do not deem it our duty, under the views entertained by the executor, to present any argument on the great constitutional questions connected with the currency. We shall assume all the Acts of Congress and the State Legislature to be constitutional.

We ask whether, when an executor files his account in the usual form, and states the dollars and cents received, and the dollars and cents disbursed, and the dollars and cents due, it is not a proper account? Whether he is called upon to state the particular kinds of currency? Whether the Court, on general principles, can distinguish between one kind of currency and another? This debt arose long before the Acts of Congress under which the legal tender notes were issued, and long before the Act of the Legislature of this State, usually called the "Specific Contract Law." We have here no question of the specific performance of a contract; no agreement to pay in "a specific kind of money or currency." In the eye of the law there is *one* great circulating medium, called money. In fact, it consists of gold, silver, and paper — but in the theory of the law it is all equal, and all money. This case arises from a mere change in or rather addition to the currency, happening accidentally whilst this claim was pending.

The law, with its broad and sweeping power, declares legal tender notes to be money — cash — and a lawful medium for the payment of all debts. But the Probate Court says in effect: "Notwithstanding this, I will distinguish between the kinds of money. I will make the debt payable only in gold."

Cases of individual hardship are constantly occurring under the present condition of the currency — they have happened in other countries — but the law must govern by general rules, and not be construed merely to avoid individual hardship.

In England, before the recoinage of all the coin of the realm in the reign of William III, the coin had become vastly depreciated by filing, clipping, boring, sweating, etc.; scarcely a

Argument for Appellant.

coin of true weight could be found. It was ordered by Parliament to be all recoined. Each man passed in his mutilated coin, which he had received *as if whole and of true weight*, and got it back only at its *exact weight and value*. What he had received in trade as £100, he received back from the mint on recoinage at say £60. The man who before recoinage, had borrowed £100 of the mutilated coin, which he had to put into the mint for recoinage to his great loss, was compelled afterwards to pay the £100 back to the lender in coin of the new issue. The hardships were enormous. The whole realm was greatly distressed. But the judgments of the Courts were uniformly entered for *£ s. d.*, and the Court never knew, through the medium of their *legal senses* that there was that great difference between the old coin and the new. (See 4 Macauley's History of England, 495, *et seq.*)

It seems to us that the issuing of legal tender notes operates, in many instances, like this recoinage in England, and that the Court, in this cause could not judicially recognize that there was any difference in value between gold and other lawful currency.

The debt of the respondent was in judgment, and that judgment was payable according to its legal effect when rendered.

Had the decedent lived, and the debt been sued for in the District Court, the judgment would have been merely for dollars and cents, and it could have been satisfied by any legal currency. How, then, can the judgment against the administrator for the same debt be made payable in gold only? Had the claim been rejected by the executor, and suit been prosecuted to judgment in the District Court, that judgment would have been merely for dollars and cents. How then could any Court have said that though payable in dollars and cents only, still that judgment must be paid in gold coin?

Now, the allowance of a claim by an executor and the Probate Judge, amounts to a judgment. "The approval of a creditor's claim by the Probate Judge is a judgment upon that claim, and cannot so far as the creditor is concerned, be ques-

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tioned at a subsequent term of the Probate Court." (*Swenson et al. v. Walker's Adm.* 3 Texas, 96; *Niel v. Hodge*, 5 Id. 487; *Finley v. Carothers*, 9 Id. 518.)

As our Probate Act is taken almost entirely from the Texas statutes, the decisions of their Courts giving a construction to them before we adopted them, are peculiarly applicable.

The debt of the respondent stood virtually a debt in judgment. That judgment was payable in any lawful currency of the United States. Such was the legal effect of that judgment, and according to that effect it was payable. Yet the Probate Judge, by a proceeding long subsequent to the allowance and on facts transpiring long after the judgment, *adds to the clauses of the judgment that it shall be payable in gold coin of the United States only*. We say, adds to it, for that is virtually the result.

After a Court of general jurisdiction has rendered a general judgment, it cannot at a subsequent term add to it; how can a Court of limited and special jurisdiction?

Patterson, Wallace & Stow, for Respondent.

The appellant is a *trustee* — First, to collect the assets; Second, to apply the same to the payment of debts, under the direction of the Probate Court; Third, to distribute the residue pursuant to the provisions of the will. (*Chapman v. Forsyth*, 2 How. U. S. 208; *Halleck v. Guy*, 9 Cal. 195; *Dox v. Backenstose*, 12 Wend. 543; *Van Horn v. Fonda*, 5 John. Ch. R. 408.)

Executors hold the property of their testators * * in their hands *in trust* for the payment of debts and legacies, and for the application of the surplus according to the will of the testator. * * (*Tiffany and Bullard on Trusts*, etc. 483; *Brewer v. Van Arsdale's Heirs*, 6 Dana, 207, 210.)

The executor, having received coin, shall not be allowed to take advantage of *his delay* in applying for an order to pay the debts, to pay the same in a depreciated currency. It was his duty to report what he had received, the debts presented

Argument for Respondent.

and allowed, and to have asked for an order to pay the debts. (Belknap's P. L. and F., Secs. 228, 243-245.) Especially was that so when the debts against the estate were drawing interest.

In *Brewer v. Van Arsdale's Heirs*, 6 Dana, the administrator and guardian had made a judicial sale of land for *par money* and he might have coerced the payment of such money; he voluntarily received payment in depreciated currency, *and offered* to pay the distributees in that which he had received, the Court said (p. 207): "But though the plaintiff may have acted in good faith, in accepting depreciated bank notes in discharge of the debt due for the land, yet, as the sale was for *par money*, and there is no evidence showing, or even tending to show, that he could not have coerced the payment of such money, he must be considered as having taken a less value, without authority, and at his peril; and so far as the distributees have not received payment voluntarily in the kind of money which he erroneously collected, *they should not be required to take less than the value it was his duty to collect.*"

McGlynn did not receive any depreciated currency. He received *money*, because Congress has not yet made gold less nor more than money. He offers to pay a different currency.

In *Trumbull v. Nicholson*, 27 Illinois, 149, it was held that an attorney has no power to receive depreciated money in satisfaction of a judgment; and that the Sheriff was bound to pay the holder of the judgment in legal currency. (See *Nolen v. Jackson*, 16 Ill. 272.)

It follows that it is the duty of the Sheriff to pay as he receives or is bound to *receive*, and in no other or different currency. He is no more a *trustee*, or *officer of the Court*, than an executor.

In *Marine Bank, etc. v. Chandler*, 27 Ill. 525, 539, it was held that a banker receiving funds on general deposit, was bound to pay his customer in currency of equal value to that which he *received*. The principle is applicable to principal and agent. (Dunlap's Paley on Agency, 28; Id. 45; *Knight v. Lord Plymouth*, 3 Atk. 480; *Hammond v. Cettle*, 6 Serg. & Rawle, 290.)

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The executor has no right to mingle the money received as assets with his own, *or to exchange the same for other money*, (doing so, he is guilty of a breach of his trust,) or to deposit the same as a general deposit with his banker. (*White v. Baugh*, 9 Bligh, 181; *Pennell v. Duffell*, 23 Law Journal, 115; *Hasler v. Hasler*, 1 Bradford, 248; 1 Serg. & Rawle, 241.)

The executor received gold coin as assets in a fiduciary capacity. “* * and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.” (Practice Act, Sec. 200, as amended April 27th, 1863, pp. 687, 688.) This applies to proceedings in the Probate Courts. (Belknap’s P. L. Sec. 293.)

To the extent of respondent’s debt, appellant received the assets for the *use of respondent*, and *in a fiduciary capacity*. This statute affects the *remedy*, and not the *contract*; it created no new liability, it only seeks to enforce a right existing prior to its passage, by prescribing the mode of enforcement. It applies as well to *assets* received before as after its enactment. It is valid, and the Probate Court but enforced the law in making the order appealed from. (*Rockwell v. Hubbell*, 2 Douglass Mich. 197; *Bronson v. Newberry*, 2 Douglass, 38; *Mason v. Hailie*, 12 Wheaton, 370; *Beers v. Houghton*, 9 Peters, 379.)

By the Court, CURREY, J.

The executor of the last will and testament of the Honorable David C. Broderick, deceased, has appealed to this Court from an order and decree of the Probate Court of the City and County of San Francisco, requiring him to pay, in gold coin of the United States, the amount of a debt due the plaintiff from the estate of the deceased. Upon the petition of the plaintiff the executor was directed by an order of the Probate Court to render a full account and report of his administration,

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showing the amount of debts and liabilities approved and allowed against the estate of the deceased; the expenses and charges of administration; the amount of all sales of real and personal property made by him, and the amount of moneys received, specifying the times when received and the kind of currency and coin received therefor by him; and it was further ordered that upon the coming in of the account and report the executor and the legatees, devisees and all persons interested in the estate of the deceased, should show cause why an order should not be made that all of the debts of the estate be paid. The executor appeared in obedience to this order and rendered his account, showing the amount of money received, and also the amount paid out, leaving in his hands a large sum of money belonging to the estate. The account so rendered did not specify the kind of money received by the executor, and for this reason the plaintiff, as a creditor of the estate, excepted to the account as insufficient, and objected to its allowance by the Court until the kind of money, which he alleged was gold coin, was specified and disclosed by the executor; and in conclusion, the plaintiff prayed the Court that the executor might be ordered and decreed to pay the debt due him in current gold coin of the United States. To the exceptions and objections so made the executor answered that his account was in all respects full and complete, and submitted that the creditor's exceptions and objections were insufficient in law and should be denied and disallowed; and he also, on his part, objected that the Court had no jurisdiction or legal authority to require a specification of the kind of money which he had received on account of the estate. The executor, for further answer to the objections and exceptions of the plaintiff, alleged that the debt due him had been tendered to him in lawful money of the United States at the Chemical Bank in the City of New York, where the promissory note on which the same was due was made payable, and that the same was refused by the plaintiff; and he further averred that the money remained deposited at said bank subject to the plaintiff's order, as the amount due him. The

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Court overruled the answer and sustained the exceptions and objections of the plaintiff, and made an order directing the executor to file an amended account on or before a day specified. The executor obeyed the order of the Court and filed an amended account showing that the money received by him as well as that disbursed was all of the description and kind of money designated as United States gold coin; whereupon the Court, by an order, allowed the account as amended, and directed and decreed that the executor pay the debt due the plaintiff in United States gold coin.

The executor duly excepted to the rulings of the Court adverse to him, and on appeal assigns as error the orders and decree of the Probate Court requiring him to set forth and show the kind of currency in which the funds referred to in his account were received, and also the decree requiring the payment to the plaintiff to be made in gold coin of the United States.

The debt due the plaintiff was the balance of a promissory note made and delivered by the appellant's testator at the City of New York on the first day of July, 1858, payable ten months after date at the Chemical Bank in that city. The tender is alleged to have been made in lawful money of the United States, which it is also alleged was then the usual circulating medium in the City of New York, and was then and there receivable in payment and satisfaction generally of all debts and liabilities existing between private persons. This answer does not disclose what particular kind of money — that is, whether gold coin or United States treasury notes — was tendered; and as gold coin of the United States and United States treasury notes were both at the time lawful money of the United States, we are left in ignorance by the answer as to which of these kinds of money was tendered; and unless either kind would have constituted a valid tender in the payment of the debt due, we must hold the plea of tender insufficient. This point, then, must be postponed as dependent upon the solution of the principal question in the case, which is as to the obligation of the executor to pay the plaintiff's

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debt in the kind of currency which he received for the property of the estate, and which he had in his custody and keeping when the order and decree was made.

An executor holds the property of his testator in trust for the payment of debts and legacies, and for the application of the surplus according to the will of the testator. He has only a qualified property in the assets of the estate of the testator, under a trust to apply the same to the payment of the testator's debts, and such other purposes as he ought to fulfil in his office as executor. (*Farr v. Newman*, 4 Term R. 645; *Tiffany and Bullard on Trusts and Trustees*, 483.) By the statute of this State an executor is not permitted to make profit by the increase, nor to suffer loss by the decrease or destruction of any part of the estate, without his fault. (Probate Act, Section 217.) The money collected by the executor upon the sale of the property of the estate of the testator, was received and held by him in a fiduciary capacity for the use of the creditors of the estate, and others interested therein as beneficiaries under the will, and it was his duty to retain in his hands the money thus received until it could be applied and distributed in the order and mode provided by law.

The executor was required to render a full account of his administration, and the authority of the Probate Court to enforce obedience to such an order is not doubted. (Probate Act, Sections 227, 228.) The account which an executor or administrator is required to render in such a case must, among other things, show what is the amount of money in his hands belonging to the estate, and if it be a matter of interest to those beneficially concerned, we deem it competent for the Court to require a specification of the kind of money received, for it is the money received by him on behalf of the estate which the creditors, legatees and distributees, as the case may be, are entitled to have.

It is said the allowance of a claim by an executor and the Probate Judge amounts to a judgment, and then it is argued that as the claim of the plaintiff in this case had been allowed, and passed into judgment, the judgment was payable in any

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lawful currency of the United States; and in the same connection, it is insisted that it was not competent for the Probate Court, by a proceeding long subsequent, to add to the judgment a clause requiring it to be paid in gold coin of the United States; and the question is propounded, how can a Court of limited and special jurisdiction add to a general judgment at a term subsequent to its rendition, when a Court of general jurisdiction could not do an act of the kind? This argument is not without logical force, and were the premises upon which it necessarily proceeds admitted, it would not be easy, if it were possible, to avoid the conclusion that the Court erred in its decree requiring the executor to pay the plaintiff the amount due him in gold coin. But did the allowance of the claim of the plaintiff by the executor and Probate Judge constitute it a debt in judgment, in a general sense?

In *Neill v. Hodge*, 5 Texas, 489, the Court said: "The approval of the account after it had been admitted by the administrator, was a judicial act; a *quasi* judgment; and so far affected the rights of the parties as to prevent any further investigation in that Court. If it had not been approved, the creditor could have sued for his demand in the District Court, and obtained judgment; he could not, however, have had an execution. It would have been certified to the Probate Court to be paid by the administrator, in the due course of administration."

In a number of cases decided by the Supreme Court of Texas, arising under a statute substantially like our own, it has been held that the approval of a creditor's claim by the Probate Judge is a judgment upon the claim, and cannot, so far as the creditor may be concerned, be questioned at a subsequent term of the same Court. (*Swenson v. Walker*, 3 Texas, 96; *Neill v. Hodge*, 5 Id. 487; *Finley v. Carothers*, 9 Id. 518.) In the case of *Deck's Estate v. Gherke*, 6 Cal. 669, the Supreme Court of this State held that, by our probate law, claims against an estate, which have been allowed by the administrator and the Probate Judge, have the force and effect of judgments.

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Neither the Supreme Court of Texas nor our own have ever held, as we are aware, that the allowance of a creditor's claim by the Probate Judge is anything more than a mere judicial determination of the estate's indebtedness in a specified sum to a particular person. When a given claim is allowed and it thus becomes judicially determined as a debt due the creditor, it thereby gains no preference over any other claim of the same class which may be allowed by the executor and approved by the Judge at a subsequent date. Claims so allowed and approved pass into judgments of a qualified character only. The amount due and to whom due is the substantive matter ascertained and determined. It is a judgment to this extent only. By the act of allowance and approval the claim is placed among the acknowledged debts of the estate; but before payment can be enforced it is necessary to obtain a decree of the Probate Court for that purpose; and when such judgment or decree is made, the executor must pay the creditor as directed. (Probate Act, Sections 243, 245.) The decree so made is a judicial determination of the rights of the parties, and possesses all the elements of a final judgment. (*Estate of Martin E. Cook*, 14 Cal. 130.) This decree determines the amount to be paid. This amount is ascertained by reference to the money of the estate in the hands of the executor. If there be sufficient in his hands for the payment in full of the creditor's demand, or only enough to pay a proportionate dividend, the decree is made according to the truth of the case, and the executor is required to make payment as directed by the decree from the money of the estate in his hands or presumed to be there. In this case the money in the hands of the executor was gold coin of the United States, and the decree requires this kind of money to be paid to the creditor. This decree is in consonance with justice, and in our judgment is authorized by the law of the land.

If there was any doubt as to the power of the Probate Court, under the law as it exists, independently of the Act of 1863, called the "Specific Contract Law" (Laws 1863, p. 687), then that Act, as it seems to us, has relieved the subject

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of all embarrassment. The second section of the Act referred to provides that "in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person." The next section provides for enforcing by execution the payment of the judgment according to its terms.

By the two hundred and forty-fifth section of the Probate Act, it is enacted that "whenever a decree shall be made by the Probate Court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for his claim or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the District Court, in favor of each creditor, and the same proceedings may be had under such execution as if it had been issued from the District Court."

The proceedings instituted by the plaintiff, as a creditor of the estate of the deceased, against the executor, was in the nature of an action for the recovery of the money which he had in his hands in a fiduciary capacity, and to which the plaintiff was entitled to the extent of his demand. The decree made upon the issue joined between the parties was a judgment against the appellant as the executor of the estate, and in order to render it at once effectual against him individually the statute has declared that he shall be personally liable for the payment decreed to be made.

The conclusion to which we come is that the appellant as the executor of the last will and testament of the deceased received the money of the estate collected by him in a fiduciary capacity and as the trustee for the creditors, and for the legatees or distributees under the will, and the same held in his possession to be paid out and distributed under the direction of the Probate Court, in the mode provided and required by the law; and that the proceedings had in the Probate Court to that end were in accordance with the law in its letter and spirit; and we also hold the executor's plea of a tender to

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the plaintiff of the sum due him in lawful money of the United States to be insufficient; because, by the laws of the United States, there was at the time of the alleged tender more than one kind of lawful money of the United States, one of which kinds in particular the plaintiff was entitled to have in payment of the amount due him. The answer does not show that this particular kind of money was tendered, and therefore the tender as pleaded must be deemed insufficient.

The decree is affirmed.

SAWYER, J., dissenting.

D. C. Broderick, in his lifetime, was indebted to respondent upon an ordinary promissory note. Upon his decease the debt survived against the estate, and the full amount was tendered to the respondent by the administrator. The administrator represents the estate until it is settled up, the debts are paid, and the assets distributed. Broderick was entitled to pay the debt in any money that the law makes a legal tender in the payment of debts. The death of Broderick did not place the respondent in any better position than he occupied during the lifetime of the deceased, and the estate was entitled to discharge the debt in any kind of money that Broderick would have been entitled to pay it in, were he alive. The administrator represents the estate and not the creditor. He is not in any just sense a trustee holding a specific piece of property, or any specific fund belonging to the respondent which he is entitled to receive in kind. Nor is he a trustee of the creditor in any sense other than that he has charge of the assets of the estate out of which the respondent is entitled to have his debt discharged. The respondent is merely a creditor of the estate, and his demand is a debt, pure and simple, due from the estate and payable in any kind of money made by law a legal tender in payment of debts. The creditor has no right to share in any profits or advantages gained by the estate arising from the management of its funds, no matter by what means they accrue. If the estate is solvent, he is entitled to

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the full amount of his debt, but under no circumstances can he get more. He is not entitled to have any portion set off to him in kind. He is entitled to lawful money, such as is a legal tender in payment of all other debts, and when he obtains that his contract is satisfied according to its terms. His demand rests in contract, and his bond is fully satisfied. Can he ask more? Upon what principle does he stand in a better position than those who are creditors of the living?

So, also, a legatee of a specific sum, payable in money, would probably stand in the same position. When the debts are paid, he becomes a creditor of the estate to the amount of the sum bequeathed.

Residuary legatees and heirs, may, perhaps, occupy a different position, for after the debts of the estate, and all specific legacies are paid, the remainder of the *estate itself* is theirs. But if they do stand in a better position than creditors, it is because the estate itself is theirs, and the executor, or administrator, is simply its custodian, and is bound to turn it over to the real owners. He does not stand in the relation of debtor to the heirs and residuary legatees. He is simply custodian of the specific property of which they are the owners. The money and property itself remaining in his custody, after paying the debts and specific legacies, belong to them, and are to be distributed in kind to the real parties entitled, under the direction of the Probate Court. But it is not necessary to determine the question as to heirs and residuary legatees at this time. They are only referred to, to show that their relation to the estate is entirely different from that of a mere contract creditor, and that there are reasons why they may be entitled to receive the specific property received by the executor, whether money or otherwise, that do not apply to creditors as such.

In my judgment there is nothing in this case to relieve it from the operation of the Act of Congress making treasury notes a legal tender in the payment of debts. It will be time enough to determine whether or not the last clause of section two hundred of the Practice Act, relating to the recovery of

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moneys received in a fiduciary capacity, and to suits for moneys had and received to the use of another, irrespective of any express agreement to pay in a specific kind of money, is repugnant to the Act of Congress, when that question properly arises. In my opinion it does not arise in this case.

If, then, the Act of Congress is to govern contracts made before, as well as those made after its passage, the order directing the executor to pay the debt due respondent in gold coin is erroneous, and ought to be reversed. But the question as to the effect of the Act of Congress on antecedent contracts is pending in another case, which we are not yet prepared to decide, and as the majority of the Court decide this case on the assumption, adopted for the purpose, only, for their present decision, that the Act controls such antecedent contracts, I express no opinion upon the point at this time.

Mr. Chief Justice SANDERSON expressed no opinion.

**HIRAM LEONARD, AND SIDONIE LEONARD HIS WIFE
v. JAMES B. TOWNSEND AND JAMES DONAHUE.**

JUDGMENT AGAINST MARRIED WOMEN.—A judgment may be rendered against a married woman for costs in an action brought by her as sole plaintiff, concerning her separate property, and when so rendered an execution in the usual form may be issued on the same, and her separate property sold by the Sheriff, and the purchaser at the Sheriff's sale, upon receipt of the Sheriff's deed, acquires a valid title thereto.

MARRIED WOMEN AS PARTIES TO ACTIONS.—The seventh section of the Practice Act places married women, in respect to the cases therein mentioned, upon a common level with all other parties to actions, and imposes on them the responsibilities it imposes on other parties.

**APPEAL from the District Court, Twelfth Judicial District,
City and County of San Francisco.**

The execution upon which the property of Sidonie Leonard was sold was in the usual form prescribed by statute in cases of personal judgment for costs.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, and Delos Lake, for Appellants.

The formal judgment for costs, and all the proceedings thereon had, including the Sheriff's deed, were void.

It is not pretended that Mrs. Leonard was a sole trader under the provisions of the Act of April 12th, 1852; or that she, in any manner, claimed the rights, or assumed the liabilities conferred by that Act; and, consequently, if there was authority for the entering up such judgment, or taking the proceedings thereon had, it is to be sought for in the common law. It cannot there be found.

It is a fundamental principle of the common law that no action at law can be maintained against a married woman. "For the judgment in that case would subject her person to imprisonment; and the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern. And for the same reason there can be no personal decree against her in chancery. It must be one which reaches her property only." (Reeve's Dom. Rel. 171.) "It is now well settled that no *action* can be maintained against a married woman." (2 Roper on Husband and Wife, 178.)

"It has been observed that, by the common law—restored by the case of *Marshall v. Rutton*—a married woman was not allowed, except in special cases, to contract as a *feme sole*; nor as such to sue or be sued. That being the legal rule, the wife cannot, at law, bind herself by any contract in respect to her separate property. In conformity with this doctrine of the wife's disability, Courts of equity hold that her general personal engagements will not affect her separate property." * * * "If, therefore, the wife contract debts generally without any act indicating an intention specifically to charge her separate estate with the payment of them, a Court of equity will entertain no jurisdiction of such estate in the hands of her trustees to such purposes during her life." (2 Roper, 241; 8 Term R. 545.)

The exception which exists in case of a sole trader by the custom of London, need not here be noticed.

Argument for Appellants.

The other exception arises from necessity, and exists in those cases only where the husband is in law considered as dead, the wife being, as it were, in a state of widowhood; for instance, where the husband has been banished from his country during life, or has been transported for a number of years, or has abjured the realm, or where there has been a dissolution of the marriage by Act of Parliament. In all such cases the marriage contract being suspended, the wife is considered so far a *feme sole*, as to be able to contract, to pay and receive money, to sue and be sued, and liable even to be taken in execution. (2 Roper on H. and W. 123.) It may be regarded as the settled law, however, that the mere voluntary absence of the husband, though for many years, "will not place the wife in the situation of a *feme sole*, so as to restore the rights of disposition, personal liabilities, and powers which she parted with on entering into the marriage state." (2 Roper, 124; *Farrer v. Countess of Granard*, 1 B. & P. New. Rep. 80; *Chambers v. Donaldson et al.*, 9 East. 471; *Kay v. Duchess de Piennes*, 3 Camp. 124.)

It had been intimated by counsel, in the case last cited, that if the husband be an alien who never was in England, his wife residing there might be sued as a *feme sole*. But Lord Ellenborough thought it quite clear, since the case of *Marshall v. Rutton*, 8 T. R. 545, restored the common law on the subject, that where the alien husband had been living with his wife in England a year before she had given the note sued on, the suit against her could not be maintained.

The idea has been advanced, on the part of the respondents, that the reason why the wife could not be sued upon contract at law, was because at law she was not regarded as having a separate estate, except in land, in which her husband was entitled to the usufruct, and consequently, (as argued,) there could have been no execution, at law, of the judgment. If that were so, there would have been no difficulty in enforcing her ordinary personal engagements by a pecuniary decree in equity, irrespective of any intent to charge specifically her separate estate. That, however, cannot be done. It was said by Lord

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Chancellor Loughborough, in *Hulme v. Tennant*, 1 Bro. C. R. 21: "I believe there is no instance of a personal decree against a *feme covert* for payment of any sum whatever. Though her personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement."

The doctrine of equity is, that "as incident to the power of enjoyment, she has the power of charging her separate property." (*Greatly v. Noble*, 3 Madd. Ch. R. 94.) The common rule that the wife cannot be sued on contract, is founded upon her want of capacity, at law, to enter into contract, except it be to charge her estate. Her mere personal obligation was not less void in equity than at law. Vice Chancellor Leach remarked, in *Stuart v. Viscount Kirkwall et al.*, 3 Madd. C. R. 388, "I had occasion to consider this doctrine fully, in *Greatly v. Noble*; I then was, and now am of opinion, that a *feme covert*, being incapable of contract, this Court cannot subject her separate property to general demands."

The proposition sought to be maintained by respondents, that where a married woman, by statute or otherwise, placed in the position of a *feme sole* for any purpose, she is to be so regarded for all purposes, is without any foundation. It is generally true, that where she is made a *feme sole* as to some specified transaction or branch of business, her rights, powers, and liabilities touching the same will be commensurate with those of an unmarried woman. But, as hereinbefore suggested, the statutory capacity of a married woman in this State, to exercise the rights and powers, and to incur the liabilities of a *feme sole* is, as a general rule, restricted to the case of a sole trader. (Act of April 12th, 1852; Wood's Dig. Art. 2,624.)

There seems to be but one exception to that general rule. By Act of February 14th, 1855, capacity is given to a married woman of legal age, to convey any estate or interest in land held by her in her own right, as perfectly as if she were unmarried, by executing an instrument of conveyance in the manner and form therein prescribed; provided, the husband be not then, and for one year next preceding the execution

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of the conveyance, had not been a *bona fide* resident of this State. (Wood's Dig. Art. 2,630.)

The power so conferred is only to be exercised under the special circumstances mentioned in the statute; is limited to the actual conveyance of land or of some estate or interest in it, which conveyance must be executed in form and manner prescribed. There is nothing, therefore, in either of the statutes referred to which can avail the respondents.

It is contended, however, by respondents, that the recovery of a judgment for costs by the party prevailing in the action is a matter of course. It is true that section four hundred and ninety-seven of the Practice Act provides that costs shall be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section four hundred and ninety-five.

It can hardly be said that a mere order dismissing a cause for want of prosecution, is a judgment. Be that as it may, however, it is certain that no judgment at law for costs can be entered up against a married woman, merely on the ground that she is sole plaintiff or defendant in the suit.

She cannot thus indirectly create a lien or incumbrance upon her estate, whether legal or equitable; nor can she thus indirectly cause or suffer an alienation of it.

Hoge & Wilson, for Respondents.

The Court had power and jurisdiction to enter a judgment, whether the rightful one could only have been questioned on appeal from that judgment. Even if the judgment were "palpably erroneous, it is not void, but is binding until reversed, and cannot be treated as a nullity in a collateral suit." This law is too well settled to require authorities, but see: *Arnold v. Booth*, 14 Wis. 180; *Howard v. North*, 5 Texas, 290; *Stearns v. Aquire*, 7 Cal. 448; *Reynolds v. Harris*, 14 Cal. 678; *Thompson v. Tolmie*, 2 Pet. 163-165; *Ex parte Watkins*, 3 Pet. 202.

But there was not even error. The judgment for costs was rightly entered against her. By section seven of the Practice

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Act she was made a free and independent suitor. She became an actor. Like all others, she had the rights but at the same time the responsibilities of a suitor.

"In this State the wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of a *feme sole*, and be enabled to make as binding admissions in writing in the action as other parties." (*Alderson v. Bell*, 9 Cal. 321.)

A wife can waive errors as well as her husband in a suit against both. (*Laird v. Thomas*, 22 Texas, 276.)

"The statute right of a married woman to litigate implies her perfect capacity to do so, and she will be held responsible for the acts of her attorney, and for the want of ordinary diligence on her part." (*Cayce v. Powell*, 20 Texas, 767.)

When she became a sole party plaintiff and brought her action, the Practice Act applied to her as much as to any other plaintiff. Her suit was bound to conform to that statute, and she was known only as a party plaintiff, disrobed of every other character. The Chapter of the Practice Act on the subject of costs applied to her as well as to others. She could not require the services of the officers without paying costs. Had she obtained judgment in her favor, costs, "of course," would have been "allowed" her, because it was "an action for the recovery of real estate." (Sec. 495, Pr. Act.)

Why would she have been "allowed" costs "of course?" Because she would have been, in the language of that section, "the plaintiff, upon a judgment in her favor."

If section four hundred and ninety-five applied to her, why did not section four hundred and ninety-seven? It provides that "Costs shall be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section four hundred and ninety-five, and in a special proceeding in the nature of an action."

The greater part of the able brief of the appellants' counsel is taken up with the discussion of the rights of married women at common law, with a great deal of which we agree. To some portions we dissent, whilst we totally disagree with the

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corollaries which are deduced from common law doctrines. It is asserted that "it is a fundamental principle of the common law, that no action at law can be maintained against a married woman." (Reeves' Dom. Rel., and Roper on Husband and Wife, are cited as authorities for that position.)

We have referred to 2 Roper on H. and W. 178, and do not find that doctrine announced. We refer to the edition printed in the 30 Vol. Law Library. But we do find in the same volume, at other pages, the contrary doctrine. There are very many cases where actions at common law could be maintained against married women, both *ex contractu* and *ex delicto*.

"Where the cause of action is founded upon a contract by the wife *dum sola*, as a debt contracted by her before marriage, the action must be brought against the husband and wife jointly." (2 Roper, 126.)

"Where the cause of action is founded on a tort, committed by the wife before marriage, as in trover, the husband and wife must be joined as defendants. Where the cause of action arises from a tort of the wife alone, during the marriage, as in an action for slander by her, or where it arises from a tort committed by the husband and wife together, the action lies against both." (Ib. 127.)

For numerous instances of actions maintained at common law against married women, and where personal judgments were rendered against them, see: 2 Hilliard on Torts, 163, 512-514; *Yates and Wife v. Reed and Wife*, 4 Blackf. 463; *Catterall v. Kenyon*, 3 Ad. & El. N. S. 315; *Mathews v. Fiestel and Wife*, 2 E. D. Smith, 91; *Austin and Wife v. Wilson and Wife*, 4 Cush. 273.

"The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company, or by his order, he alone is liable. If not, *they are jointly liable, and the wife must be joined in the suit with her husband.*" (*Wagener v. Bill*, 19 Barb. 324; 2 Kent's Com. 149.)

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By the Court, SANDERSON, C. J.

This is an action by a husband and wife to recover a lot in the City and County of San Francisco, alleged in the complaint to be the separate estate of the latter. The case was tried by a referee, to whom it was referred with directions to try all the issues, both of law and fact, and report a judgment thereon. The referee reported a finding and judgment in favor of the defendants, and thereupon the plaintiffs moved the Court to set aside the report of the referee and grant a new trial upon the ground, in substance, that upon the facts as found by him the judgment should have been for the plaintiffs. By stipulation the report of the referee was made a statement of the case upon the motion for a new trial. The motion was denied, and the plaintiffs have appealed.

It appears from the finding of the referee that the plaintiff, Sidonie Leonard, then being the wife of the plaintiff, Hiram Leonard, in 1853 brought an action, as sole plaintiff, to recover the premises in controversy in the present action, against certain other parties then in possession. In that action she recovered judgment. This judgment was, however, reversed on appeal and a new trial ordered. The case was remanded to the District Court and placed on the calendar for that purpose. On the day appointed for the trial the plaintiff failed to appear and prosecute her action, and upon motion of the defendants it was dismissed at her costs. In due course the costs were taxed and judgment therefor entered against her. Upon this judgment execution was issued, and the premises which were in controversy in that action and in this were levied upon and sold to the defendant Townsend, who in due course obtained a Sheriff's deed therefor.

Upon the foregoing facts the referee held that the title of the plaintiff Sidonie Leonard passed to the defendant Townsend by the execution sale and Sheriff's deed, and accordingly rendered a judgment in favor of defendants.

The validity of the judgment under which the Sheriff's

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sale to Townsend was made is the only question involved in this case.

It is contended on the part of the appellants that the judgment in question, and all the proceedings thereon, including the Sheriff's deed, are null and void, because, Mrs. Leonard being a married woman and not a sole trader, no valid judgment for costs could be rendered against her.

In support of this point the learned counsel for appellants have filed an able and ingenious argument, founded upon the principles of the common law touching the rights and disabilities of married women and the claim that those principles, so far as the question under debate is concerned, are unaffected by our Practice Act. As we understand the argument, it is to the effect that our statute removes the common law disabilities of married women, so far as their capacity to sue in certain cases is concerned, but does not annex to that capacity the liabilities which are imposed by the statute upon all other suitors.

We do not think that the solution of the question under consideration is aided by a reference to the common law; for assuming all that is claimed by appellants on that score the whole question still remains, which is simply whether (admitting that she can maintain the action only by virtue of the statute) she enjoys the right to sue upon the same terms and conditions as all other suitors, or enjoys it unincumbered with the liabilities which its exercise may entail upon them, and is to be solved in our judgment by a reference to the statute alone.

Title one of the Practice Act treats of civil actions and the parties thereto, and in the seventh section provides in what cases a married woman may sue and be sued, without imposing any conditions or bestowing any privileges. Thus, in respect to the cases mentioned, she is put upon a common level with all other parties to actions, no discrimination being made in her favor or against her. Thereafter the statute proceeds, and without any distinction as to persons, prescribes in general terms, applicable to all alike, the manner in which actions

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shall be prosecuted and the nature and form of the judgments which shall be rendered, and the manner in which the same shall be executed. We nowhere find any provision excepting any party or class of parties, from the operation of any of these general rules. The provisions of the statute relating to judgments do not declare that judgments may be rendered in favor but not against married women; on the contrary, they merely provide in general terms when the plaintiff or the defendant shall have judgment and execution regardless of the fact whether they are male or female, married or unmarried. All the property of the judgment debtor, except as otherwise provided, regardless of the fact whether such debtor be male or female, married or unmarried, is declared subject to seizure and sale under execution. Thus we find in the statute no foundation upon which the theory of the appellant can stand, for it deals in general terms, and creates no exceptions in favor of any party or class of parties.

The Provision of the Practice Act, allowing a married woman to sue alone is not, as counsel for appellants contend, merely the adoption of the old chancery rule allowing her in certain cases to sue by her "next friend." It is something more, for it allows her to sue alone. The office which the *prochein ami* performed was to be responsible for costs. The old form of suing by *prochein ami* is abolished, but the right of the opposite party to recover costs is unimpaired, and, as a necessary consequence, resulting from dispensing with the *prochein ami*, the married woman has herself been charged with the responsibility which previously attached to him; and there is no good reason why it should not be so. If she is to be regarded as a *feme sole* for any purpose connected with litigation, she ought to be so regarded for all. There is no justice in according to her all the advantages and benefits to be gained by an action, and at the same time exempting her from all risk and responsibility. If she is to be allowed the rights of a suitor, she must, in the absence of an express provision to the contrary, be held to take also the responsibilities of a suitor, for they ought not to be separated.

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So far as we know, this precise question has not before arisen in this State; but a question somewhat analogous arose in *Alderson v. Bell*, 9 Cal. 321, where the Court said: "In this State the wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of a *feme sole*, and be enabled to make as binding admissions in writing, in the action, as other parties." But the question has arisen in New York, from which State our system is borrowed, and has been there determined in accordance with the views entertained by us. In *Moncrief v. Ward*, New York Com. Pleas (reported in note to *Baldwin v. Kimmel*, 16 Abbott's Prac. R. 364,) this same question was involved, and it was held that an execution for costs against a married woman could be enforced against her separate estate, whether it contains a direction to that effect or not. Mr. Justice Brady said: "Having the right to sue, the power must be employed *cum onere*. The statute awarding costs does not exempt a married woman, either as plaintiff or defendant, from the payment of costs when unsuccessful. There is no just reason why she should be thus exempted. Having the status of a *feme sole* in the Courts, if she fail in her action it would be unjust to compel her adversary to resort to extraordinary modes to collect his costs. It cannot be that the Legislature intended this. It is true that, until the amendment of the code (Sec. 274) in 1862, the Legislature did not in express terms provide that costs could be recovered against her, but such was the effect of the statutes then in existence, as I interpret them. That amendment merely declared the necessary legal conclusion from the existing statutes; no class of suitors, as already suggested, having been excepted from them. The execution to compel the payment of such costs must be enforced against her separate estate, whether so directed or not. It cannot be employed against the property of another person *per se*."

But it is insisted on the part of the appellants that the foregoing case has no authority in this State, because the language of the New York statute is different and broader than ours,

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and vests a married woman, to a great extent, with all the powers and liabilities of a *feme sole* touching her separate estate.

We are not able to perceive the difference between the two statutes claimed by counsel. The New York statute provides that she may sue or be sued "in the same manner as if she were sole;" by ours she is authorized to sue or be sued "alone." We think the two expressions are equivalents. The effect of both is the same. Each removes the disability of coverture, and nothing more.

By the laws of Pennsylvania the property of a married woman is now kept as her separate estate, as in this State, and she is authorized to sue for it in her name alone. In the case of *Goodyear v. Bumbaugh and Wife*, 13 Penn. St. R. 480, the husband and wife joined as plaintiffs to recover the wife's separate realty. It was objected that the husband was misjoined. The Court said: "We see nothing in the exception of which the defendant can complain. He has two, instead of one answerable for costs."

The case of *Maclay v. Love*, (25 Cal. 367), decided by this Court, is cited by appellants in support of their position; but we are at a loss to perceive upon what ground it can be claimed that their position is fortified by that case. The question involved in that case was as to the power of the wife to incumber or charge her separate estate by voluntary contract, and the mode and manner in which it can be legally exercised; and we held that the mode and manner was prescribed by the statute defining the rights and duties of husband and wife, and no valid incumbrance could be voluntarily created in any other way. The decision in that case was grounded upon the statute applicable to the question then before us. The same is true of our decision in the present case. We here ground our decision upon the provisions of the Practice Act, by which alone the question before us is to be determined. We cannot reverse the judgment in this case without doing violence to the theory upon which *Maclay v. Love* proceeds, and we repeat what we said in that case as equally applicable to the present:

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"The rights of the parties are fixed by statute, and the only duty or power of the Court is to enforce those rights in accordance with the spirit of the statute as plainly indicated by the letter. Had we never been educated under the double system of common and equity law, as they prevail in England and the older States, we should have little difficulty with the statute before us, as we apprehend, in determining the rights of the parties in respect to the questions under consideration." In this State we have, in many instances, whether wisely or unwisely, departed widely from the rules of the common law, and to a great extent established a new system by which to determine civil rights. This new system sometimes runs counter to the proverbial conservatism of the legal profession, but it must nevertheless be applied by the Courts, and it is well to study its provisions by its own light, rather than the dying embers of that which it was intended to entirely supplant.

Judgment affirmed.

Mr. Justice CURREY expressed no opinion.

GEORGE O. WHITNEY AND J. HENRY WOOD v. AMOS
BUCKMAN.

APPOINTMENT OF RECEIVER AFTER JUDGMENT.—After verdict and judgment for plaintiff, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it.

WHEN RECEIVER MAY BE APPOINTED.—In an action to recover the possession of land, after verdict and judgment for the plaintiff, if the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation on motion for new trial and appeal.

APPOINTMENT OF RECEIVER.—If notice is given of an application for an injunction, and the petition prays for an injunction, the Judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application.

REVIEW OF ORDER APPOINTING A RECEIVER.—On an appeal from an order made after final judgment directing a receiver to pay over to the prevailing party

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moneys in his hands, the Supreme Court cannot review the order appointing the receiver.

APPLICATION FOR RECEIVER TO PAY OVER MONEY.—On an application to the Court, after final judgment, for an order for a receiver to pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and took possession of property to which he was not entitled, nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

John Reynolds, for Appellant.

The Practice Act, section three hundred and thirty-six, treats the final order in special proceedings as a judgment from which an appeal may be taken, as from other judgments. (*Adams v. Wood*, 21 Cal. 165.)

The order appointing a receiver was without authority, and was improvidently made. The judgment in the ejectment suit had then already been rendered. There was no judgment for rents, nor was there included in that judgment anything for rents or damages. Then clearly, a receiver could not be appointed to collect the rents and profits, and apply them to the payment of the claim for damages, because there were no such damages.

Again, there was no application on the part of the plaintiffs before the Judge for the appointment of a receiver, nor did the order to show cause require the defendant to prepare for any such application. Therefore, if the Judge had a right to appoint a receiver in such action, and under the circumstances of this case, he could not do so without showing the necessity of such receiver, and that upon a notice to the defendant for that purpose. The want of such showing and notice was a fatal error, and the order should be set aside upon that ground.

But I think no case can be found in which a Court of equity has ever appointed a receiver of the rents pending an action of ejectment, and especially when the plaintiff in the

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action expressly disclaims all right to such rents. That Court has, in some peculiar cases, interposed to stay waste. This Court has held that such injunction may issue in the same action, without resorting to a separate bill in equity. (14 Cal. 548.) But it has never been held in any case that the Court, in the action of ejectment, will go any further than Courts of equity go in a separate suit.

But suppose the order appointing the receiver was properly made, the final order of November 11th, 1862, cannot be sustained. The money in the hands of the receiver could not be paid to the plaintiffs in lieu of mesne profits or rents. These were, as before shown, expressly waived, and can only be recovered, if at all, in a separate action.

If the funds in the hands of the receiver can be treated as mesne profits, the judgment in ejectment does not show that the plaintiffs were entitled to them without other proof. (*Yount v. Howell*, 14 Cal. 466.)

C. H. Parker, for Respondent.

The *only* order that can be considered by the Court on this appeal, is the one which required the receiver to pay the money in his hands over to the plaintiff, which order he obeyed.

The petition for an injunction makes out a *prima facie* case for the appointment of a *receiver*, as required by section one hundred and forty-three of the Practice Act. The Court must have so held. This, it will be remembered, was after a *general verdict*, and judgment for plaintiff, and before a new trial was granted. If the appointment of a receiver was a nullity defendant should have disregarded it; if erroneous or irregular, he should have moved the Court to vacate the order, as was done in the case of *Copper Hill Mining Company v. Spencer*, No. 1, 25 Cal. 11, and then the unsuccessful party could have made up a case as is required by section three hundred and forty-six of the Practice Act. (*Paine v. Linhill*, 10 Cal.

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370; *Stone v. Stone*, 17 Cal. 513; *Bodley v. Ferguson*, 25 Cal. 584.)

If the appellant intended to review the order *appointing* a receiver, he should have had it reviewed when the whole record was before the Court on the appeal by the respondent from the order granting a new trial. That appeal carried up the whole record, and all prior interlocutory orders should have been then reviewed, if reviewed at all. (*Hanscom v. Tower*, 17 Cal. 518.) This appeal carries up only so much of the judgment roll as relates to the *order to be reviewed*, and cannot reach an *interlocutory order lying behind a final judgment*. Any other order or determination of the Court below, made in the case *before final judgment*, might be reviewed with as much propriety as the *order appointing* a receiver was *before* final judgment, and by section three hundred and forty-seven the appeal must be from a special order made *after final judgment*.

Interlocutory orders can only be reviewed on appeal from a final judgment. (10 Cal. 503.) Here, there is no appeal from a final judgment.

But the appellant seems to think that the Court may treat the money in the hands of the receiver as rents and profits, but insists that the plaintiffs were not entitled to them *without other proof*, and cites *Yount v. Howell*, 14 Cal. 466, to sustain that proposition. That case can have no application to this; the language there used referred to proofs required to recover in a separate action brought to recover the rents and profits. In this case the rents and profits had been preserved by the Court *in specie*; no evidence was necessary to ascertain the amount. In this case, from the very fact that the Court had taken the rents and profits, no action at any time could have been maintained against the defendant to recover them for the *period during which the Court intervened*; the defendant, from that fact, would have had a perfect defense. He would have said: "They are in the custody of the law, and you must go there for them; the Court cannot take them away from me, and still render judgment against me for them."

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By the Court, SAWYER, J.

Plaintiffs sued to recover one hundred and sixty acres of land in Napa County, upon which there were certain mineral springs, well known by the name of Soda Springs, and recovered judgment. After verdict, and pending a motion for a new trial, plaintiffs filed a petition, supported by several affidavits, alleging their title to the lands, and stating that they derived title to an undivided half thereof through a Sheriff's deed, in pursuance of a sale under a decree foreclosing a mortgage entered against the defendant Buckman; that they had been put in possession under a writ of assistance; that notwithstanding they had been so put in possession, the defendant had again intruded upon said lands and ousted them from possession; that they had brought this action to recover said possession, and had obtained a verdict and judgment thereon; that a motion for a new trial was pending; that defendant declared his intention to appeal if said motion should be decided against him; that after plaintiffs were put in possession of said undivided half, they erected certain buildings and machinery on said premises, over and inclosing a valuable mineral spring, for the purpose of bottling the waters thereof for sale; that the waters of said spring are impregnated with certain minerals and gases, imparting to them certain valuable qualities, so recognized by the community, and by reason thereof that there was a demand and ready sale for all of such waters that could be placed in market; that the said spring, for the purpose aforesaid, was of the value of five hundred dollars per month, the entire value being for purposes of sale as aforesaid; that defendant, for the purpose of harming said plaintiffs and depriving them of the use of said waters, had cut a tunnel into the hill above the point where said waters issued from the earth, and just outside of plaintiffs' said house, tapping said vein of water, and by means thereof had turned the same down the hill, whereby it became wholly wasted and of no use to either, and thereby also rendering said plaintiffs' building and machinery for bottling of no use or value; that

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defendant has built a small wooden house over said place where said waters now issue from the earth, and that he pretends to appropriate said waters, but without making any use of them; that there are other valuable springs on said land besides the one last named having buildings and machinery for bottling placed there by plaintiffs' grantors; that the buildings and machinery are in the possession of said defendant, who is using the same and bottling and selling the waters, and making large profits therefrom, notwithstanding the said waters belong to said plaintiffs; that he is wasting the substance of the estate and wearing out the machinery; that he threatens to tear down and sever from the freehold and take away the buildings and machinery, etc., that may be left in case plaintiffs gain this suit; that he is depriving the plaintiffs of the income which they might derive from the sale of said waters; that the defendant is insolvent and has no property out of which a judgment for damages could be satisfied; that the injuries are irreparable and such as could not be compensated in damages, etc. They pray for an injunction. An order to show cause was granted, and on the return day the defendant appeared and filed his answer to the petition, in which he admits the proceedings in foreclosure, and that plaintiffs were put in possession under the writ of assistance, as alleged, but avers that the premises in suit do not include more than one hundred and twenty acres; denies title of plaintiffs to one hundred and sixty acres, including said Soda Springs and improvements, or to more than one hundred and twenty acres; admits the recovery in this suit, but denies that more than one hundred and twenty acres are included in the recovery; admits the erection of the building by plaintiffs, but avers that the building and the spring it covers is only partly on the lands of plaintiffs, and that the rest is on lands of defendant, not embraced in the description contained in the complaint in this suit; that the spring is not on the land of plaintiffs; admits that there are other springs, but avers that only one is on land of plaintiffs; and makes many other averments, the gist of which is, that the acts performed by defendant were not performed upon

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the lands described in the complaint; denies insolvency, etc. Upon the hearing the Judge thought, that the interest of the parties required, and the facts justified the appointment of a receiver to take charge of the springs, bottle and sell the waters, and retain the proceeds pending the litigation. A receiver was accordingly appointed. Subsequently, the motion for new trial having been granted, plaintiffs appealed, and the order granting a new trial was reversed, with directions to enter judgment on the verdict. After the entry of final judgment, in pursuance of the directions in the remittitur, on motion of plaintiffs, the net proceeds of the sale of soda water in the hands of the receiver, amounting to five thousand dollars, were ordered to be paid over to the plaintiffs, and this appeal is taken from said order.

We think the facts stated in the petition and affidavits were sufficient to justify the Judge in appointing a receiver, under section one hundred and forty-three of the Practice Act. (See also *People v. Mayor of N. Y.*, 10 Abbt. 110.)

But it is insisted that the Judge erred in appointing a receiver, when the application was for an injunction, and not for a receiver. The bill of exceptions shows, that defendant excepted to the appointment of the receiver, but the ground of the exception is not stated. It is not shown that any objection was made on the ground that the notice did not specify that a receiver would be applied for. The necessary facts and parties were all before the Court. Had the defendant been surprised, and asked for further time to meet the questions as to the propriety of appointing a receiver, doubtless the Court would have given it. But it does not appear that any such desire was manifested, or that any technical objection, or exception whatever was interposed, and we must presume that there was none. The Judge, in the exercise of his discretion, with the necessary facts and parties before him, deeming the case a proper one for a receiver rather than an injunction, made the appointment complained of, and it is manifest that the interest of the parties was subserved by the course pursued. But whether the Judge erred or not in mak-

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ing the appointment, without notice of an application for that specific remedy, the appellant has not appealed from the order, and it cannot be reviewed on this appeal, which is only from the order directing the receiver to pay over the profits accrued from the bottling and sale of the water, pending the motion for new trial and appeal. The appointment of a receiver is not a special proceeding within the meaning of section three hundred and thirty-six of the Practice Act. (*Adams v. Wood*, 21 Cal. 165.) It is a proceeding in the suit to recover the premises, auxiliary to that action, and a part of it. It had no independent existence.

This appeal, therefore, is not from a final judgment in a special proceeding, but an appeal from an order subsequent to judgment, and on such appeal the order appointing the receiver cannot be reviewed.

The defendant opposed the order to pay the money in the hands of the receiver to the plaintiffs, and moved the Court to frame and submit to a referee, or a jury, issues as to the boundary of the land described in the complaint, and as to the value of any personal property, if any, in the hands of the receiver, and the ownership thereof, and what part, if any, of the money in the hands of the receiver has been earned and acquired from property belonging to the defendant, or to which he is entitled as against plaintiffs; which motion was denied, and defendant excepted, and he now alleges this ruling to be error. The receiver was appointed to take charge of the springs on the premises in controversy in the suit. We must presume that the Judge informed himself as to what he placed in the hands of the receiver before he made the appointment, and we cannot presume that the receiver transcended the bounds of his authority. The judgment in the suit to recover the property adjudged the recovery of "all that certain tract or parcel of land situated in said County of Napa and State of California, consisting of a pre-emption claim of one hundred and sixty acres of land, and commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging," etc. The only money in the hands of the

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receiver was the proceeds of the sales of the water from the "Soda Springs." As the land "embracing said springs" was recovered by the plaintiffs, it follows, as a matter of course, that they were entitled to the proceeds of the sales of the water of the springs it embraced pending the motion for new trial and the appeal. The very object of appointing the receiver was to preserve these proceeds in order that they might be delivered over to the party, who should finally recover in the action. Judgment having been finally entered in favor of plaintiffs in pursuance of the direction of the Court, on appeal, the order to pay over the said proceeds to them was properly made.

Let the order be affirmed.

Mr. Justice CURREY expressed no opinion.

SUSANA MARTINEZ DE MERLE v. H. MATHEWS

et als.

JUDGMENT NOT REVERSED FOR ERRORS UNLESS THEY INJURE A PARTY.—A

Court of review will not reverse the judgment of an inferior tribunal for errors committed in excluding evidence, if the evidence excluded is contained in the record, and it appears that the party complaining would not have been entitled to recover if the evidence had all been admitted.

REVERSAL OF ORDER GRANTING NEW TRIAL.—If in the course of a trial a

portion of plaintiff's evidence is excluded by the Court, and a nonsuit is granted and judgment rendered for defendant, and an order afterwards made granting a new trial, from which defendant appeals, and the record contains the evidence excluded, and the Court of review comes to the conclusion that if the evidence excluded had been admitted, plaintiff could not have recovered, the order granting a new trial will be reversed.

A DEED RECITING A SALE IMPLIES A PRICE PAID.—A deed which recites that

the grantor has sold to the grantee the premises therein described, implies a price paid as a consideration for the transfer of the property.

DEED UNDER LAW OF MEXICO.—The Mexican law of 1844 and 1845 did not invalidate a deed because not executed in the presence of and witnessed by a Notary Public.

DEED BY LAW OF MEXICO NEED NOT STATE PRICE PAID.—A deed executed in California while it was a part of Mexico, was not void or invalid because no consideration or price paid for the property described was expressed therein.

PRICE PAID FOR LAND PROVED BY PAROL.—If a deed does not express upon

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its face the fact that a price was agreed upon and paid for the property conveyed, the true consideration may be proved by parol.

DEED OF LAND TO ALIEN UNDER LAW OF MEXICO.—Previous to the cession of California by Mexico to the United States, a citizen of Mexico might convey land to an alien by deed, and the grantor thereby became divested of his title, and the alien grantee acquired a defeasible estate therein, which he retained, unless deprived of it by the proceeding of denouncement, or by the sovereign authority.

PURCHASE BY ALIEN UNDER COMMON LAW.—By the common law an alien born might purchase land, and the title remained in him until office found.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court below granted the new trial on the ground that it had erred in excluding the copies offered by the plaintiff from the books of record kept by the Alcalde.

The other facts are stated in the opinion of the Court.

J. B. Crockett, for Appellants.

In the case of *Havens v. Dale*, 18 Cal. 359, it is expressly held that a deed is good which expresses no consideration. The case of *Hayes v. Bona*, 7 Cal. 153, is the leading case in this State, in which it was intimated that, under the Mexican law, the consideration must be expressed. The same principle was recognized in *Stafford v. Lick*, 10 Cal. 12, and incidentally in *Stanley v. Green*, 12 Cal. 148. But in these cases the question was very little considered, and was apparently not very well understood by the bar of this State at that early period. The question was a new one in our Courts, and depended for its solution upon the laws of a foreign country, written in a foreign language with which neither the bar or bench were familiar. Since then the question has been more fully examined, and I think there can remain scarcely a doubt that under the Mexican law a deed was not void because it failed to specify the consideration. (*D'Orgenoy v. Droz*, 13 Louisiana, 387.)

No authority, I think, can be produced to establish that an alien could not hold land until it was denounced, or some other proceeding was had equivalent to an inquest of office found at common law. This is distinctly established in the

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case of *The People v. Folsom*, 5 Cal. 373, and in *Ramirez v. Kent*, 2 Id. 558. In the former case the Court holds that an alien may not only hold lands, but may *inherit* them under the Mexican law. In an inheritance, the estate is cast by operation of law, whereas in a purchase, the party takes by his own act. If an alien may inherit, therefore it is difficult to see why he may not purchase. The law would not cast an estate upon him which he could not hold; and if he can hold it by inheritance, it cannot be against the law or its policy for him to hold by purchase.

The policy of the Mexican nation in respect to the acquisition of lands by foreigners is plainly apparent from the Colonization Law of August 18th, 1824, the first section of which promises security to foreigners in their persons and property; and the sixth, seventh, and eighth sections direct that no tax or duty shall be imposed on foreigners emigrating to the country, and that previous to 1840 Congress shall not prohibit the entry of foreigners to colonize; also that preference shall be given to Mexican citizens as colonists, but that land may be granted to foreigners. The Regulations of the 21st November, 1828, made to carry this law into effect, are even more explicit. The first section empowers the Governors of the provinces to grant lands to foreigners, in express terms—not only to individuals, but to *empresarios* who will contract to settle many families. These provisions not only authorize but were intended to encourage the acquisition of lands by foreigners; and this policy was never abandoned by the Mexican nation whilst it retained dominion in California.

The Supreme Court of the United States have in three several cases had before them the question of a grant of lands to foreigners under the Colonization Law. (See *United States v. Fremont*, 17 How.; *United States v. Reading*, 18 Id. 1; *United States v. Dalton*, 22 Id. 436.) Whilst the Court in these cases does not expressly decide the question, they intimate their views very clearly, and particularly in the case of *Reading*, to which I invite attention. From the intimation given in these cases it is quite evident how that Court would

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decide in respect to a colonization grant to a foreigner. Indeed, it is difficult to see how they could decide otherwise under the Colonization Law of 1824 and the Regulations of 1828. If, then, foreigners could hold large bodies of land as colonists, with what grace can it be pretended that a foreigner was incapable of taking a town lot by purchase?

On the trial, the respondent cited and relied upon an Act of the Mexican Congress of March 12th, 1828, to be found in Schmidt's Civil Law, Appendix, No. VII.

The sixth section provides that foreigners shall be protected by the laws and have the same rights which are granted Mexicans, "with the exception that they cannot hold real estate, unless in conformity to the laws touching property held by persons not naturalized."

This proviso admits that, under the laws, persons not naturalized might acquire and hold lands in certain cases, but does not specify in what cases. The eighth section reaffirms the Colonization Law of August 18th, 1824; and the eleventh section provides that "property acquired by non-naturalized foreigners in fraud of this law may be denounced by any Mexican, to whom it will be adjudged as soon as such fraud is proved."

This section is a key to the whole law. It establishes that a sale to an unnaturalized foreigner in any case was not void, but only voidable on a denouncement. Under the Mexican system, a denouncement is equivalent to and a substitute for the inquest of office found at common law. In other words, it establishes beyond a doubt that foreigners could hold lands until the title was divested by the proper proceeding, to wit: by a denouncement. The only penalty fixed by law for its violation was that the lands became subject to denouncement. The title was not void, but only voidable.

It was wholly immaterial whether the documents were excluded or not. If they had been admitted on the trial, they would not have helped the plaintiff's case, and on another trial, it is submitted, would be wholly immaterial. The most important of the copies which were offered were

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copies of the petition of Sanchez, the Alcalde's grant, the conveyance from Sanchez to El Moro, and the two conveyances from Hinckley to Paty. All these were admitted without objection, except the conveyance to El Moro. There was also offered a copy of a deed from Noe to Ross, and of a mortgage from Ross to Boggs. The exclusion of these three documents is the ground on which the new trial was granted. But if they had been all admitted, they would not have varied the case. Suppose it were conceded that Sanchez conveyed the lot to El Moro; that El Moro died, leaving a will, and appointing Escalante his executor; that Escalante, as executor, conveyed it to Noe, and that Noe conveyed to Hinckley; would this have helped the plaintiff? It would simply have proved the title in Hinckley; but the plaintiff proved that Hinckley had conveyed all his title to Paty, and put him in possession. What title was there, then, in Hinckley, to pass to his widow?

If, then, the Court erred in excluding these papers, the error was wholly immaterial, and would not have changed the result. It should not have granted a new trial, when it was evident the plaintiff had no case, even if these documents were in.

Eugene B. Drake, for Respondent.

The Court erred in permitting Paty to testify relative to the price or consideration that he paid Hinckley or Noe for the land in controversy, because there is no price recited in the deeds from Hinckley.

At common law it is necessary to allege price before proof *aliunde* will be permitted; the price, if not recited in the deed, is an *issuable fact*. (*Perry v. Price*, 1 Missou. 394; *Cheny v. Watkins*, 1 Harr. and John. 527; *Pacea v. Forwood*, 2 Harr. and McH. 175; *Stephens v. Griffiths*, 3 Vermont, 488; 4 Kent's Com. 465.) And under the Mexican law, by which this case must be decided, proof *aliunde* cannot be admitted.

The written deed or contract must carry on its face and

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contain within itself every material ingredient to support it. (2 Moreau's Partidas, p. 663, Law 6; 1 Domat's Civil L., p. 802, n. 2,022-2,025.)

The Court also erred in permitting Paty to testify relative to his transactions and agreements with Hinckley and Noe concerning his purchase of the lot. Such evidence *only enlarged, varied, and altered* the written contracts between Hinckley and Paty. In this action the legal title *only* is in issue, *and the party holding such legal title must prevail*. All evidence introduced by defendants, from the mouth of Paty, tending to show an equitable title in the defendants, should therefore have been excluded.

But, may it please your honors, we claim that the proof actually given and admitted on the trial of this cause, entitled the plaintiff to recover, and the Court erred in deciding that the plaintiff did *not* make a sufficient case for the jury.

From the testimony given, and now appearing in the agreed statement on motion for new trial, the jury (if they had been permitted by the Court) were bound to make a special finding of the following facts:

First — That Guillermo Hinckley was, on the 28th day of May, 1844, the legal and lawful owner, and in possession of the land in dispute, under a grant made by the Ayuntamiento of San Francisco, dated 8th November, 1837.

Second — That John Paty received the possession thereof from said Hinckley, and entered into possession under the writings from the latter to the former, dated respectively 28th May, 1844, and September, 1845.

Third — That Charles L. Ross received the possession thereof from said Paty, and that the defendants herein respectively received their possession from and entered therein under said Ross, and have remained in such possession ever since.

Fourth — That neither the defendants here, or the said Ross, or Paty, ever acquired any further or different right to the possession of said land, from said Hinckley, or his heirs, than is

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specified and set forth in said writings, dated respectively 28th May, 1844, and September —, 1845.

Fifth — That said defendants did not prove the payment of any price to said Hinckley, or to his heirs, for the said land, or the payment of any price for the possession thereof, by said Paty, or Ross, or themselves, or either of them.

Sixth — That said Hinckley was a naturalized citizen of Mexico, and that he died on the 30th day of June, 1846, at the "Mission Dolores," leaving this plaintiff his widow, and that he left no other relatives in the Republic of Mexico, ascendant, descendant, or collateral.

Seventh — That said land is situated in the Pueblo of San Francisco, and within the boundaries of the Van Ness Ordinance.

If the foregoing facts correctly appear from the testimony, and we insist that they do, the plaintiff was *entitled to judgment*.

The only questions of law upon which there can be any discussion are: 1st — What effect can the Court give to the pretended deeds or writings executed between Hinckley and Paty, dated respectively May 28th, 1844, and September, 1845? And, 2d — As to the Statute of Limitations?

As to the first question, we claim and expect to show that the pretended deeds from Hinckley to Paty are *void* for want of price. At common law the consideration of a bargain and sale deed must be of money, or money's worth. (Watk. Prin. Con. by Preston, 237; Bou. Dic. 158; 1 Cowen, 622; 4 Cowen, 427; 6 Paige's Ch. 526.) Consideration of blood or marriage must also be recited to sustain a covenant to stand seized.

We have already shown by the decisions in 1 Missouri, 394; 1 Harr. & John. 527; 2 Har. & McH. 175; 3 Vermont, 488; and 4 Kent Com. 465 — that a deed without price is void, unless supported by an *allegation* of price in pleading, and followed by *proof* on the trial. In this case neither allegation of price or proof thereof appears.

But we suppose that the character of the deeds from Hinck-

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ley to Paty must be determined by the rules of Mexican law, which was in force at the time they were executed. (*Hoen v. Simmons*, 1 Cal. 119; *Hayes v. Bona*, 7 Cal. 153; *Stafford v. Lick*, 10 Cal. 12; 1 How. U. S. 319; 2 How. U. S. 608; 9 Cal. 85.)

Under the Mexican law, sales of land must be made by writings, the deed or conveyance must be written on stamped paper, provided and sold by Government, and must recite the *description* of the land conveyed, the *price* paid, the *names* of the *grantee* and *grantor*, and the *date* of the transaction, and be executed in the presence of a Notary Public, or Alcalde, and before witnesses.

The deed must be by *Escritura Publica*. Escriche (Paris Ed. of 1852,) on page 1,529, word *Venta*, n. II., says: "If the property sold is real estate, it is necessary for the validity of the contract that the sale be made by a public writing." (*Instrumento Publico*.) And n. V, page 1,530, says: "Three things are necessary to sustain a contract of purchase and sale (*compra venta*) viz: The consent of the vendor and purchaser, a thing to be sold, and the price thereof." On same page, n. VIII, the law reads, the price must be *certain, just, and in money*.

The pretended deeds from Hinckley to Paty are entirely without price, either certain or uncertain, just or unjust, and therefore *void*. (*Hoen v. Simmons*, 1 Cal. 119; *Hayes v. Bona*, 7 Cal. 153; *Stafford v. Lick*, 10 Cal. 12.)

1 Domat's Civil Law, B. 1, Tit. 2, Sec. 3, n. 295, says: "The laws connive at the injustice of buyers, *except in the sale of lands where the price given for them is less than half their value*."

Pothier, (on Oblig.) n. 33, 34, (by Evans,) also says: "That injury is commonly deemed excessive which amounts to more than a moiety of the just price; and the person who has suffered such an injury may, within ten years, obtain letters of rescission for annulling the contract."

If there is no price mentioned in the pretended deeds from Hinckley to Paty, how is it possible to ascertain whether Paty

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paid Hinckley *more or less* than a moiety of the value of this land? There is absolutely nothing, in either the pretended deeds, or the pleadings of the defendants, or in the testimony of Paty, that gives us any light on the subject.

He who alleges a payment must prove it. (1 Domat's C. L. p. 896.) There must be *two* witnesses to make proof. (Id. p. 813.)

To avoid the uncertainty and impossibility of reaching the facts of such cases as this, the Mexican law wisely provides that all contracts of and for the sale of lands *must be in writing*, and that such writing *shall recite the price paid*.

The writing itself must contain the price, otherwise the transaction is a blank, and proof *aliunde* cannot be admitted. (2 Moreau's Partidas, p. 663, Law 6.)

By the Court, CURREY, J.

This is an action of ejectment brought for the recovery of a lot—No. 76, one hundred varas square—in the City of San Francisco. The defendants filed separate answers to the complaint, denying the plaintiff's alleged title, and setting up title in themselves, severally, to distinct portions of the premises, and also pleading the Statute of Limitations. The cause was tried before a jury, and on the trial the defendants, in compliance with a written notice from the plaintiff, produced certain original documents, as follows:

1st. A petition of Francisco Sanchez, bearing date November 8, 1837, addressed to the Ayuntamiento of San Francisco, asking for a grant to him of the lot in question.

2d. A grant, made in accordance with the petition, of the same date.

3d. An instrument in writing, purporting to be a deed of conveyance of the premises from Sanchez to one Jacinto El Moro, bearing date May 12, 1839.

4th. Two instruments in writing, purporting to be deeds of conveyance from William Hinckley to John Paty for the prem-

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ises, one of which was dated in May, 1844, and the other in September, 1845.

The petition and grant were written on the same sheet of paper, and were admitted by the defendants to be genuine, and were then read by the plaintiff to the jury. On the back of the same sheet of paper was a writing purporting to be a conveyance of the premises from Sanchez to El Moro, bearing date May 12, 1839, which the plaintiff proposed to read in evidence without proof of its execution. To this the defendants objected, denying the genuineness of the instrument and protesting that they did not produce it under the notice, and insisting that as the subscribing witness thereto was living, the plaintiff was bound to prove its execution before it could be received in evidence. The Court sustained the objection and the plaintiff excepted.

The plaintiff then offered and read in evidence, without objection, two instruments in the Spanish language indorsed on the back of the petition and grant, which the defendants admitted to be genuine, of which the following are translations:

FIRST CONVEYANCE.

"I, the undersigned, having purchased the land before mentioned, and being the legal owner of said lot, this day have sold to Mr. John Paty two lots of fifty varas square, each one of said lots being east and west in the lot No. 76, on the plan of Yerba Buena, and for further testimony whereof I sign, this 28th day of May, 1844.

"GUILLERMO HINCKLEY.

"NATHAN SPEAR."

SECOND CONVEYANCE.

"I the undersigned, having sold to Mr. John Paty what is left in my possession of the lot granted in this document, I

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renounce all right in said lot, delivering this document to said Paty, and signing in presence of the Alcalde of this place.

"YERBA BUENA, September —, 1845.

"GUILLERMO HINCKLEY.

"Witness:

"FRANCISCO SANCHEZ.

"Witness:

G. H. NYE.

"*In the absence of the Alcalde,*

"ROBERT T. RIDLEY."

The plaintiff then produced from the County Recorder's office a book called Book A, of Original Grants, and proved it to be in the handwriting of Washington Bartlett, a former Alcalde of San Francisco, and that it was on file in said Recorder's office as a part of the records of the office, and also that it was kept and used in the office of the Alcalde as a book of records at the dates mentioned therein. The plaintiff offered to read from this book copies of the petition and grant, the conveyance from Sanchez to El Moro, and the two conveyances from Hinckley to Paty; also, a certificate of Washington Bartlett, Alcalde, dated October 17, 1846, to the effect that by virtue of these documents John Paty declared himself to be the legitimate owner of a lot of one hundred varas square on the plan, numbered seventy-six, and that said lot was then fenced in, but had no house on it.

The defendants objected to reading these papers, on the ground that the same were secondary evidence, and on the further ground that there was no proof of the execution of the originals, and that said book was not a book of records entitled to be used in evidence, either as original or secondary evidence. The Court sustained the objection, and the plaintiff excepted.

The plaintiff then offered in evidence a copy of a deed of conveyance and release of the lot in question from José de Jesus Noe to Charles L. Ross, bearing date December 8, 1847, in which it was recited that the lot described was transferred "by Gregorio Escalante, administrator of Jacinto El Moro," to said Noe, and by said Noe to William Hinckley. The plain-

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tiff also offered in evidence a copy of a mortgage of a portion of the same lot, executed by Charles L. Ross to L. W. Boggs, dated November 22, 1848, describing the premises as the lot of ground originally granted to Francisco Sanchez. In connection with the offer in evidence of this deed and mortgage, it was proved that the same were recorded, the one in Liber A and the other in Liber C, kept in the office of the Alcalde of San Francisco, at their respective dates. To admitting these copies in evidence the defendants objected, on the ground that the execution of the originals, of which the record purported to contain copies, was not proved. The Court sustained the objection, and the plaintiff excepted.

The plaintiff then gave in evidence a deed from John Paty to Charles L. Ross, bearing date the 8th of December, 1847, conveying to him all the grantor's right, title and interest therein, for the consideration of one thousand and fifty dollars. It was admitted by stipulation of the parties that all the defendants entered originally under conveyance from Ross, and at the time of the trial held whatever title Ross acquired in the premises.

Other evidence was produced by the plaintiff, showing that William Hinckley was the husband of the plaintiff at the time of his death, in June, 1846; that he was, at the time of his marriage in 1842, and also when it is claimed the lot in question was conveyed to him, a naturalized citizen of the Republic of Mexico; and also evidence was given to the effect that the plaintiff was his only heir at law at the time of his death. It was also proved by John Paty, who was called as a witness for plaintiff, that he was the person to whom Hinckley executed the instruments in writing, the one dated in May, 1844, and the other in September, 1845; that he was a native of the United States of America and never was a naturalized citizen of the Mexican Republic, nor the husband of a Mexican woman; and also that he never had a license or permission from the Mexican Congress to acquire or hold land in California. Paty also testified that, at the dates of these instruments, he obtained possession of the property therein described, and

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held the same in possession until he sold and conveyed to Ross. That when he purchased the lot Hinckley was indebted to him, and that by an arrangement between them the witness paid a consideration for the property, in part by the discharge of the debt due him from Hinckley and in part by the payment of a debt due from Hinckley to Noe, as the consideration for the lot on the sale thereof by Noe to him.

When the plaintiff had closed his evidence the defendants moved the Court to grant an order nonsuiting the plaintiff, on the ground that a case had not been established by the evidence, proper or sufficient to be submitted to the jury. The Court granted the motion and the plaintiff excepted. Judgment was then rendered in favor of the defendants. Subsequently, on the application of the plaintiff, the nonsuit was set aside and a new trial granted, and from this order the defendants have appealed.

It is not necessary to determine whether the Court was right or wrong in excluding the instruments purporting to be deeds and copies of deeds, provided we come to the conclusion that if the same had been received in evidence the plaintiff would not have been entitled to recover, for it is not a matter of course that a Court of review must reverse a judgment of an inferior tribunal for errors committed except for those by which the complaining party may have been injured. (*Comstock v. Smith*, 23 Maine, 210; *Bohr v. Steamboat Baton Rouge*, 7 Sme. & Marsh, 723; *Crease v. Barrett*, 1 C. M. and R. 932; *Brazier v. Clapp*, 5 Mass. 10; *Hoyt v. Dimon*, 5 Day, 484; *Johnson v. Blackman*, 11 Conn. 358; *Lively v. Ball*, 2 B. Mon. 54.)

There is no controversy between the parties in respect to the validity of the grant to Sanchez, and as the case stands upon the documentary and parol evidence offered on the part of the plaintiff and appearing in the record, some portions of which were admitted and others excluded, we may consider the case upon the hypothesis that all such evidence is before us, and that at the date of the instruments purporting to be conveyances executed by William Hinckley to John Paty the title to the premises was in Hinckley, and that he is the com-

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mon source from which the respective parties derive whatever right and title they or any of them may have in the premises.

In this position of the case two questions arise:

First — Were the instruments in writing executed by Hinckley to Paty valid and operative as conveyances in fact, or invalid and void because no consideration or price paid for the property described was expressed therein, or for the reason that they were not executed in the mode required by the law?

Second — Was John Paty, the grantee named in such instruments purporting to be conveyances, for the reason he was not a citizen of the Mexican Republic, but an alien, incapable of taking, by grant, the land intended to be conveyed to him, and of holding the same?

I. In the consideration of the first question here propounded, it is proper to ascertain from the instruments executed by Hinckley, which the defendants claim were conveyances of his right, title and interest in the premises, the intention of the parties. In the first of these instruments Hinckley declares: "I the undersigned, having purchased the land before mentioned, and being the legal owner of said lot, this day have sold to Mr. John Paty two lots," describing the same as a portion of the lot before mentioned; and in the second of said instruments he recites having sold the remainder of the premises to the said Paty, and then renounces all his right in the lot, delivering to his grantee the document which he then signed in the presence of witnesses. It requires neither argument nor illustration to ascertain what Hinckley meant by the use of the language employed. In both instruments he declared in terms that he had sold to John Paty portions of the premises, which of itself implies a price paid as a consideration for the transfer of the property; added to which Paty testified on the trial that he paid a pecuniary consideration for the premises, which we must deem adequate in the absence of evidence to the contrary, provided the instruments intended to be deeds of conveyance are not to be pronounced invalid, for the reason that the price was not expressed therein, or for other cause.

It is earnestly insisted on the part of the plaintiff that these

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instruments should be held void, because it does not appear upon their face that a just price was paid by the vendee for the premises; and it is also insisted that the omission to state therein that a price was paid for the property cannot be supplied by proof of the fact *dehors* the documents themselves, and the Partidas, and Domat's Civil Law are cited in support of these positions. But these authorities do not lay down the doctrine for which they seem to have been invoked. (Partida 5, Tit. 5, Law 6; 1 Domat, Book 3, Tit. 6. Secs. 4-6.) According to the Partidas, sales and purchases might be effected in two ways: the one by writing, the other without. If the purchaser desired the contract to be reduced to writing, and that mode of evidencing the transaction was agreed upon, a sale thus made was not perfect, although the parties were agreed upon the price, until the writing was made and executed, for until then either party might retract. In the summary prefixed to Law 9, Title 5, of the Fifth Partida, it is said that "the price shall be expressed with certainty in the sale." If this is to be understood to the effect that the price must be expressed in the writing executed, then, by reference to the body of the law itself, it will be found to contain no such requirement. (*Walker v. Fort*, 3 La. (O. S.) 538; *Holmes v. Patterson*, 5 Martin, 693; Pothier on Sales, Part 1, Art. 2, Sec. 2.)

In *Hayes v. Bona*, 7 Cal. 158, the Court gave countenance to the doctrine that a contract for the sale and transfer of land, under the law existing in California at the time when the conveyances from Hinckley to Paty were executed, must contain the names of the parties, the thing sold, the date of the transfer and the price paid; and subsequently, in *Stafford v. Lick*, 10 Cal. 16, the same Court repeated the rule suggested in *Hayes v. Bona* as the settled law; and in *Stanley v. Green*, 12 Cal. 166, it was held that "any instrument in writing which contained the names of the parties, a designation or description of the property sold, the date of the transfer and the price paid was sufficient to pass the title." That an instrument containing all the characteristics thus designated was sufficient as a deed of conveyance may be and is admitted, but it does

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not therefore follow that the omission of the date, or the failure to mention the price, would render a deed designed as a conveyance inoperative and void. Any one who comprehends the nature of a contract of sale evidenced by writing will readily perceive that the writing, in order to constitute the contract or evidence of the contract, must show who are the contracting parties and the subject matter transferred. These constituent parts of a written contract of sale are essential to it as a contract, and are therefore indispensable, but it is not so in respect to the mention of the date or of the price paid as the condition of the transfer.

In *Havens v. Dale*, 18 Cal. 366, the Court refused to follow *Hayes v. Bona*, saying that they could not see anything in the point that the deed in question in that case was void by the Mexican law, because it did not recite the price or consideration.

The Court makes no reference, in *Hayes v. Bona*, to any law or authority requiring the price paid to be mentioned in the contract, unless it be to Law 29, Book 8, Title 13, of the *Recopilacion de Indias*. We have examined the law referred to, and find nothing in it requiring a written contract of sale to specify the price paid by the purchaser. This law providing for the execution of contracts in the presence of a certain officer had relation to the public revenue. The law made it the duty of the officer in whose presence contracts were executed to furnish once a month, to another of superior grade, a copy of every contract of sale made in his presence during the preceding month, with a statement specifying the day, the month and year when executed; the names of the vendor and vendee; a designation of the property sold or exchanged, and the price paid or the thing exchanged for it. This is the sum and substance of the requisition of this law, which comes entirely short of requiring that the price paid should be expressed in the deed of conveyance.

In the second volume of the "*Nuevo Febrero Mejicano*," at page 702, (Ed. of 1851) it is said: "In order to make a contract of sale valid, the following conditions are necessary:

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First—A legal ability in the contracting parties and their free consent; *Second*—A thing certain and determinate; *Third*—A fixed determinate price—for if any one of these three conditions be wanting there will be no contract of sale.” In Volume 1, Title 26, Chapter 3, of the same work, the author says, “when the deed of sale is simply of property, it ought to recite who sells, and to whom; the nature and condition of the vendor; a designation of the thing sold; whether it be movable or immovable property; whether it be free or incumbered, and where situated; and if it be land, its extent and quantity.” This author goes into a minute specification of the particulars which the deed ought to recite; for instance, if the subject of sale be a vineyard or olive orchard, he says the deed ought to set forth the number of vines or olive trees therein, and also how many it can contain. If it be a house, then of what material it is built, and the style of its front and foundation, and the number of superficial feet it covers, etc. And in cases of sales of merchandise, he says the goods should be minutely described, with an enumeration of the pieces or weight, according to the proper mode of measurement, with the prices of the articles. It is said the *escribano* should be very careful in this respect, for though the omission to observe these directions may not annul the instrument of sale, fraud may be presumed, and the Judge can impose on him an arbitrary penalty for not having complied with the requirements of the law, besides compelling him to make good the damage which may have been caused to any one of the contracting parties. Another clause of the same law is to the effect that the writing should contain a declaration of the vendor that the price at which the sale is made is the just and true value of the thing sold, and for that reason there is neither *lesion* nor fraud; and then it is said, “and in case the thing have a greater value, in order that he may have no cause of action to make a demand for the excess, let the seller make to the purchaser a donation thereof, perfect and irrecoverable, and a renunciation of the same, as he is authorized to do by Law 2, Title 1, Liber 10, of the *Nueva Recopilacion*.” The law here referred to required

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that if the vendor of a thing declare that he was deceived to the extent of more than one half the just price thereof, the purchaser should be required to make up to him the deficiency in the just price of the thing at the time he received it. If the buyer made the like declaration, then the vendor was required to restore to the purchaser what was in excess of a just price, or receive back the property sold, returning to the purchaser at the same time what he had already received for it. This rule, it is declared, should be observed in sales and exchanges and other contracts of like nature; and it is also declared that this law shall be effective in all such contracts from the day they are executed for the term of four years, and no longer.

Thus it appears that either of the parties may have his remedy for an injury of the nature described (provided he does not renounce his right to it, under the law), in the mode prescribed, at any time within four years; after which he is barred by the limitation specified; but the same law provides that the contract shall not be annulled by the omissions of this requirement.

We have been referred to the work of Sala, which is admitted to be of high authority. In Volume 2, Title 16, Section 5, Article 22 of this work, generally entitled "*Sala Mejicano*," it is said: "The certainty of the price ought to appear (*debe aparecer*) from the tenor itself of the contract or by some other thing or certain person expressly therein mentioned." And then to illustrate what is meant by the reference to some other thing or person for ascertaining the price, this author says: "The sale of a house, for instance, would be valid when sold for all the money there may be in the chest; for what it cost; for whatever may be appraised by some person agreed upon, and even for whatever may be a fair price." Sala does not say the price must be mentioned in the instrument of sale. He says it ought to appear from the tenor of the contract or by reference therein to some other thing or some particular person. We do not understand the words *debe aparecer*, to be used in the imperative sense of

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must appear. It seems from this learned commentary that the sale would be valid if it appeared that the price agreed upon was "whatever may be a fair price;" thus leaving the amount of the price to be ascertained by evidence *dehors* the deed of sale.

The word "sold," as used in the instruments executed by Hinckley to Paty, implies, as we have said, a price or consideration paid or contracted to be paid for the property transferred; and after a period of more than eighteen years since these transactions, we would not be justified in presuming that such price was not just and of the value of the property at that time.

It should be observed that the Spanish and Mexican authors to which we have referred do not say that a contract of sale which omits to set forth the many subordinate matters mentioned, shall be void because of such omission. While certain things are of the essence of a contract, others are not; and though it is said that such subordinate things ought to appear by the contract itself when in writing, it is obvious from the whole tenor of authorities that the object of such stipulations was the protection of the one or the other of the parties from consequences that otherwise might ensue to his prejudice. In these respects it is evident that these provisions of the laws were directory merely; and that contracts were not void because of a failure to observe such directions.

Another question touching the validity of the conveyances from Hinckley to Paty to the effect that they were not executed in the presence of a proper officer and authenticated by him as it is maintained the law required, is suggested.

Failing to appear before an *escribano* or Notary Public, that he might witness the execution of a contract did not, so far as we are able to learn, render the transaction void; on the contrary, contracts in writing entered into without the presence of the officer, were held valid, as sufficiently appears by Law 1, Title 1, Liber 10, of the *Novissima Recopilacion*, which is also to be found at pages three hundred and sixty-one and three hundred and sixty-two of the second volume of Rodriguez's

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General Code of Laws, published in Mexico in 1840, entitled *Pandectos Hispano Mejicanos*. This law relates to contracts and obligations in general, and translated reads as follows: "If it appear that one has undertaken to bind himself to another by promise or by contract or in other manner, he shall be required to perform his obligation; he shall not be allowed to object that no stipulation was made; that is, that the promise was not made with certain legal solemnities, or that the contract or obligation was made between persons absent, or that it was not made before an *escribano publico*, or that it was made by one private person in the name of others who were absent; or that one person contracted that another should do or give something; we decree, nevertheless, that all obligations and contracts so made, shall be valid in whatever way it may appear that one may have bound himself to another."

This law, as we are advised from reliable sources, was the law of the land at the time Hinckley executed the instruments set forth, and we are of the opinion that it was not indispensable to the validity of such conveyances that they should have been executed in the presence of an officer.

It appears from the evidence that a price certain was agreed upon by the parties at the time the transfers were undertaken to be made, but that the same was not expressed in the instruments executed. To this it is objected that evidence *aliunde* cannot be received to establish the fact that a price was agreed upon and paid. This objection is not tenable. Such evidence neither contradicts nor varies the deeds. The rule has become general that where no consideration is expressed in a deed of conveyance of land, the true consideration may be proved by parol. (*Peacock v. Monk*, 1 Vesey, 127; *Jackson v. Fish*, 10 John. 456; *Frink v. Green*, 5 Barb. 455; *Barnes v. Perine*, 15 Barb. S. C. 249; 2 Kern. 18.)

II. At the time when the conveyances were executed by Hinckley, in 1844 and 1845, his grantee, Paty, was not a citizen of the Mexican Republic, nor the husband of a Mexican woman, and it is therefore objected on the part of the plaintiff,

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as before stated, that he was not competent to take and hold real property in California, by grant.

By the law passed by the Mexican Congress, on the 18th of August, 1824, respecting colonization, foreigners were invited to acquire and settle upon the vacant lands of the republic, and the nation promised to those who might come to establish themselves in its territories, security in their persons and property, provided they subjected themselves to the laws of the country. The same law provided that, previous to the year 1840, the entry of foreigners to colonize should not be prohibited, except with respect to the individuals of some nations, it should become necessary; and it was also provided that in the distribution of lands Mexican citizens should be preferred to foreigners. The regulations for the colonization of the territories of the republic, passed on the 21st of November, 1828, authorized the Governors, in compliance with the law of the 18th of August, 1824, and under the conditions therein specified, "to grant vacant lands in their respective territories to such contractors (*empresarios*,) families or private persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating and inhabiting them."

The proceedings which the Mexican was required to adopt in order to acquire lands from the Government seems to have been the same as that demanded of the foreigner, so far as appears from the law of 1824 and the regulations of 1828. The only discrimination which the law of 1824 made between the Mexican citizen and a foreigner, was that the former should be preferred to the latter in the distribution of the public domain. It seems to have been the policy of Mexico to encourage the acquisition by foreigners of permanent interests in its territories, though by laws and decrees subsequent to the law of 1824 and the regulations of 1828, the acquisition of lands in the frontier departments by foreigners was limited to those of countries whose territory was not contiguous to that belonging to the Mexican Nation.

By the edict of Santa Anna, signed on the 11th and ordered to be published on the 14th of March, 1842, it was decreed

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that foreigners not citizens in the republic might acquire and hold lands by purchase, adjudication and denouncement, or any other title established by the laws, except in the departments of the frontiers and bordering on other nations, in regard to which it was declared special laws of colonization would be enacted, "without the power to foreigners to ever acquire property in them, without the express license of the Supreme Government."

Upon the authority of this edict or decree, it has been supposed by some that a transfer of real property, by one capable of granting, to an alien, was *ipso facto* void; but we do not understand such to be its effect in relation to a private grant. The declaration that in regard to the departments of the frontier and bordering on other nations special laws of colonization would be enacted is indicative, if not demonstrative, of the subject matter to which the edict applied; and this view of the subject is fortified by reference to a subsequent portion of the same decree, wherein it is declared that "foreigners cannot acquire royal or public lands in all the departments of the republic without contracting for them with the Government, which possesses the right as representing the domain of the Mexican Nation." By this it appears again that this law or decree of 1842 had reference to the acquisition by foreigners of the public lands; and was designed as a limitation to a prescribed mode, by which an alien could acquire lands of the public domain within the interior departments of the republic. If our understanding and construction of this law be correct, then the capacity of an alien to acquire and hold land by grant from a private source must depend upon other laws relating particularly thereto.

In 1828 the Mexican Congress passed an Act in relation to passports, and the mode of acquiring property by foreigners. The former portion of this Act specified by what means foreigners might lawfully enter and pass through Mexican territory, and further provided what those who had entered the country before then must do to avoid the prescribed penalties for neglecting its prospective requirements, and then it is

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enacted that "foreigners who have entered and established themselves according to the preceding rules, or to those which may hereafter be prescribed, are protected by the laws, and have the same civil rights which are granted to Mexicans, with the exception that they cannot hold rural real property (*propiedad territorial rustica*), unless in conformity to the laws touching property held by persons not naturalized." Thus it appears that a foreigner might acquire and hold real property subject to the laws having reference to his condition and character as an alien. These laws were to be observed, but not, it would seem, as a condition precedent to the alien's capacity to acquire property in lands, because in a subsequent section of the same law it is declared that "Property acquired by non-naturalized foreigners in fraud of this law may be denounced by any Mexican, to whom it will be adjudged as soon as such fraud is proved." (*Schmidt's Civil Law of Spain and Mexico*, 346.)

When the edict of Santa Anna, to which we have referred, is considered in the light of the law of 1828, and of the general law relating to the subject of denouncement, we cannot regard a conveyance of land by a private citizen to an alien as void; but, rather, that the grantor in such case would be divested of the property which he had undertaken to convey, and at the same time the alien grantee would become invested with a defeasible estate therein, of which he might be deprived by the sovereign authority, or by a citizen of the republic by the inquisition of denouncement.

A denouncement was a judicial proceeding, and though real property might be acquired by an alien in fraud of the law—that is, without observing its requirements—he nevertheless retained his right and title to it, liable to be deprived of it by the proper proceeding of denouncement, which in its substantive characteristics was equivalent to the inquest of office found, at common law. (*Escriche*, "Denuncia;" *Ramirez v. Kent*, 2 Cal. 558; *People v. Folsom*, 5 Cal. 378; *Craig v. Leslie*, 3 Wheat. 563; *Bradstreet v. Supervisors of Onida Co.* 13 Wend. 546.)

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At common law an alien born might purchase lands, but not for his own use, for thereupon the King became entitled to them. (1 Black. Com. 372.) A conveyance of land to an alien was a cause of forfeiture to the Crown of such lands, not only on account of the alien's incapacity to hold them, but likewise on account of his presumption in attempting by an act of his own to acquire real property. (2 Black. Com. 274.) But notwithstanding, until office found, the title remained in him. (1 Com. Dig., Title Alien, C. 2.)

So far as we are advised, the consequences that might follow this species of infraction of the law was substantially the same under the Mexican law as at common law, and until denouncement, the alien grantee of land could hold and possess it as his own property.

In argument the plaintiff's counsel admits that if Paty had received a good and valid deed from Hinckley, sufficient in law to convey the title in fee, that though an alien he could have held such estate until divested of his right by denouncement. Then, if Paty, being an alien, acquired the property in controversy in fraud or contravention of the law (which is not to be presumed in the absence of evidence to that effect), he held it at the time of his conveyance to Ross; for it is not proved, nor is it pretended that any proceeding was ever instituted by a Mexican or on the part of the Government to divest him of his title, and it is now too late to question his right on account of his having failed to observe the requirements of the law, even if it could be proved that such was the case.

We have examined and considered this case, with the evidence on which the plaintiff relies for a recovery and which she proposed to introduce to the Court and jury, before us, and are of the opinion that it would not authorize a verdict and judgment in her favor; it therefore follows that the order setting aside the nonsuit, and the judgment thereupon given and the granting of a new trial should be reversed, and it is accordingly so ordered.

Mr. Justice SHAFTER expressed no opinion.

Argument for Appellant.

JOHN CAPERTON v. FREDERICK SCHMIDT.

JUDGMENT IN ACTION TO RECOVER REAL ESTATE.—A judgment rendered in an action to recover the possession of real estate, under our system of pleading and practice, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar in another action between the parties or their privies where the same matters are directly in issue.

LIMITATION OF BAR OF JUDGMENT.—The bar of a judgment and verdict in an action to recover the possession of real estate is limited to the rights of the parties as they existed at the time when it was rendered, and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, that their rights have been varied or extinguished at a period after the rendition of the verdict and judgment.

PLEADING IN ACTION TO RECOVER REAL ESTATE.—Under our system of pleading, the plaintiff, in an action to recover possession of real estate, is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seized of the premises, or of some estate therein, in fee, for life, or for years, or he may aver a former possession and ouster; but whatever is put in issue and determined is conclusive and final.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Horace Hawes, for Appellant.

The maxims that no one ought to be vexed twice for the same cause, and that it is the interest of the republic that there be an end to litigation, are common to the jurisprudence of all civilized countries. The rule has been so well given in the *Duchess of Kingston's Case*, cited in Greenleaf's Evidence, and in Broom's Legal Maxims, 246 (marg.), that it is the general text of authors and jurists.

In *Eastman v. Cooper*, 15 Pick. 285, the rule is thus stated: "The law applicable to the subject is well stated in Bull. N. P. 232, in the case of *Sherwin v. Clarges*. If a verdict be had on the same point and between the same parties, it may be given in evidence, though the trial were not had for the same lands; for the verdict in such case is a very persuading

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evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the present jury. But, then, this verdict ought to be between the same parties, because otherwise a man would be bound by a decision who had not the liberty to cross examine; and nothing can be more contrary to natural justice than that any one should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert. But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." But no verdict shall be given in evidence but between those who are parties or privies to it. (Id.) And "it is not necessary that the fact to be proved by the record should have been solely and specifically put in issue on the former trial; it is sufficient if it was a fact essential to the finding of that verdict." (Stark. Ev. 4 Amer. ed. 200.)

And it is not necessary that the form of the action in the former suit should be the same as in the latter. Thus a recovery in an action of assumpsit is a good bar to any action brought upon the same contract. (*Slade's Case*, 4 Co. 94 B.) "It is held that the nature of the judgment has no effect on the operation of the rule, and a decree with regard to the *status* of an individual will be equally conclusive with a decision upon a right of property as guardian, administrator, naturalization of an alien, the adjudication of a descent or pedigree." (24 Vermont, 42; *Ib.*, 123; 1 Selden, 293; 1 Jones, 220.) It is equally well settled that the mode in which the question is brought before the Court is immaterial if it be actually decided. (*Kelly v. Pike*, 5 Cushing, 484.) The inflexible and invariable rule is, that when the cause of action is substantially the same, and is or might be sustained by the same evidence, no change in the form of the suit or of the pleadings shall avail to withdraw a matter which has once been judicially determined from the estoppel of the adjudication. (*Baker v. Rand*, 13 Barb. 152; *Burkhead v. Brun*, 5 Sand. 154; *Chapman v. Smith*, 16 Peters, 144; 3 Wil. 304;

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4 Rawle, 188; 2 Whart. 119.) The rule is the same where the previous determination has been by the decree of a Court of equity. (*Jackson v. Hoffman*, 9 Cow. 371; *Owen v. Davidson*, 1 Watts, 149; *Montford v. Hunt*, W. C. C. R. 28; or *vice versa*, *Kingsland v. Spaulding*, 3 Barb. Ch. 141.)

In order that a judgment in one action be conclusive in another, it must appear with convenient certainty that the question in controversy in the second suit was litigated and decided in the first. Where this is apparent on the face of the record, the mere production of the record is enough. (17 Ala. 133; 4 Cow. 71; 14 Bar. 511.)

A judgment rendered on a point of law, when the facts are admitted by a demurrer or case stated, will be an absolute bar to renewal of the controversy in a subsequent proceeding. (*Perkins v. Moore*, 16 Ala. 17.) And it is settled that the correctness of a judgment cannot be impeached on the ground that the law was mistaken by the Court or the facts wrongfully found by the jury, because the party has his remedy. (*Kelly v. Pike*, 5 Cush. 484; *Marsh v. Pier*, 4 Rawle, 282; *Lloyd v. Barr*, 1 Jones, 41; 13 Bar. 152; 18 Ala. 281.)

Every judgment is *prima facie* a substantial and final determination of the matter in controversy or in issue, and this presumption cannot be overcome by extrinsic evidence, unless there is something on the face of the record to justify the admission.

The conclusive effect of a verdict is the same, whether it was rendered upon the evidence or in obedience to a technical rule of law, (*Green v. Clark*, 5 Denio, 497,) and a plea of a former recovery for the same cause of action cannot be answered by a replication that the decision was not on the merits, without showing that the proceeding was such that they could not have been decided. (*Agnew v. McElroy*, 10 S. & M. 552.) The Court say that a defendant cannot escape the consequences of an adverse judgment on the ground that he had a good defense in fact, and relied inconsiderately on an untenable point of law. So, where the plaintiff offers evidence in relation to a claim contained in one count of his

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declaration, which evidence is rejected by the Court, and a general verdict is rendered, (the count to which the rejected evidence is applicable not having been stricken out,) the judgment thereon will be a bar to the claim so attempted to be established. (*Smith v. Whiting*, 11 Mass. 445; *Gardner v. Buckbee*, 3 Cow. 120.) Former suit brought on promissory note, and successfully resisted on the ground of fraud. The verdict and judgment were held as conclusive evidence of the fraud in a subsequent suit on another note given for the same transaction, and in that case parol evidence was admitted to show (what did not appear from the record) that *on the former trial* fraud was the defense made, and the point on which the decision was founded. (So held in *George v. Gillespie*, 1 Iowa, 421; same principle in *Doty v. Brown*, 4 Cow. 71; *Chase v. Walker*, 26 Maine, 553. See, also, 7 Ga. 434; 19 Vt. 144; 18 Conn. 91.)

In *Aslin v. Parkin*, 2 Burr, 666, 668, (A. D. 1758,) which was an action for *mesne* profits, Lord Mansfield, in conformity with the opinion of all the Judges, lays down the following principles:

1. That by the judgment in ejectment the tenant is concluded in the action afterwards brought against him for *mesne* profits, and cannot controvert the plaintiff's title or possession.

2. That this judgment, *like all others*, only concludes the parties as to the *subject matter of it*. Therefore, beyond the time laid in the demise, it proves nothing at all; because, beyond that time, the plaintiff has alleged no title, nor could he be put to prove any.

The principles laid down by Lord Mansfield, in *Atkins v. Horde*, and *Aslin v. Parkin*, and which have been adopted in many American cases, form no exception to the general rule, which is applicable to all actions, and is eminently conservative of social order: that any fact which has been put in *issue* and judicially determined, shall never again be brought in question between the same parties. The principles laid down in the two cases referred to have reference only to the established form of pleading in the action of ejectment, in which

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the *title* was never put in issue, but simply the present right of possession, which, in many cases that may be supposed, the lessee might have and enforce even against the owner of the fee. The action was brought to recover a term for years from which the tenant had been ousted, and no issue was ever made upon the title. It is true that it became the common method of trying title to land, but as no issue was formed upon title by the pleadings, the title came only *collaterally* and *incidentally* before the Court. (Bl. Com. B. 3, Chap. XI, Vol. 3, pp. 202, 205.) The record could present no evidence that any question of that nature had been tried or adjudicated upon. The action itself did not belong to the class of real actions. The subject matter of it—an estate for years—does not even ascend to the dignity of real property—it is only a chattel. It was not simply because it was a possessory action that it could not prejudice the right of property, but because upon the face of the record it did not in any manner *concern* the freehold, as the action by writ of entry or disseizin, and assize, which were likewise possessory actions, did. The latter were the remedies adopted for an ouster of the freehold, while the writ of ejectment was the appropriate remedy for an ouster of the term of years. But although the fee simple was not drawn in question by the pleadings in any of these actions, the judgment in each of them was nevertheless final and conclusive *quoad* the subject matter; for the principle of *res judicata pro veritate habetur* admits of no exception, either in the civil or the common law. Accordingly, it is laid down by Judge Blackstone (Com. Book 3, Chap. X, Vol. 3, p. 185,) respecting the writ of entry and the writ of assize, after pointing out a very unimportant distinction between them, that “these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other; so that when a man’s possession is once established, by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them.” And again, he observes that a judgment in any possessory action, if obtained by him who hath not the true ownership, is held to be a spe-

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cies of deforcement, which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. (Ib. p. 191.) And again, he observes, respecting the writ of right, which lies only in favor of such as claim to be tenants of the fee simple, that after issue once joined in this action, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand. (Ib. p. 104.) All this accords with the doctrine so clearly illustrated by Lord Ellenborough, in *Outram v. Morewood*, that the judgment in every action is conclusive as to all matters put in issue by the pleadings. If the plaintiff counts upon the fee simple, and issue is taken upon it, the title is concluded if there is any form of action or pleading by which it can be. If that is an action of ejectment in which *such* an issue is joined, then the action of ejectment has swallowed up all other actions affecting landed property. But, call it as you may, there can be no higher action than that in which such an issue is tried, inasmuch as there is recognized by our laws no higher estate in land than the fee simple. Although it be true, therefore, that the unsuccessful party in a *possessory* action at common law, might resort to an action of a higher nature (not to retry what was before tried, but) to try what was not in issue or litigated in the first action, yet no such resort is open where, as in our case, the highest right of property has already been in issue, tried, and determined.

In California, the common law forms of action, pleadings, and proceeding were never in force; for with the organization of our Courts, the Act to regulate proceedings in civil cases, passed April 22d, 1850, went into operation. (See Statute of 1850, p. 428; Act to supersede certain Courts, etc., Ib. p. 80, Sec. 28, *et seq.*, and Sec. 41; Act to provide for holding the first county election, Ib. p. 81.) In some of the States where those forms of proceedings did once exist they have been abolished by a reformed code of practice similar to ours.

New York, where one trial and judgment is now conclusive in every case upon the matter in issue, gave us a model, and it

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seems to have been substantially followed in Mississippi and Georgia, in which States a verdict and judgment in an action for the recovery of real property where the title is put in issue, is held to be a bar to any subsequent action for the same cause. (*Brewer v. Beckwith*, 35 Miss. [6 George] 467; *Sims v. Smith*, 19 Georgia 124.)

In Alabama the action of trespass "to try title as well as to recover damages," prescribed by the Act of 1821, is not conclusive on the title in a subsequent action, because that Act expressly declares that "the laws now in force in relation to the action of ejectment, except so far as relates to fictitious proceedings therein, shall be applied to the action of trespass to try titles." (*Vide Camp v. Forrest*, 13 Ala. 118; *Mitchel v. Robertson*, 15 Ib. 412.)

In South Carolina, where the action of trespass to try titles was substituted for the action of ejectment in 1791, one trial, verdict, and judgment, is conclusive on both parties. (*Thomas v. Geiger*, 2 Nott & McCord, 528.)

By our Practice Act there is but one form of civil action for the enforcement or protection of private rights and the redress of private wrongs, (Sec. 1.) No fictitious parties or forms are to be used, but every action is to be prosecuted in the name of the real party in interest, (Sec. 4); *all the forms* of pleading and the rules for testing their sufficiency are those prescribed by that Act, (Sec. 37); the pleadings are to state the facts constituting the cause of action or defense, according to the truth of the case, in ordinary and concise language, (Secs. 39-46); and "the judgment is the final determination of the rights of the parties in the action or proceeding," (Sec. 144.) Under these provisions the forms and fictions which constitute the essence of the action called ejectment could not be admitted in practice, and it is evident that the action of ejectment proper—that form of action to which Lord Mansfield refers in the cited cases of *Atkins v. Horde* and *Aslin v. Parkin*—is not in use in this State. Nevertheless, the judgment in that action, as in all others, was conclusive as to the subject matter of it as shown by the pleadings.

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E. W. F. Sloan, for Respondent.

It is a general rule at law, that neither a verdict nor judgment in ejectment concludes the parties *from questioning the title* in any subsequent contest about the same land. (*Botts v. Shield's Heirs*, 3 Litt. 36; *Aslin v. Parkin*, 2 Burrow, 668; *Jackson v. Diffendorf*, 3 John. 270; *Smith v. Sherwood*, 4 Conn. 280.)

As to the subject matter, however, a judgment in ejectment, like that in other cases, is conclusive upon the parties. But what is the subject matter of the action in ejectment? It is simply the *right of possession for a limited period*. The commencement of that period, under the former system of pleading, was the *date of the demise* laid in the declaration; it ended with the term. Hence, beyond the time laid in the demise, the judgment in ejectment proved nothing at all; "because, beyond that time the plaintiff has alleged no title, nor could he be put to prove any." (2 Burr. 668; *Garner v. Marshall*, 9 Cal. 270; *Yount v. Howell*, 14 Cal. 468.)

The alleged lease, though fictitious, became an admitted fact by the consent rule, which the defendant was obliged to enter into before he was permitted to defend.

The plea of not guilty put the plaintiff upon the trial to prove a right of entry in his lessor, the admitted demise constituting his right under the lessor. A recovery in ejectment being conclusive in an action against the tenant in possession for mesne profits, it was advisable for the plaintiff to lay the demise as far back as possible; that is, as far back as the lessor's title would permit.

On the trial in ejectment the plaintiff might rest upon proof that his lessor was actually possessed of the land at the time of the alleged demise; or he might show that he then had an existing legal estate either in fee simple, fee tail, or an estate for life, or years, or in remainder and death of tenant for life; and in doing so he might put in evidence any number of derivative title deeds from a great variety of sources, or introduce

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any other legitimate evidence of a right of entry; and all this under the same count.

The matter in issue is the right of possession only; the nature of the estate upon which it depends, and the titles which go to sustain it are matters arising merely collaterally.

It has been assumed by appellant's counsel that under our system of pleading and practice, what is usually denominated ejectment is something more than a mere *possessory* action. No case, however, has been cited or reason adduced in support of the assumption.

In New York it is held that the character and form of the action of ejectment has not been changed by the code; that it still remained a possessory action as formerly, and that it can only be brought against the actual occupant. (*Van Buren v. Cockburn*, 14 Barb. 118; *Pulen v. Reynolds*, 22 How. 354.)

The conclusive effect of a judgment in ejectment under our system is even more limited than it was under the former. Independent of the time at which the plaintiff's right of entry is alleged to have accrued, he can recover in this State, provided he is able to show such right accrued to him at any time before action brought.

Thus it is said by the Court in *Yount v. Howell*, 14 Cal. 468: "The rule of the common law in relation to proof of a legal estate and right of entry at the demise laid in the declaration, has no application under our system." "In our practice it is sufficient if it appear that the plaintiff was entitled to the possession of the premises at the commencement of the action, and the date of the alleged seisin or possession and ouster become material only, when the question of mesne profits is involved."

"When mesne profits are claimed in an independent suit, the record of recovery in the judgment is as to the title *only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had.* With us the judgment is only conclusive of two points: the right of possession in the plaintiff, and the occupation of the defendant at the institution of the suit. Whatever beyond these

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facts may be necessary in an independent suit to recover mesne profits, must be established by evidence outside of the record in ejectment."

Again, say the Court in *Garner v. Marshall*, 9 Cal. 270: "Ejectment is a possessory action, and must be brought against the occupant. It determines no rights but those of possession at the time, and it matters not who has or claims to have the title to the premises."

It was suggested by appellant that *Hayes and Caperton v. Schmidt*, was a real action.

I see no reason why an action in the nature of the writ of right would not lie in this State. A distinction between the "recovery of real property" and the "recovery of the possession thereof," is clearly recognized in section six of our Statute of Limitations, which seem to me to contemplate the bringing of real actions. But there is no case of that character to be found in the reports of our State. Nor is it probable that there is a complaint on file in any of our Courts which would be a good count in the writ of right. In that action the demandant must count upon the *actual seizin* of him who was, in fact, last seized, setting forth correctly his own derivative title. If the right descended from his father, who, being once seized in fact, became afterwards disseized, he should count upon the seizin of his said father; then allege his own derivative right as heir at law. In such case, if he counted on his own seizin, never having been in fact seized, his action would abate, even though he proved his father's seizin and his right to inherit. But, if he sued again, counting on the seizin of his father, he could upon the same proof recover, for the judgment in the former action would be no bar. Though the parties be the same, and the land the same, yet the foundation of the right alleged would *not* be the same. Not only must the demandant count accurately, as to the fact of seizin, but he must also set forth his derivative right correctly. If he claims by inheritance, he must show that he is heir and *how*. (*Jayne v. Price*, 5 Taunt. 326; *Dunsday v. Hughes*, 3 Bos. &

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Pul. 453; *Dowland v. Slade*, 5 East, 273; *Wells v. Prince*, 4 Mass. 64.)

"A material part of the count," says Reeves, "was the deducing of descent from the ancestor seized down to the demandant. No chasm could be left. If any was omitted in the descent; if it commenced with one who never was in seizin; if there was any error in the person, or if the name of any one mentioned in the descent was a *villein*; in all these cases the action would abate, and the demandant would lose his suit." (1 Reeves' Hist. Eng. Law, 431, 432; *Denham v. Stephenson*, 1 Salk. 355; Roscoe on Real Actions, 19, 22, 177, 215, 323, 329.)

There can be no mistake as to what is actually put in issue and tried and determined in the writ of right. In ejectment, however, which is purely a possessory action, the plaintiff counts upon his own right of possession; and on the trial he may sustain that right by any available evidence.

A verdict for the plaintiff establishes nothing but his right of possession for the time being, a right which may expire with the day of recovery. A verdict for the defendant establishes nothing except that the plaintiff did not have the right of possession when he commenced his action, though he might then have been the "owner in fee." It is consistent enough, with an existing leasehold estate in some one else, to say that the plaintiff is the owner in fee. Such ownership does not necessarily carry with it a present immediate right of entry.

That a verdict and judgment in ejectment in one action may, under certain circumstances, be given in evidence in a subsequent suit, is a proposition not questioned. But a proper case for the admission of such evidence rarely happens in practice, and hence only a few precedents of the kind are to be found in the reports.

From the statement of the case of *Doe ex dem. Strode v. Seaton*, 2 Crompt. M. and S. 728, it does not distinctly appear for what purpose the record of the former judgment was read in evidence. It is probable, however, that in all other

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respects the case made by the evidence in the second action was the same as in the first. Upon such a state of proofs, the former verdict might, perhaps, with propriety be introduced as "persuasive evidence."

The only authorities referred to in that case are Buller's N. P. 232, and Bacon's Ab. Tit. Evidence, F. "What twelve men have already thought of the fact may be supposed fit to direct the determination of the present jury," is the reason there given.

It seems to place the verdict, as matter of evidence, on the same footing with the opinion of experts. Obviously there are cases in which evidence merely persuasive cannot be properly received.

Where, in one ejectment, the plaintiff recovered possession of the land from the defendant, and in a subsequent action by the same defendant against the plaintiff a question arises as to whether said plaintiff had entered lawfully, it would be clearly proper to read the former judgment in evidence, to show that he had entered under it, and therefore lawfully, as in *Jackson v. Rightmire*, 16 J. R. 314.

By the Court, SAWYER, J.

The complaint in this action alleges, that, on the first day of January, 1860, the plaintiff "was the owner in fee, and seized of and in the possession of" Block 142, in the City of Oakland, Alameda County; that afterwards, on the 20th of January, 1860, "whilst said plaintiff was so seized in fee and possessed of said tract of land, the said defendant wrongfully and unlawfully entered into and upon said premises and unlawfully ousted and ejected said plaintiff therefrom, and still continues to withhold wrongfully from said plaintiff the possession of said premises," and prays judgment for restitution of the premises, and for damages.

The answer specifically denies the allegations of ownership and seizin, and the ouster, thereby putting the title and ouster in issue. It then affirmatively alleges, that, on the 20th of

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December, 1858, in the District Court of the Third Judicial District, the plaintiff and one John C. Hays, claiming the said lands as tenants in common, commenced a suit against said defendant for the recovery of the same premises, claiming the same and the possession thereof, as owners in fee simple, the said defendant denying the ownership, title and right of possession of said plaintiffs, and setting up and claiming title in himself as owner in fee simple to the undivided forty eighty-first (40-81) parts of said premises; that the right and title of plaintiffs and of the defendant in said suit to the said premises so in controversy, and their respective rights and claim to the possession thereof, as owners or otherwise, were duly put in issue by the pleadings, and were fully litigated, tried, and finally determined in said suit; that after a full trial, it was finally adjudged by the Court in said suit that the plaintiffs do have and recover the possession of the undivided forty-one eighty-first (41-81) parts of said premises, according to their undivided interests as tenants in common with the said defendant, and that the said defendant do have and recover against said plaintiffs the undivided forty eighty-first (40-81) parts of said land and premises, and for possession thereof as co-tenants with said plaintiffs; that the right, title and claim to the said premises now set up by the said plaintiff, Caperton, are the same that were tried and determined in said suit; that the interest of said John C. Hays has been transferred to said Caperton since the final judgment aforesaid, which judgment is still in full force; and that said Caperton has no right, title or claim to said premises, or to the possession thereof, other than that which was tried and determined in manner aforesaid. The answer then insists that the said matter so adjudged ought not to be again brought in question; acknowledges the title of plaintiff to the forty-one eighty-first parts adjudged to said Caperton and Hays, and the right of the plaintiff as co-tenant to that extent to enter into possession with said defendant; and avers that he never withheld the possession thereof from said plaintiff. The answer also avers, that defendant is owner in fee of the undivided forty eighty-first parts, of which he is

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lawfully in possession, and disclaims any interest, claim or possession as to the rest.

The plaintiff on the trial relied upon a title derived from Luis Peralta, the original grantee of the Mexican Government, through his sons Vicente and Domingo Peralta, to whom the grant was confirmed by the Land Commissioners, and the Courts of the United States on appeal. Plaintiff also proved that defendant had been in possession since 1857.

The defendants, to maintain the issues on their part, offered in evidence the record of the former suit set up in the answer; to the introduction of which, the plaintiff objected. The Court sustained the objection, and defendant excepted. This ruling is assigned as error.

The complaint in the record offered in evidence, and excluded by the Court, avers that, "on the 27th day of September, 1858, the said plaintiffs (Caperton and Hays) were the owners in fee simple and seized of, and as such entitled to the possession of" * * * Block 142, in the City of Oakland, Alameda County; that while so seized and possessed and entitled to the possession the said defendant, (Schmidt,) on said day, "unlawfully and without title or right trespassed and entered upon said premises and took unlawful possession of the same, and he withholds and detains the same without right or title," etc., and prays judgment "for the restitution and recovery of said premises;" also for damages, etc.

The answer "denies that the said plaintiffs were or are owners in fee simple, or seized of, or were or are entitled to the possession of the tract of land and premises mentioned in the complaint," etc.; denies that "he ever unlawfully, or without right or title, trespassed or entered upon said premises, or any part thereof, or took unlawful possession of the same, or dispossessed said plaintiffs," etc.

The defendant then sets up a claim to an undivided one half of the premises, averring that he is lawfully in possession of said undivided one half, and lawfully entitled to the possession thereof, in common with others, his co-tenants, to the extent of his interest and possession in common, as aforesaid,

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and avers that he has always confessed and still freely confesses the right of his co-tenants, lawfully possessed of an estate in said premises, to enjoy the same in common with himself.

Thus the title and right of possession were distinctly put in issue. The cause was tried by the Court, without a jury, and the Court found and adjudged, that the plaintiffs were entitled to forty-one eighty-first parts of the premises, "and that they be let into possession of the said premises according to their said undivided interests as tenants in common with the said defendants, and that said defendants do have and recover judgment against the said plaintiffs for the undivided forty eighty-first parts of said land and premises, and for the possession thereof as co-tenants with said plaintiffs, and that plaintiffs pay the costs of suit."

The record also contains an agreed statement on motion for new trial, embracing the evidence, which shows that the parties, on the former trial, relied upon the same title, and same evidence to support it, as on the trial in this case. But on the former trial the will of Peralta, offered in evidence by plaintiffs, was excluded, while on the trial in this case, it was admitted. The plaintiffs in the first action appealed to the Supreme Court, the judgment was affirmed, and it is still in full force.

The former proceeding and judgment having been set up by way of estoppel, the question is, whether the record and judgment in the first action, were admissible in evidence on the trial of the second.

It is perfectly well settled, that the judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar; and where there has been no opportunity to plead it, and it is offered in evidence, it is admissible and conclusive between the same parties and their privies upon the same matter directly in issue in another Court; and also when coming incidentally in question in another Court for another purpose. The entire current of authorities in England and America establish the rule as here limited, and many extend it further.

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(1 Greenl. Ev. Secs. 528-531; *Duchess of Kingston's Case*, 20 State Trials, 355; 11 Conn. 249; *Marsh v. Pier*, 4 Rawle, 289; 11 Mass. 446; Starkie's Ev. by Shars. 333; 19 N. H. 167; *Betts v. Starr*, 5 Conn. 550; 17 Mass. 365; 3 Cow. 127; 2 Smith's Lead. Cases, 572; 2 Hill, 481; 10 Wend. 85; 8 Wend. 40.)

And the rule is applicable to real, as well as personal actions. "Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its subject matter by way of bar to future litigation for the thing thereby decided." * * * 'What, therefore,' Lord Coke says, 'that in personal actions concerning debts, goods and effects (by way of distinction from other actions), a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever *quoad* their subject matter.' " (*Outram v. Morewood*, 3 East, 357.)

But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which only comes collaterally in question, though within the jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment. The matter to become as a plea, a bar, or as evidence conclusive, must have been directly in issue. (1 Green. Ev. 528; *Fulton v. Hanlow*, 20 Cal. 451; 15 Cal. 147; *Hopkins v. Lee*, 6 Wheat. 109; and cases before cited.)

It will be seen from the rule as here stated, that, the matter adjudicated to become, as a plea, a bar, or as evidence conclusive, must have been *directly* in issue, and *not merely collaterally litigated*. It must be a fact "immediately found according to the pleadings, not that on which the verdict was merely based—a fact in issue, as distinct from a fact in controversy." (*Potter v. Baker*, 19 N. H. 166; *McDonald v. B. B. W. and M. Co.*, 15 Cal. 148.) And what constitutes a fact in issue, as distinct from a fact in controversy, is well illustrated in the cases of *King v. Chase*, 15 N. H. 15-17; *Betts v. Starr*, 5 Conn. 552.

The respondent's counsel does not controvert the correct-

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ness of these principles, but relies on them. He says "It is not questioned on the part of the respondent, that a judgment pronounced on the merits in one action by a Court of competent jurisdiction, is conclusive upon the parties and privies in a subsequent action, as to the same subject matter. Nor does he contend that a judgment in ejectment forms an exception to the rule." * * * "The object of ejectment for land is the recovery of possession; the subject matter to be tried is the right of possession as between the plaintiff and defendant; that is the extent of the issue. On the trial of that issue various matters may arise collaterally, but the only fact directly put in issue, tried and determined in the action, touches the right of possession. As to the matters so put in issue, tried and determined, the judgment concludes the parties."

This proposition is partly, but not entirely true. The recovery of possession was, doubtless, in part at least, the object of a suit in the old action of ejectment—the fruit sought by the litigation—but the *right* of possession was not, strictly speaking, the *fact* litigated and determined. The subject matter in one sense may be the right of possession, but the right of possession is a conclusion of law to be *drawn from the facts* put in issue and determined, and *not the facts* themselves from which it is deduced. A complaint alleging in terms a right of possession merely, and a wrongful withholding, would present no issue of fact which a Court could try. The subject matter litigated and determined depends upon the facts alleged in the pleadings.

This proposition of the respondent's counsel proceeds upon the theory, that, the recovery alone, and not the matter in issue and determined, and upon which the recovery is had, constitutes the bar. Lord Ellenborough, in commenting upon a prior case, in *Outram v. Morewood*, 3 East, 354-5, said:

"The Court very properly distinguished then between what operates by way of bar to a *future recovery* of the same thing, and what by way of *estoppel*. That was the case of a mere recovery in *ejectio firmæ*, without title alleged; and the plain-

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tiff might in respect of possession, or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is *not* the recovery, but the *matter alleged* by the party, and upon which the recovery proceeds, which creates the estoppel. *The recovery itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined and solemnly found against them.*"

This shows that it is not the object of the suit, the recovery, or fruits of the litigation alone that constitutes the estoppel, but the facts put in issue, and found, upon which the recovery is based. The controversy, then, is, as to what is directly in issue in an action to recover the possession of real estate under our system of pleading and practice.

From habit, and as a matter of convenience, we ordinarily speak of the action, in a general sense, as an action of ejectment. This is well enough, so long as we do not suffer ourselves to be misled by confounding the action to recover real estate in use in this State, with the action of ejectment at common law, and as a consequence embarrass ourselves by attempting to apply the rules of law peculiar to the latter action to the former. Technically, and substantially, we have no action of ejectment. The forms constitute the substance of that action at common law. True, practically, the possession of the land was recovered. But this was equally true of the writ of entry, and an assize. All these were possessory actions merely. And there would be just as much propriety in calling our action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment. In theory, the writ of entry, and the assize, were actions to recover the freehold; while ejectment was an action to recover the term of the tenant—a mere chattel interest. But, in our

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State, an action is rarely brought by a tenant, either in substance or form, to recover his term. Practically, the possession of the land, and nothing more, was recovered at common law in each of the actions named.

In regard to the two former actions Mr. Blackstone says: "These remedies are either by writ of entry, or an assize, which are actions merely possessory, serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims; they decide nothing with respect to the right of property; only restoring the demandant to that situation in which he was (or by law ought to have been) before the dispossession committed."

"The first of these remedies is by writ of entry, which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues in possession."

The writ requires the tenant to deliver seizin, or show cause why he will not. "This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he may claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it." (Sharswood's Black. Com. 180-1.)

After stating the exceptions, Blackstone says, "But in general the writ of entry is the universal remedy to recovery possession, when wrongfully withheld from the owner." (Ib. 183.) Notwithstanding these actions are merely possessory and "*decide nothing* with respect to the *right of property*" (a question which could only be determined in a writ of right), a judgment in one writ of entry *was conclusive* in another, or *in an assize* for the same land.

Says Mr. Blackstone: "As a writ of entry is a real action which disproves the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action which proves the title of the demandant merely by

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showing his or his ancestor's possession; and these two remedies are, in all other respects, so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. (Ib. 184. See, also, *Adams v. Barnes*, 17 Mass. 365.)

"Actions of ejectment have succeeded to those real actions called possessory actions; but an inconvenience was found to result from them which did not follow from real actions, to which it has been found necessary to apply a remedy. Real actions could not be brought twice for the same thing; but a person might bring as many ejectments as he pleased, which rendered the rights of parties subject to endless litigation." (Archbold's note to Sharswood's Bl. Com. 206.)

The inconclusiveness of the judgment resulting from the form of proceeding was admitted to be an inconvenience, and the necessary remedy for it, referred to by Mr. Archbold, was, an injunction, which was at length granted, after two or more trials. (Ib.) In these real actions, then, we may say, with at least as much propriety as the respondent's counsel says of the action of ejectment, "the object is the recovery of possession; the subject matter to be tried is the right of possession as between plaintiff and defendant; that is the extent of the issue."

It is manifest, therefore, that the reason that one recovery in ejectment at common law was not a bar to a second ejectment between the same parties for the same land, was not because the subject matter to be tried was the right of present possession; for this reason would apply with equal force to the actions we have just considered, in which a former recovery was a bar. But the reason is found in the very framework and essential qualities of the action, which rendered the rules of law laid down at the commencement of this opinion inapplicable. The character of the proceeding is well known. Originally, the party who desired to recover the possession of land in this action entered upon the land, and there executed

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a lease to some friend, and left him in actual possession, where he remained till some other friend, (called the casual ejector), or the prior tenant, came and turned him out. For this injury the tenant brought his action against the party who ousted him. If the party ousting him was a stranger, he was bound, under a rule of Court, to give notice to the tenant in possession that he had been sued and should make no defense, and that unless the tenant in possession should defend he would be turned out. This served as process to the tenant in possession, who then appeared and defended by permission of the Court, and became the real defendant in the suit. The plaintiff *did not allege title* in his declaration. He simply alleged that his lessor, on a day named, demised to him the premises in question, to hold for a specified term then next ensuing; that by virtue of said demise he entered into said premises and became and was thereof possessed for the said term; that being so possessed the defendant, at a time specified, and before the expiration of his term, with force and arms entered and ejected him. Subsequently a change was made by the Courts, after which the plaintiff and casual ejector were fictitious persons. The tenant in possession, as a condition of being allowed to appear and defend, was required to enter into what was called the consent rule, whereby he agreed to confess the lease, entry and ouster, and to plead not guilty. This obviated the necessity of proof on the points admitted, and left the parties at the trial at that stage of the proceedings in which they would have been after proving lease, entry and ouster. But the form of the declaration continued to be the same. Upon proof of the facts alleged, as the action originally stood, or upon their admission under the modified forms of proceeding, without proving any title in the landlord, if the defendant should introduce no testimony whatever, the plaintiff would probably be entitled to recover. He certainly would upon the face of the record, whatever the practice might have been under the almost unlimited control exercised over the action by the Judge who introduced it, and his successors. And he certainly would at this day in this State, on such a complaint, and proof

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of the facts alleged, with no counter proof. But it would not be safe for the plaintiff to rest on such proof or admissions; for the defendant would undoubtedly introduce testimony to rebut his *prima facie* case; hence it was necessary for the plaintiff to show title in his lessor, notwithstanding none was *directly* alleged; and the title, though *not directly in issue*, thus became the real question and the only question *litigated*. But, as there was no averment of title, and no issue directly taken upon it, the title was only *collaterally* or *incidentally* litigated. It became "*a fact in controversy*," as distinct from "*a fact in issue*." Mr. Blackstone, after stating the mode of proceeding, says: "This is the regular method of bringing an action of ejectment, in which the title of the lessor comes *collaterally* and *incidentally* before the Court in order to show the injury done to the lessee by this ouster." (Shar. Bl. Com. 202); and again (Ib. 205), "Such is the modern way of *obliquely* bringing in question the title to lands and tenements, in order to try it in this *collateral* manner." But we have seen, that, the rule in all cases requires that the matter tried must be *directly*, and not *merely collaterally*, in issue, in order that the judgment shall be a bar. And in an action of ejectment at common law the title is *not directly in issue*; hence the judgment under the rule was not a bar, nor could the determination of the title be used as a matter of estoppel.

"In ejectment the unsuccessful party may retry the same question, (that is the title,) as often as he pleases without leave of the Court, for by making a fresh demise to another nominal character it becomes the action of a new plaintiff upon another right." (Christian's note to Bl. Com., Ib. 205.)

This is the reason given in the books. By a new demise a different term is created, a new possession and ouster alleged, and the matters directly alleged are different from those directly alleged in the former suit. The *recovery* alone, therefore, could not be a bar, as a *different term* was recovered. And the determination of the title was not available as *matter of estoppel*, because it was *not directly in issue*. And thus the title — the "*fact in controversy*," but not "*directly in issue*" —

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might be again and again "collaterally, and incidentally" tried. The judgment is not conclusive upon the title till it has been "directly" put in issue, and determined. In an action for mesne profits, brought after a recovery in ejectment, the judgment in the ejectment suit was conclusive evidence of the plaintiff's right to recover from the date of the demise laid in the action of ejectment, for the reason that the right to the possession of the particular term for which the mesne profits were demanded was directly in issue and established in the ejectment. So in the action of trespass *quare clausum fregit*, the gist of the action is the injury done to the plaintiff's possession. But it frequently happens that the title is directly put in issue and determined, and, when "a verdict is found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect to the same fact or title." (*Outram v. Morewood*, 3 East. 346.)

In this case (page 354) Lord Ellenborough says "That a recovery in any one suit upon issue *joined on matter of title* is equally conclusive upon the *subject matter of such title*; and that a finding upon title in trespass not only operates as a bar to a future recovery of damages for a trespass founded on the same injury, but *also operates by way of estoppel to any action for an injury to the same supposed right of possession.*" (Ib.)

In many States of our own country the common law action of ejectment has either been abolished, or the proceedings materially modified; and we shall now examine some of the decisions under such modified proceedings for the recovery of real property bearing upon the question under consideration.

In Connecticut, if the common law action of ejectment was ever in use, it was abandoned at a very early period, and a proceeding substituted, generally called an action of disseizin, sometimes ejectment; but whether the change was originally made by virtue of statutory provisions, or by the Courts we have not been able to discover with certainty—probably by rules of practice adopted by the Courts under statutory authority.

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In the Revised Statutes of Connecticut of 1824, the only provision bearing on the subject under discussion which we have been able to find, is, that "the process in civil actions shall be by summons or attachment," and "shall be accompanied with a declaration, containing the cause of action," (Laws 1824, p. 34, Sec. 1); that "all suits wherein title to land is to be tried and determined * * * shall be brought and tried in the county where the land lies," * * * (Ib. Sec. 21); "that the parties shall make their pleas, and join issue according to the rules and orders established by the Court," (Ib. Sec. 29); that "the general issue of not guilty, owe nothing, did not assume and promise, *no wrong or disseizin*, or any other general plea proper to the action whereby the whole declaration is put in proof, according to the nature of the action may be made by the defendant, under which general plea the defendant shall be at liberty on the trial of the cause to give in evidence his title," etc., provided he shall not give in evidence under the general issue any matter required to be specially pleaded at common law without giving notice, etc. (Sec. 30.) Similar provisions as to the mode of commencing suits and the general issue are also found in the Revised Laws of 1796.

Smith v. Sherwood, which arose in 1822, (4 Conn. 280) was an action of disseizin or ejectment. The plaintiff alleged title and a disseizin. The defendant by way of estoppel plead a former judgment in a similar action, and averred that the title of the plaintiff in that action was the only subject of determination. Plaintiff demurred to the plea. The plaintiff in the first action alleged title and a disseizin. The defendants plead "no wrong and disseizin," and the jury found for defendants. The question was as to the sufficiency of the plea of estoppel. The Court were equally divided on the question, Hosmer, C. J., and Brainard, J., holding it to be insufficient, and Bristol and Peters, Justices, holding it sufficient. Hosmer, C. J., says: "Neither can the record be an estoppel to the plaintiff's demand, as the *ground of determination does not appear*. The defendants, it was found, did not disseize Salmon,

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and the verdict may have been rendered upon the fact that *they had not been in possession of the premises*, or that *they had possessed by license from plaintiff*, or for other reasons which never involved the validity of his title. It is impossible to say upon an inspection of the record only that the title of Salmon was ever drawn in question. The estoppel, if there be one, must be found on the averment of the defendant in his plea that the title of Salmon was the only subject of determination." He then holds, that, to constitute an estoppel, not only must the precise point which is to create the estoppel have been put in issue and decided, but also, that this *must appear from the record alone* — that the record cannot be helped out by averment and parol proof. It will be seen here, that the distinguished Judge put his decision upon the ground that, although title was alleged, the general issue, "no wrong and disseizin," did not necessarily put it in issue, for a failure to prove the defendants to have been in possession, would entitle them to verdict on that plea, and the record would not show but that this was the ground of the verdict. But he does not deny that the estoppel would have been good, if issue had been distinctly taken on the title. The implication from what is said here, and by the same learned Judge in 6 Conn. 164, and 5 Conn. 132, in respect to the general issue, is that it would. On the other hand, Bristol, J., stoutly maintains, that the plea is good notwithstanding the trial of the first case was had upon the issue of "no wrong and disseizin."

He says, (p. 284): "The action of disseizin (called indiscriminately disseizin or ejectment) is the only real action known to our laws. Whether the plaintiff declares upon a seizin in fee, or any lesser estate, it is the only remedy for settling the title to real property. This is probably the first time that a doubt has been intimated as to the nature of the action, and of its being *adopted to the great business of terminating disputes concerning the title to land.*"

After discussing the question at length, and citing and commenting on the case of *Outram v. Morewood*, (3 East, 346), he proceeds (p. 286): "Let it be tested by the undoubted principles

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of that case. The plaintiff, Salmon, in the record alleged that he was seized in fee of the land in question, and that Sherwood disseized him. The defendant pleaded the general issue. Now was not the title directly in issue between the parties, being affirmed by the plaintiff and this affirmation denied by the defendant? Suppose judgment had been rendered for the plaintiff, to recover the land, upon a verdict that he had done wrong and disseizin; could the defendant, just turned out of possession by execution, without any new title, bring another action of ejectment against the former plaintiff, and try the title? Should the last jury differ from the first, and decide that he had title, he would again go into possession; and the parties, after two lawsuits, arrive at the point from which they started, and with the consolation that the same game might be continued without end. Most certainly the defendant in an action of disseizin must be permitted to bring a new action and try the title again, notwithstanding a prior recovery of ejectment against him, provided the plaintiff, in case a judgment is rendered against him, can be permitted to bring a new action for the same land; for the judgment must bind both or it can bind neither. It is obvious, then, that had Salmon recovered in the former suit the judgment would have concluded the defendant's title, as that title was directly put in issue and found against him; and it would seem a dictate of justice as well as law that the judgment being in favor of the defendant should be equally conclusive in his favor."

Again, upon question whether the entire matter of estoppel must appear by the record, he said (p. 287):

"The defendant has averred, that on trial of the case of Salmon the ouster was proved and admitted by the defendant, and consequently the judgment and verdict proceeded on the ground that Salmon had no title. The only question, therefore, is, whether such averments are admissible. These averments are consistent with the record. They do not contradict it. The title was undoubtedly in issue by the declaration and plea, and the only effect of the averment is to show, what is consistent with the record, that the verdict was found in favor

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of the defendants because Salmon had no title. To permit such averments seems indispensable to attain the purpose of justice; and they have frequently been admitted in similar cases. (*Hitchin v. Campbell*, 2 W. Black. 827; *Sedden v. Tutop*, 6 Term Rep. 607; *Rover v. Founes*, 4 T. R. 146.) Numerous cases in our sister States recognize the necessity and propriety of showing by averments anything not contradictory to the record when the question is whether a former judgment bars a subsequent suit."

And such seems to be the current of authorities on this point. (*Gardner v. Buckbee*, 8 Cow. 127; *Young v. Black*, 7 Cranch. 565; *Burt v. Steinburgh*, 4 Cow. 559; *Lawrence v. Hunt*, 10 Wend. 85; *Young v. Rummell*, 2 Hill, 478; 4 Barb. 36, 457; *Doty v. Brown*, 4 Coms. 71; 2 Smith's Lead. Cases, 575.) But they are not entirely uniform, and subsequent decisions seem to settle the point the other way in Connecticut.

It will be seen that the question in this case was, as to whether the title was shown by the record to be in issue and determined on the plea of "no wrong and disseizin;" and if not, whether the record could be aided by averment, and not as to the effect of the judgment, if in issue. *If the title was shown by the record to be determined, or the record could be aided by averment, it seems to be taken for granted by all the Judges that the judgment would have been conclusive.*

Mr. Chief Justice Swift, in his Digest of the Laws of Connecticut, says, in relation to this subject: "In several States in the Union, they have copied in substance the English forms of real actions, with such variations as local circumstances required. In Connecticut, we have introduced one action which comprehends and answers the purposes of the whole. This is indiscriminately called an action of ejectment or an action of disseizin. Like the writ of right, *it definitely settles the title and is a bar to another action.*" Here the sentence ended in the former edition. But Professor Dutton, in the revision of 1851, made since the case of *Smith v. Sherwood* arose, adds this qualification: "[Provided issue is taken on

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such title. But if on the general issue, no wrong or disseizin is pleaded, the judgment, whether for plaintiff or defendant, will not be an estoppel. The defendant in this action may plead an estoppel specially.]” Mr. Chief Justice Swift proceeds: “Like the writs of entry and assize, it will lie for possessory rights. Without the formalities and delays of real actions, or the fictions of the writ of ejectment, it comes directly to the object in the simplest form and with all the ease and expedition of a personal action.” (1 Revision Swift’s Dig. 507; see also p. 666.)

So also in Connecticut, the party in whose favor the title to land is determined, by an award of arbitrators, may avail himself of it, in a subsequent action by way of estoppel. (*Shelton v. Alcox*, 11 Conn. 248.)

Thus, in Connecticut, if issue be taken distinctly on the title, the verdict and judgment are conclusive upon the same principles that judgments in other actions conclude the parties.

In South Carolina, the action of ejectment, with some statutory modifications, was formerly in use. In 1791, the action of ejectment was abolished, and the action of trespass to try title substituted. The effect of the judgment upon the rights of the defendant in this action was left to be determined by the principles of the common law. And it was held in *Thomas v. Geiger*, 2 Nott and McCord, 528, that, “the defendant, in an action of trespass to try title, cannot, after a recovery against him, in turn become plaintiff and sustain a second action to try title.” The Court say, (p. 530): “It has been contended that a change of action does not alter the rights of the parties, and, therefore, in an action of trespass to try title, the parties retain the power of renewing the action as often as was permitted in an action of ejectment. The rights of the parties must not be confounded with the incidents peculiar to forms of action. The fictitious action of ejectment was substituted for the real action. As trespass to try title is now substituted for ejectment, were the rule contended for to prevail, trespass to try title as well as ejectment, must be governed by the incidents peculiar to a real action. This doc-

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trine would leave no other difference between a real action, ejectment, and trespass to try title, than a name. The Legislature, however, contemplated a greater change. They were dissatisfied with the fictitious proceedings in ejectment, and their consequences, and therefore substituted the action of trespass."

Prior to 1847, the action of ejectment was in use in Georgia. In that year an Act was passed which provides: "That from and after the passage of this Act, the form of a declaration for the recovery of real estate and mesne profits may be as follows, etc., etc., to wit:

"(Title of cause.) The petition of A. B. sheweth that C. D. is in possession of a certain tract of land in said county, (here describe the land), to which your petitioner claims title; that C. D. has received the profits of said land since, etc., and refuses to deliver said land to your petitioner, or to pay him the profits thereof. Wherefore, your petitioner prays process, etc. (Cobb's New Dig. Laws of Geo. 1851, p. 490.)"

There is no provision as to the effect of the judgment. In 7 Geo. 172, it was held that a plaintiff, if he chose, might, notwithstanding this provision, still proceed under the old forms of the action of ejectment. But in *Sims v. Smith*, 19 Geo. 124, a verdict and judgment in an action brought under the Act of 1847, just cited, was held to be conclusive, even when set up in a subsequent action of ejectment brought in the common law form for the same land. In this case the second action was brought under the old form. The former recovery, under the form prescribed in the Act of 1847, was pleaded in bar. No new title or right of possession since the verdict in the former action was shown. Mr. Justice Starnes, who delivered the opinion of the Court, says, (p. 125):

"The rule of practice, as derived from the English Courts, was, that a recovery in ejectment did not bar a subsequent action. The rule was founded, I suppose, upon the nature and character of the action." After stating the character of

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the action he proceeds: "All this ingenuity and contrivance had their origin, no doubt, in the high estimate which was placed upon real estate in England, and its immense importance as an element in the feudal policy. But whatever may have been the reason of the rule, such it was—and we have made it a part of our law.

"We are all ready to admit, however, I suppose, that there is no necessity for the rule with us; that there is no reason in our State, why a suitor claiming real estate in a Court of justice should have this advantage over one who was suing for personal property; that substantial and practical reasons cannot be assigned for it. Still, if called upon to enforce it in such a case, and under such circumstances as would demand its enforcement at the common law, we should feel constrained to adopt it. But when a different case is presented, arising in part out of our own legislation, we are at liberty to adopt a more reasonable and practicable rule. The case is presented here. The first action, brought according to the provisions of our statute of 1847, was a real substantial claim of title, and it was determined against the plaintiff.

"Now, we regard the Act of 1847 as intended to try title, not possession. The plaintiff confessedly cannot directly bring another action against the defendant under and by virtue of the provisions of the statute, for the purpose of trying the title to the same premises. Shall he be allowed to do so circuitously, by adopting the common law fiction? This unreasonable result is avoided by holding that the common law rule, which we have been considering, can properly be held applicable to a case of ejectment only when the common law forms have been adopted and followed by the plaintiff—that the Act of 1847 repeals the common law fiction as to all cases where it is followed; and when a verdict is rendered under it, the common law fiction must give way and can no longer apply. If another case be brought by the plaintiff against the defendant, in the form of common law ejectment, if it can be shown that the latter case is in truth and in fact an action for the trial of the same title."

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Thus we see, upon a careful examination of the subject, that the forms and fictions of the action of ejectment are of the very essence and substance of the action, and that wherever its forms are swept away, its peculiar incidents and consequences go with them.

In several of the States, as in New York and Illinois, there are special statutes regulating actions for the recovery of real estate. In such cases, the forms of the common law action of ejectment are generally abolished, and another form substituted, and—what would naturally be expected, as a consequence of the change of the form in the action—the effect of the judgment is also modified, regulated and prescribed. Sometimes one new trial in the same action is granted, as a matter of right, and another upon a proper showing, in the discretion of the Judge. But when *finally determined in that action*, it is made *conclusive*. The statutory form of a declaration in New York does not even allege title. It only alleges a possession by plaintiff and an ouster by defendant. Yet the judgment is made conclusive. A second trial, if any be had, *must be in the same action*.

But these provisions granting new trials, as a matter of absolute right, were adopted many years ago, when the old ideas as to the peculiar importance and sacredness of real estate, in comparison with personalty, still lingered in the minds of the people. At this day, and especially in the new States, little more importance is attached to real estate, than to personal property of equal value. It is almost as much an article of traffic, commerce and speculation as merchandise. No restraints are thrown around its alienation, except so far as are necessary for the protection of parties dealing in it, by enabling them to trace and preserve the evidence of titles, and judge of their validity. Since the change in the form of actions, no technical reason exists—and we can perceive no substantial reason inherent in the nature of the property—why the title to a piece of land should not be finally determined by one trial fairly conducted, in which no error occurs, that does not apply with at least equal force to an action for the recovery of a

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horse, a ship or any other piece of personal property of equal value; and a judgment upon title to a ship or other personal property is conclusive. (*Dennison v. Hyde*, 6 Conn. 516.) In fact, if there is any difference, the reason is stronger for a second trial in the case of personalty than of realty; because, from the fixed character of real estate, the muniments of title can be more easily preserved and traced. The evidence of title may be, and generally is, of record, open to the examination of all—always at hand and easily produced whenever occasion requires; while the evidence of title to personalty generally, to a great extent, rests in parol—is more evanescent in character—more liable to be lost, or, if in existence, more liable to be beyond the reach of the party at the particular time when he has occasion to produce it. Hence, a party is much less likely to be able to present the full strength of his case at the time when forced into trial of the right to personal property, than upon a similar trial as to realty. Neither is there anything in the particular estate which a party may have in the property, or the character of the right sought to be enforced, that distinguishes one kind of property from the other.

One party may have the absolute right of property; a second, the right of enjoyment for a specified time; a third, a right of immediate possession; and a fourth, the actual, rightful or wrongful possession of personalty, as well as of realty; and there may be injuries to the rights of each of these parties, for which they have a remedy. A party may recover possession who has no right of property, as well as in the case of realty; and we can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated and determined—whether it be title, a right of present possession, or something else—should not be conclusive, as well as when it relates to personalty. No principle of the common law would be violated by such a result. On the contrary, its rules require it. Nor would it be contrary to any principle of public policy.

Mr. Greenleaf says: "The rules of law upon this subject are founded upon these evident principles, or axioms, that it

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is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question between those parties should be forever closed." (2 Greenl. Ev., Sec. 522.)

If there is any litigation that the "interest of the community, and "the public tranquillity demand," "should be forever closed," after one full and fair trial—or even without trial unless it be speedily had—it is, in our judgment, litigation in respect to titles to lands. And such was manifestly the opinion of the Legislature of this State; for in adopting a Statute of Limitations that should bar all actions in relation to realty, they fixed upon the unprecedentedly short period of five years. And in prescribing the mode of proceedings in civil cases, that body left the action for the recovery of real estate untrammelled by any of the forms and fictions that pertained to actions of ejectment, and to the almost innumerable variety of other proceedings relating to real and mixed actions at common law. They made no distinction between personal and real actions, but left them all to be governed by the same principles, and attended by the same incidents and consequences. Whether the action be real or personal, the plaintiff alleges the facts that constitute his cause of action. There is no general issue. The defendant must take issue directly upon each material allegation by denying it, or it will be taken against him as admitted. Whatever is put in issue and passed upon, is, upon the principles of the common law, finally determined. In the language of Mr. Chief Justice Swift, in speaking of the action of disseizin in Connecticut, as distinguished from the numerous real actions at common law, before quoted, we have but "one action which comprehends and answers the purpose of the whole. Like the writ of right it definitely settles the title, and is a bar to another action, provided issue is taken on such title. Like the writs of entry and assize it will lie for possessory rights. Without the formalities and delays of real actions,

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or the fictions of the writ of ejectment, it comes directly to its object in the simplest form, and with all the ease and expedition of a personal action."

It does not follow, that a party suing to recover the possession of land must use the same stereotyped form of complaint, or that he must allege title in fee, because he may do it. He need not of necessity adopt the precise form of complaint, which was in controversy and approved in *Payne and Dewey v. Treadwell*, 16 Cal. 243. The form may be adapted to the estate sought to be recovered, and the facts desired to be put in issue. The cause of action should be stated *according to the facts*. In the language of Mr. Chief Justice Field, in that case (p. 245,) the plaintiff may aver, "that he is seized of the premises, or of some estate therein in fee, for life, or for years, *according to the fact*;" or "When the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession and entry, ouster and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential." (Ib. p. 244.) *But whatever is put in issue, and determined, is conclusive and final.*

If a party declares upon a seizin in fee, and thus puts his title in issue, and chooses to rely upon a prior possession merely, or does not choose to put in all his evidence of title, or is unable from any accident to get it in, he is in no worse position than many other parties, who for any reason fail in personal actions to get in sufficient, or all their evidence. Prudent counsel, where, from any unforeseen accident they fail to make as strong a case as the facts and evidence attainable should enable them to do, and they are not satisfied of the sufficiency of their proofs, will submit to a nonsuit, or in a proper case, with the permission of the Court, withdraw a juror and begin again. If they do not, they cannot complain that the judgment against them in the action should be followed by its legitimate consequences.

In order that we may not be misapprehended, we will add,

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that the estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that their rights have been varied or extinguished at a subsequent period. No injury, therefore, can result on that ground.

In this case the record offered in evidence, and excluded by the Court, shows, that in the former suit, the title was distinctly put in issue and determined, (the possession of an undivided half was admitted by the answer); that the undivided forty-one eighty-first parts was found and adjudged to be in the plaintiffs—and forty eighty-first parts in the defendant; that the same title, and the same ouster, were relied on in this action—for the plaintiffs proved that the defendant's possession extended as far back as 1857 before the commencement of the former action, and no evidence of title acquired since the former suit was offered. The Court therefore erred in refusing to admit the record in evidence, and the judgment must be reversed.

Another question of great importance has been presented in this case and elaborately argued, which the counsel urge us to decide. But under the views we have taken, it becomes unnecessary to determine the question in this case, and the importance of the questions already discussed have required so wide a range of investigation, that we have already devoted as much time to the consideration of the case as the accumulated business, and other pressing duties of the Court will admit of at this time.

This cause was decided by the late Supreme Court, Mr. Justice Crocker delivering the opinion, in which all the Justices concurred. At the time of the transfer of the cause to the new Court there was a petition for rehearing pending. As the questions involved were new in this State, and supposed to be of great practical importance, a rehearing was granted in order that they might be further considered. Upon a thorough examination of the case we have arrived at the same conclusions as those attained by our predecessors, and upon substantially the same grounds.

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Let the judgment be reversed and the cause remanded for further proceedings.

RHODES, J.: I concur in the judgment.

CURREY, J.: I dissent.

[NOTE.—Since the foregoing decision was announced, we have been favored by Mr. Justice Field with a copy of the opinion of the Supreme Court of the United States in the case of *Miles v. Caldwell*, (2 Wall. 35), recently decided. The Court had occasion to discuss, to some extent, the questions involved in *Caperton v. Schmidt*, and we are gratified to find that the views so ably expressed in the opinion of Mr. Justice Miller coincide with those announced by us in this case.]

E. MOORE AND L. E. YATES v. GEORGE L. MURDOCK AND H. B. POST.

APPEAL FROM ORDER DENYING NEW TRIAL.—On an appeal from an order denying a new trial, no objection or exception will be examined except such as are included in the appellant's statement of points on which he intends to rely.

DECISION OF APPELLATE COURT WHEN NEW TRIAL GRANTED.—On an appeal from an order granting a new trial because the verdict is not sustained by the evidence, the decision of the appellate Court affirming the order on the ground that the granting of a new trial in such cases rests in the sound discretion of the Court, does not settle the law of the case upon the evidence, that defendant is entitled, on the new trial, to a nonsuit, when plaintiff has closed his case.

MATTER OF EVIDENCE IN PLEADINGS NOT ISSUABLE FACTS.—Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial.

MORTGAGE OF PERSONAL PROPERTY.—A sale of personal property made to secure an indebtedness of the vendor to the vendee, makes the transaction a mortgage.

TRIAL BY COURT — FINDINGS OF FACT.—An appellate Court will not set aside the findings and grant a new trial on the ground that the findings are not warranted by the evidence, unless the evidence was such, that if the questions had been submitted to a jury, the Court would set aside the verdict as contrary to evidence.

DEMAND WHEN NECESSARY BEFORE SUIT.—If a Sheriff seizes the property of A., then in A.'s possession, as the property of B., under an execution

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against the property of B., a demand of the return of the property by A. is not necessary before bringing suit for damages.

CONTRACTS MADE ON SUNDAY.—Contracts made in this State on Sunday are not void because made on Sunday.

MORTGAGE OF PERSONAL PROPERTY.—The mortgagee of chattels who takes the same into his possession, holds the legal title, and an officer having an attachment against the property of the mortgagor is not authorized to take the mortgaged property out of the possession of the mortgagee.

ADMISSION BY COUNSEL IN BRIEFS.—If the respondent is entitled to a judgment for some amount, and recovers judgment for the whole amount sued for, and appellant insists in his brief that the respondent must recover the whole amount sued for or nothing, the Court will not decide whether the judgment was entered for a proper sum.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

Plaintiffs brought their action to recover damages for the alleged wrongful taking and conversion of sixteen hundred sheep, and asked for judgment for five thousand dollars.

The answer, after denying the allegation of the complaint, set up that defendant Post was a creditor of one Hugh Forsman in the sum of two thousand four hundred dollars, and that on the 2d day of February, 1861, he commenced an action against Forsman in the District Court, San Joaquin County, and procured the issue of a writ of attachment directed to the Sheriff of Stanislaus County, and that the plaintiffs, who resided in Stockton, knew of said facts and left Stockton the same day at five o'clock, p. m., and went to the residence of Forsman, in Calaveras County, and that on the next day, Sunday, there was a pretended sale of the sheep by Forsman to plaintiffs for the pretended consideration of two thousand dollars, but no actual delivery, and that the sale was made for the express purpose of hindering and delaying the creditors of Forsman. The answer also alleged that defendant Murdock took possession of the sheep by virtue of the writ of attachment. The answer further averred that at the time of the sale by Forsman no money was paid, and that Forsman was not indebted to plaintiffs, and that the same persons who were in charge of the sheep prior to the sale remained in charge of them afterwards until the attachment was levied.

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The suit was commenced in February, 1861, and plaintiffs in their replication to the answer denied that the sale was pretended or fraudulent, and alleged that it was made in good faith and for a valuable consideration, and that the sheep were actually delivered to them. The replication did not deny the averments in the answer about the plaintiffs going to Calaveras County to see Forsman, and keeping the persons in charge of the sheep after the purchase who had charge of them before, and that they went with Forsman from Calaveras County to Stanislaus County on Sunday and made the purchase.

The case was tried by the Court without a jury. The Court filed its findings of fact and conclusions of law. Judgment was rendered for plaintiffs for five thousand dollars damages and legal interest on that sum from the time of the conversion.

Defendants moved for a new trial, and made a statement embodying all the evidence, objections, and exceptions to the rulings of the Court during the progress of the trial. There were many objections made and exceptions taken during the trial, but the statement concluded with the following:

"The defendants will rely upon the argument of this case upon motion for a new trial upon the following: 1st—The Court erred in denying defendants' motion for a nonsuit at the close of plaintiffs' case; 2d—The conclusions of law drawn by the Court are not warranted by the facts found."

The Court denied a new trial, and defendants appealed from the order denying a new trial and from the judgment. The following are the facts found by the Court:

1st. That on the third day of February, 1861, the plaintiffs were the securities of one Hugh Forsman in a joint note made by said Forsman and the plaintiffs in November, 1860, to one W. N. Ryer, for the sum of two thousand dollars, bearing interest at the rate of two per cent per month, and payable twelve months after date; which note was—February 4th—taken up by plaintiffs, by their own note to Ryer for two thousand one hundred dollars, or thereabouts, bearing two per

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cent per month, which was subsequently paid by the plaintiffs at maturity.

2d. That the consideration of said note was the sum of two thousand dollars, loaned by Ryer to Forsman.

3d. That on said third day of February, the said Forsman was in failing circumstances, and attachments had been or were about to be issued against his property by sundry creditors.

4th. That said Forsman resided at that time in the County of Calaveras, and was engaged in the quartz mill business, and the business, also, of dealing in sheep.

5th. That he owned at that time a band of sheep, about eleven or twelve hundred in number, exclusive of lambs; which sheep were then kept in the care of Collins and Franklin, his herders, on a sheep range upon the open public lands, about nine miles distant from the said Forsman's mill and residence.

6th. That at said range there was a small cabin occupied by the herders, and a corral wherein the sheep were penned during nights.

7th. That these improvements were upon land claimed by one Robert Moore, who had constructed them for his own personal use.

8th. That on said third day of February, the plaintiffs applied to Forsman to secure them as his securities on said Ryer's note, and Forsman then agreed to turn out to them, for that purpose, the said flock of sheep, and made to the plaintiffs a written transfer of said property, of which the following is a copy:

"This is to certify, that I have sold to E. Moore and L. E. Yates twelve hundred head of sheep, and possession given, for the sum of two thousand one hundred dollars, paid by their assuming note that I owe Wm. M. Ryer for said amount, they being securities on said note; this sale being made to secure the payment of said note.

"HUGH FORSMAN."

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9th. That the plaintiffs and Forsman, on said third of February, went together to where the sheep were kept and found them in the corral, and Forsman then directed his herders to turn the sheep out to the plaintiffs, which was done, Forsman declaring, at same time, that he thereby delivered to plaintiffs the possession of said sheep.

10th. That plaintiffs then, and as the sheep were then being delivered, employed said herders to take the care and charge of said sheep for and on account of the plaintiffs, with whom they agreed for future wages; the said Forsman having first discharged the said herders from his employ.

11th. That plaintiffs, immediately thereafter, supplied said herders with the necessary groceries and provisions, and continued to occupy and use the cabin and corral for their sheep and herders, (until the seizure hereinafter mentioned,) with the knowledge and without objection from the said Robert Moore, who had the possessory claim thereto.

12th. That the plaintiffs, after the sheep were so turned out to them, remained with the sheep on the range until noon on the said third of February, at which time the plaintiffs returned to Stockton, about twenty-three miles distant, where they resided and were engaged in business.

13th. That one of the purposes of their return was to procure supplies for their herders, of which they stood in urgent need.

14th. That on Monday, the fourth of February, 1861, at Stockton, service of sundry attachments against property for debts was made upon the plaintiffs by divers creditors of said Forsman, with notices on the backs thereof that all moneys or property in plaintiffs' hands belonging to said Forsman were attached by virtue of said writs; to each of which said garnishments defendants answered that they had no funds in their hands belonging to said Forsman.

15th. That on said Monday evening they went back to a point near said sheep, where the plaintiffs passed the night, going on the morning of Tuesday to the sheep range where the sheep were.

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16th. That on said Tuesday, and whilst the plaintiffs and said herders were out upon the range, not far from the cabin and corral, one Hassinger, a Deputy Sheriff of the Sheriff and defendant, "Murdock," came to where the said parties, the plaintiffs, were standing near the sheep, and made known to plaintiffs that he had in his hands an attachment for debt, at the suit of the defendant, "Post," against the property of said Forsman, and that he had been informed that the sheep then and there were the property of Forsman.

17th. That the plaintiffs then and there informed said Hassinger that said sheep were not the property of Forsman, but that they were the property of the plaintiffs, and that they had bought them from Forsman, had paid for them, and had them in their (the plaintiffs') possession.

18th. That said Hassinger then declined to levy said attachment, declaring that he could not, unless the defendant, Post, gave the Sheriff a bond of indemnity; and that this bond was afterwards, at Stockton, given to Hassinger by or through the attorney of said Post, on Hassinger's demand.

19th. That thereafter said defendant, Murdock, by his said deputy, viz: on Wednesday, the 6th day of February, levied upon said sheep, seized and took them into his possession, and subsequently sold the same, under an execution upon a judgment recovered in the suit of the defendant, Post, against the said Forsman.

20th. That at the time of the transfer of said sheep, they were nearly all greatly and injuriously diseased with a disease known as the "scab," and at the same time the ewes were rapidly lambing.

21st. That in the then condition of the sheep, they could not have been removed from their range without much risk of loss and damage, especially by reason of the necessary separation, in case of removal, of the very young lambs from the ewes.

22d. That other herders could not have been employed in the immediate region of the sheep range, and the nearest probable places of getting them were Knight's Ferry, on the

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Stanislaus River, and the City of Stockton, both about twenty-three miles distant.

23d. That there was no other sheep range near the range in question, where could be had the necessary shelters of cabin and corral, for herders and animals.

24th. That the plaintiffs, after the transfer to them, and before the defendants' levy, applied to one C. D. Reynolds, engaged in the sheep business, about one and a half or two miles distant from the range in question, to oversee the plaintiffs' herders in plaintiffs' absence; but in consequence of the diseased condition of the sheep, said Reynolds would not receive them at his place to be brought in contact with his own herd.

25th. That the defendant, Murdock, after his levy, continued the same herders in his employ for twelve or fifteen days, when said defendant delivered up said property, at Post's request, to said Post. That said defendants kept said sheep on the same range until the month of April, 1861, when they were removed, after the sale thereof.

26th. That the value of said sheep, at the time of said seizure, was the sum of five thousand dollars, being the same which is alleged in the complaint, and which the answer does not deny.

Tyler & Cobb, for Appellants.

There was no such delivery and change of possession as to take this case out of the Statute of Frauds. The delivery was not *actual*, but only *constructive*; and there was only a *constructive* and not an *actual* change of possession. (*Vance v. Boynton*, 8 Cal. 561; *Hurlburt v. Bogardus*, 10 Cal. 519; *Paige v. O'Neal*, 12 Cal. 495; *Stevens v. Irwin*, 15 Cal. 504.)

The sale was absolute in form, but was really intended as a mortgage to secure the payment of the sum of two thousand one hundred dollars, for which plaintiffs were contingently liable only, while the property, as shown by plaintiffs' evidence, was worth five thousand six hundred dollars, and there

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was a secret understanding between plaintiffs and Forsman that plaintiffs should hold the balance for Forsman's benefit. (*Chenery v. Palmer*, 6 Cal. 122.)

The sale was made to hinder, delay or defraud the creditors of Forsman. At the time of such sale Forsman was insolvent, and known to be so by plaintiffs; and plaintiffs and Forsman knew that defendant, Post, and others, had sued out attachments against the property of Forsman. The buying of five thousand six hundred dollars worth of property of the insolvent debtor under such circumstances, for two thousand one hundred dollars, which, as plaintiffs were only *contingently* liable, they *might*, or *might not* have to pay, was, *as matter of law*, a fraud upon the creditors of Forsman.

The plaintiffs had showed no demand of the Sheriff and refusal on his part to deliver, after the property was attached by him, and before the bringing of this suit. (*Taylor v. Seymour*, 6 Cal. 514; *Daumiel v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Cal. 75.)

The sale and delivery being upon Sunday, was void by the statutes of this State. (Statutes 1858, p. 124; *Lyon v. Armstrong*, 6 Vt. 219; *Robeson v. French*, 12 Met. 24; *Gregg v. Wyman*, 4 Cush. 322; *Patten v. Greely*, 13 Met. 284; *Wight v. Geer*, 1 Root, 474; *Northrup v. Foot*, 14 Wend. 248.)

Admitting, for the sake of argument, that the sale was made in good faith, and that the delivery and change of possession were actual and continued, then we say the plaintiffs ought not to recover, because plaintiffs held the sheep to secure the payment of two thousand one hundred dollars; and, by plaintiffs' own showing, the property in their hands was worth five thousand six hundred dollars, and when on Monday after the sale, defendant Post garnisheed them, they answered "that they had nothing in their hands belonging to Forsman." Whereas, in truth and fact, they *had* property at that time belonging to him, in their hands, to the value of three thousand three hundred dollars; and if they had answered the truth, defendant Post could have secured the payment of his whole debt.

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By bringing this suit in its present shape, plaintiffs must recover the whole sum sued for, or nothing.

John B. Hall, for Respondents.

The point "that the sale and delivery being upon Sunday, was void by the statutes of this State," is without force.

The Act is penal and must have a strict construction, and neither expressly nor by fair implication does it embrace these parties and this transaction.

It is plain that the first clause of section two of the Act was intended to describe certain classes of persons, and to prohibit the "*keeping open*" of their business houses, for business purposes on Sunday; and the second clause (whereon the point must rest) was designed to operate as a more specific prohibition against "*selling or offering for sale,*"—but yet directed against the same business classes only—these being merchants, bankers, manufacturers, etc.

It is against the prosecution of a *regular* business, that the statute was directed; and the business of *milling quartz*, and the mill, were the business and the place of business which the law would affect, and not dealing in sheep, especially when the act complained of is out of the usual course of such dealing.

The transaction was not an absolute sale, but a *mortgage or pledge of the property*, as appears by all the evidence, written and oral, and as the Court finds.

There is no evidence in the record to support an allegation of fraud, whether in the form of an understanding to cover up a possible difference between the value and the debt, for Forsman's benefit, or to practice a fraud by other means on creditors.

The expectations of Forsman, without Moore's knowledge, could not charge the latter; but neither the expectations of the one, nor the promises of the other, gave any direction to the surplus (if any) other than that commanded by the law—that is to say, *creditors to get it*. No attempt has been made

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by the plaintiffs to conceal or evade this obligation. (*Wellington v. Sedgwick*, 12 Cal. 474.)

Forsman's insolvency, outstanding attachments with plaintiff's knowledge, the exclusion of other creditors by means of the preference given to plaintiffs, will not, singly or combined, defeat the indemnity secured by their vigilance and activity. (12 Peters, 178, 200; *Dana v. Stanford*, 10 Cal. 269; *Wheaton v. Neville*, 19 Cal. 41.)

No demand before suit was necessary, because the property was seized when in *plaintiff's possession, and with notice to the defendants of such possession and title*. (*Ledley v. Hays*, 1 Cal. 160; *Scriber v. Maston*, 11 Cal. 303, 306; *Paige v. O'Neal*, 12 Cal. 495; *Sargent v. Sturm*, 23 Cal. 359.)

Elsewhere, that actual possession is shown upon the proofs; *but by the pleadings alone is the fact established*, for the answer does not make an issue on that point.

Under point four of appellants, it is claimed that the Court should have granted yet another trial to the defendants, because the sheep being held to secure the Ryer debt, with interest, (which, it may be observed here, amounts now to about the sum of three thousand eight hundred dollars,) stated at two thousand one hundred dollars, they answered untruly when answering "no funds in their hands," for they had (say counsel) to the value of three thousand three hundred dollars, that sum being the difference between the debt and interest and the real value.

Accepting the *voluntary sworn statement* as to the value by the defendants, the estimate is correct.

The answer did not prevent the garnishment, for that was completed, and whether true or false, did not in the least degree impair the legal effect of that proceeding. If there were funds or property, they became bound without regard to the garnishee's return. (*Roberts v. Landecker*, 9 Cal. 262.)

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By the Court, RHODES, J.

The only point we can consider, is the alleged error of the Court below in overruling the appellant's motion for a nonsuit. The other grounds of the motion for a new trial, were not specified, either as regards the insufficiency of the evidence or the errors in law, as is required by the statute (Acts of 1863, p. 643), and therefore they should be disregarded by the Court below, and cannot be examined on appeal. (*Wixon v. Bear River & A. W. M. Co.* 24 Cal. 367; *Walls v. Preston*, 25 Cal. 59; *Hutton v. Reed*, 25 Cal. 478.)

The appellants insist that the law of this case was settled upon the previous appeal, but in this they are mistaken. The appeal was from an order granting the defendants' motion for a new trial, and the Supreme Court says: "It seems that it was granted on the ground that the verdict was not sustained by the evidence. The granting of new trials, for such reasons, rests on the sound discretion of the Court, and we see no gross abuse of that discretion in the present case. The order is therefore affirmed." Such language is quite inappropriate to express the opinion that a nonsuit should have been granted.

The point that "upon the pleadings themselves the defendants were entitled to a nonsuit" (meaning probably a judgment) is not well taken. The allegation of new matter in the answer, respecting the possession and pretended sale of the sheep—the property in controversy—the place where they were, and the persons who had charge of them are mere matters of evidence, from which the ultimate and issuable fact of the ownership of the sheep, by Forsman, at the time of the service of the attachment might be inferred; but treating them as amounting in the aggregate to such ultimate fact, the allegations of the replication that the sale was made to the plaintiffs in good faith and for a valuable consideration, and that the possession was delivered to them before the levying of the attachment, sufficiently put the alleged facts in issue.

The transaction between the respondents and Forsman

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amounted, as was properly found by the Court below, to a mortgage of the sheep by Forsman to the respondents, to secure them for the payment of the amount which they agreed to pay and did pay to Ryer on the note formerly given to him by Forsman, with the respondents as his sureties. The instrument as set out in the findings concludes with the recital, "this sale being made to secure the payment of said note." Under the issues, it was necessary for the respondents to introduce evidence to prove the execution and consideration of the mortgage, the delivery of the possession of the sheep, and the actual and continued possession thereof by the mortgagees, prior to the levying of the attachment by the appellants. The evidence offered was such that the Court was justified in finding the execution of the mortgage for a valuable consideration, and in holding that there had been such an immediate delivery, and actual and continued change of possession of the property in controversy, as would satisfy the Statute of Frauds. The question as to whether the sale was made to hinder, delay or defraud the creditors of Forsman, whether the respondents had notice of the fraudulent intent, and whether there was a secret trust for the benefit of Forsman, created by the parties to the mortgage at the time of its execution, are questions of fact, and this Court will not disturb the action of the Court below and direct a nonsuit to be entered, unless the evidence was such that if those questions had been submitted to a jury and the jury had found for respondents, the Court would set aside the verdict as contrary to the evidence. (*Mateer v. Brown*, 1 Cal. 222; *Rudd v. Davis*, 3 Hill, 287; *Stuart v. Simpson*, 1 Wend. 376; *Demper v. Souiser*, 6 Wend. 486; *Wilson v. Williams*, 14 Wend. 146; *Fort v. Collins*, 21 Wend. 109; *Jansen v. Acker*, 23 Wend. 480.) Under that rule, and in view of the evidence in the cause, we would not be justified in ordering a nonsuit.

A demand of the property was not required to be made by the respondents before bringing suit, the cause at the time of its seizure by the Sheriff under the attachment the respondents were in possession and the demand would not give the officer

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any greater or other notice than was imparted by the possession of the respondents.

It is thought that the sale is void because made on Sunday. It is a sufficient answer to say that the statute of 1861 was not designed to prohibit the making of contracts, but the keeping open of a house or place of business on Sunday; that the statute has not prescribed as a penalty for a violation of the Act, that the contract made on Sunday shall be void; and that this ground was not taken in the Court below on the motion for a nonsuit.

The appellants insist that the respondents, by denying to the Deputy Sheriff, who was about to levy the attachment upon the sheep, that Forsman owned them, and claiming that they had bought them and were in possession of them, misled the appellants, inducing them to believe that Forsman had no interest in the sheep. We think this point is not included in any of the grounds of the motion for the nonsuit. But if it is included in those grounds, the point cannot assist the appellants in this action, for whether the instrument executed by Forsman to the respondents was a bill of sale or a mortgage, the respondents were entitled to the possession under the contract. The mortgagee of chattels holds the legal title of the mortgaged property (2 Hilliard on Mort. 277, 426; *Hackett v. Manlove*, 14 Cal. 89), and the officer holding an attachment against the property of the mortgagor, is not authorized to take the property out of the possession of the mortgagee. The suppression of the fact that the transaction amounted to a mortgage, if it prevented the officer in any manner from acting, simply induced him not to do what he had no right to do—that is, to take possession of the sheep. It will be observed that the respondents had been served with a garnishment process by the judgment creditor, and if they answered untruly the law furnishes a remedy.

Judgment was entered for the value of the sheep, and that sum exceeded the amount of the principal and interest of the debt intended to be secured by the mortgage; but we are not called on to determine whether the judgment was entered for

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the proper sum, for the appellants contend that the respondents, by bringing their suit in the present form, must recover the whole sum sued for—the value of the sheep—or nothing.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

JAMES MORTON v. THE SOLAMBO COPPER MINING COMPANY.

MINE USAGES AND CUSTOMS.—Where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten.

NOTICE LOCATING CLAIM UNDER MINING CUSTOMS CANNOT BE CHANGED.—If a mining custom allows a person to locate a lode or vein for himself and others, by placing thereon a notice, with his own name and the names of those whom he may choose to associate with him, appended thereto, designating the extent of his claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same become tenants in common with the locator and the others, and cannot be divested of their interest by the locators afterwards tearing down the notice and posting up another omitting their names, unless this is done with their knowledge and consent.

APPEAL from the District Court, Fifth Judicial District, Tuolumne County.

The facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellants.

A mere mining usage, not established or sustained by a mining written rule, cannot have the force of law so as to vest property.

There was no proof that by the unwritten custom or usage the effect of simply placing a name upon a notice was to vest property in the person bearing that name; in the absence of such proof it was error to give such effect to the writing of the name only.

The unwritten custom or usage proven, required expressly,

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in order to vest property or acquire a right, that there must be a compliance with the condition of then "entering upon and working such vein or lode."

There was no proof as to what power the locator had over names used by him. Upon principle, if he could *insert* a name in a notice, surely he must have the power to *erase* it. *Quoad* the notice, he is *dominus rerum*. Especially could he erase the names of Vigoreux and Reviere, for he inserted them *without authority*. (*Anderson v. Coonley*, 21 Wend. 279; Story on Agency, 126, 127.)

There was *no acceptance* by Amy, Vigoreux, or Reviere.

Until *acceptance* and *consent* of the person whose name is used, such person does not acquire property. (*Hannah v. Swarner*, 8 Wats. 11.) Mutual consent is necessary to a gift even. (2 Kent. 438.)

Amy acquired *no title*; because, though any acceptance would be a compliance with *common law* rule, yet the unwritten usage relied on by respondent, required him (by himself or by another) to *enter and work*, as the *sole evidence* of acceptance.

Vigoreux and Reviere did not accept, even by parol, and no presumption of their intention to accept can arise, especially when the right is acquired only by compliance with the onerous condition of entering and working.

The proof showed that they had no knowledge, even, of their names being thus used, and the whole thing was without any authority from them. Neither on the principles of agency, nor of grant, can Vigoreux and Reviere be held to have acquired anything.

This case differs from that of *Gore v. McBrayer*, 18 Cal. 585, for Gore authorized McBrayer to locate for him; here, Vigoreux and Reviere gave no authority to Dejon, and there was no proof of ratification by their adopting or in any manner recognizing the act of Dejon before the right of these defendants attached.

H. P. Barber, for Respondent.

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The right to a mining claim vests by taking, in accordance with local rules, and the custom of miners in such cases is entitled to great if not controlling weight. (*McGarity v. Byington*, 12 Cal. 431; *Brown v. Forty-Nine Quartz M. Co.*, 15 Cal. 161.)

The placing of the names of plaintiffs (or their grantors) upon the notice by Dejon, together with his own, and his entry upon and working the mine, gave all parties whose names were so placed on said notice, a *vested interest* as tenants in common therein, and no act of Dejon could subsequently affect their interest. This principle is expressly recognized in *Gore v. McBrayer*, 18 Cal. 582, 587.

The placing of their names on the notice gave plaintiff a *vested right* under the mining rules, and until they rejected or abandoned it (which of course they could not do before knowledge of the fact) their co-tenants could not divest them of their rights.

The fact that Dejon was the discoverer, and placed these names up, gave him no superior right to any other co-tenant. It was not in the nature of a gift, which might be revoked before actual delivery, (even if placing the names on the notice were not in fact a *quasi* delivery of seizin,) because Dejon had not a foot of ground to *give* them. His power was derived *solely* from the mining usages of the vicinity, and after he had once publicly chosen his associates in the manner prescribed by those usages, the *power* under which he acted became extinct.

The action of Dejon in erasing these names and substituting others, was fraudulent, and therefore void. (*Sanford v. Head*, 5 Cal. 298; *Clark v. Underwood*, 17 Barb. 202.)

Appellant contends that a mere mining usage, unless sustained by a *written rule*, cannot vest property. The Practice Act (Sec. 621) provides that in mining cases the *customs, rules and regulations*, shall govern the decision of the action. (See, also, *Gore v. McBrayer*, 18 Cal. 582.)

Appellant contends that it was necessary for *plaintiff himself* to work the claim.

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It was sufficient if Dejon, the discoverer, plaintiff's co-tenant, worked the common claim, and the record is express as to this point. The possession and working by one co-tenant is a possession and working by all. (*Waring v. Crow*, 11 Cal. 371.)

By the Court, SANDERSON, C. J.

This action was brought to recover an undivided interest in a copper mining claim called the Solambo Claim. The plaintiff recovered judgment in the Court below and the defendant appealed. The case comes before us upon the following statement:

"On the trial it was proven that at the time of the location of the Solambo Claim the mining customs, usages and regulations in force in the mining district where said claim is located (there being no written mining laws) adopted and in use in locating such claims were: That the discoverer placed up a notice on the vein or lode, claiming the same for himself and such persons as he thought proper to place with him on the notice, in the proportion of three hundred feet for the discoverer and one hundred and fifty feet for each of the parties so associated with him on said notice, and then entering upon and working such vein or lode. That on or about the 26th day of January, 1863, Joseph Dejon, the discoverer of said lode, in accordance with said mining customs, usages and regulations, located a copper vein or lode, placing thereon the following notice:

"'No. 1—Discovery Claim, Solambo Lead.—We, the undersigned, claim three thousand nine hundred feet in this copper lode, running one thousand nine hundred feet northwest and one thousand nine hundred and fifty feet southeast from this notice, with all dips, angles and spurs, the lode being three thousand and nine hundred feet in length, and five hundred feet on each side of the lode.'

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"To this notice, Joseph Dejon, the discoverer, appended his own name, with sufficient other names to make up the amount claimed in parcels of one hundred and fifty feet each, and afterward placed said notice, so containing said names, on the lode, entered, took possession of, and worked the same. Among the names so placed by Joseph Dejon on said notice, were those of Victor Amy, Joseph Vigoreux and Victor Reviere, grantors of the plaintiff, and comprising three shares of one hundred and fifty feet each, or four hundred and fifty in all.

"The name of Victor Amy was placed on said notice by his permission and consent. The names of the other parties were placed upon said notice without their knowledge, and Dejon had no authority to use their names from any of them except Victor Amy.

"After the claim had been so located by said Dejon, and said notice had remained thereon a few days, and before the aforesaid parties, except Victor Amy, knew that their names were on said notice, Joseph Dejon took down and destroyed said original notice, and placed up another, claiming the same ground, but omitting the names of all the foregoing parties and substituting others in their stead.

"The parties so substituted transferred their alleged interest to defendant, who took exclusive possession, refusing to permit said parties above named whose names were first placed on the notice by Dejon to enter upon the claim or to recognize them as having any right therein.

"Said first named parties transferred their respective interests to plaintiff. On the trial the Court charged the jury as follows: 'That if they believed from the evidence that Dejon was the discoverer of the lode in question, and had located the same in accordance with the mining customs of the district, by placing upon said lode a notice such as had been given in evidence, and containing the names of plaintiff's grantors thereon, and had entered upon and worked the same thereunder, such location and entry in point of law, gave said parties, whose names were so placed on said notice, a vested right as tenants in common in said lode, and said Dejon had no right

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afterward, without their knowledge or consent, to tear down the first notice and place up another omitting their names. That such conduct on his part did not destroy any right they acquired by the mining customs under said location, and that unless it was shown that such alteration was made with the knowledge or consent of said parties, it could not affect their rights; and they would be entitled to recover to the extent of their respective interests.'

"To this instruction defendant's counsel then and there excepted, and now assign the same as error."

The six hundred and twenty-first section of the Practice Act provides that: "In actions respecting 'mining claims' proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decision of the action."

At the time the foregoing became a part of the law of the land there had sprung up throughout the mining regions of the State local customs and usages by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture or loss of mining ground. (We do not here use the word forfeiture in its common law sense, but in its mining law sense as used and understood by the miners who are the framers of our mining codes.) These customs differed in different localities and varied to a greater or less extent according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured and its use and enjoyment continued and preserved and by what non-action on the part of the appropriator such right should become forfeited or lost and the ground become, as at first, *publici juris* and open to the appropriation of the next comer. They were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all contro-

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versies touching mining rights. And it was a wise policy on the part of the Legislature not only not to supplant them by legislative enactments, but on the contrary to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the Legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. And it is to be regretted that the wisdom of the Legislature in thus leaving mining controversies to the arbitrament of mining laws has not always been seconded by the Courts and the legal profession, who seem to have been too long tied down to the treadmill of the common law to readily escape its thralldom while engaged in the solution of a mining controversy. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the State, and however it may have been heretofore, there is no reason why Judges or lawyers should wander, with counsel for the appellant in this case, back to the time when Abraham dug his well, or explore with them the law of agency or the Statute of Frauds in order to solve a simple question affecting a mining right, for a more convenient and equally legal solution can be found nearer home, in the "customs and usages of the bar or diggings embracing the claim" to which such right is asserted or denied.

The only question for us to determine in the present case is whether the instruction of the Court, contains a correct exposition of the mining rule or custom under which the Solambo Claim was located, for that custom contains all the law applicable to the question before us, and by it the question is to be solved, whether the custom is written or unwritten, without

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any reference to the Statute of Frauds, or the law of agency, except as declared in the custom itself.

The custom provides that any person who has discovered a vein or lode and desires to locate a mining claim upon it for himself, or for himself and others, may do so by putting up a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, to that effect, designating the extent of his claim, which may amount to three hundred feet for himself and one hundred and fifty feet for each of his associates. Thus the law itself makes the discoverer the agent of those for whom he chooses to act, and makes his act their act regardless of the fact whether they have any knowledge of it or not. The discoverer can only locate three hundred feet for himself; and if he locates more he can only do so as the agent of another; and having located for another his power as agent ceases, for beyond the act of location the custom does not authorize him to proceed as agent, and he can thereafter make no change without power to do so from the person whose name he has used. The act of location being accomplished in the manner designated, the discoverer becomes vested with a mining right to the extent of an undivided three hundred feet and no more; and each of his associates with an undivided one hundred and fifty feet, and thereafter they hold the claim as tenants in common, provided that the discoverer or some of them enter upon and work the same. It follows that the instruction was correct, and the judgment must be affirmed.

We cannot leave this case without commending the manner in which the statement has been prepared. It is a good example of what every statement ought to be, and we have copied it into this opinion in part for the purpose of calling the attention of the profession to it. We have copied the entire statement except the authentication. By adopting the course taken in the preparation of this statement, instead of inserting the testimony bodily, as many do, much useless labor will be saved to the Court and counsel, and much expense to litigants.

Judgment affirmed.

WILLIAM HAYES v. ISAAC S. JOSEPHI.

DISCHARGE OF SURETIES ON UNDERTAKING.—If the defendant obtains an order for the release of property attached in the action by delivering to the Court or Judge an undertaking, executed by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, and the property is thereupon released: whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiffs, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John B. Felton, for Appellant.

The simple doctrine contended for is, that a surety is discharged by a tender of the amount of the debt to the creditor, even though the creditor refuse to receive it.

On principle, this must be so. In the first place, the surety has, by tendering the money, done all that he contracted to do. He did not contract that the creditor should receive the money; he only contracted to put the creditor in a position to receive the money—and this he has done. He has fully discharged every moral or legal obligation incurred by him.

In the second place, the contract of the surety is to pay the debt of another, and that other becomes, when the surety pays his debt, a debtor to the surety, who is immediately entitled to sue him. Of course, it is a part of this contract, that the surety shall have the right to pay the debt at any time, in order to sue the principal debtor. If the creditor refuses to receive the money, the surety is just as much prevented from having his legal remedy, as if the creditor had given time to his principal debtor.

The authorities are all clear to the point, that the surety has no recourse against the principal until after he has paid the debt. And it is clear that if, under the circumstances of this case, after the tender by Josephi, Josephi had sued Lewis,

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his principal debtor, Lewis could have recovered on the ground that Josephi had never paid anything to his use and *non constat*, that he ever would be obliged to. (See *Shepard v. Ogden*, 2 Scammon, 260; *The Hampshire Manufacturers' Bank v. David P. Billings, Administrator*, 17 Pick. 87; 6 Bacon's Abr. Tender H, 2; *Harbert v. Dumont*, 3 Indiana, 346.)

In the case of *Baker v. Briggs*, 8 Pick, 121, it was held that where a creditor had by mistake represented to the surety that the debt was paid, the surety was discharged.

This case also goes much further than the case at bar. No injury was shown to the surety. He had not tendered the money. He had lost no legal right. But the mere fact that he was given to understand that the debt was paid, discharged him. (See, also, *Commonwealth v. Vanderslice*, 8 Serg. & Rawle, 457; *Leichtenthaler v. Thompson*, 13 Serg. & Rawle, 157.)

The authorities are clear to the point that the slightest extension, even for a day, or an hour, discharges the surety. In this case there must be a delay, greater or less, according to circumstances. It may be for a week, or it may be for an hour. But we have found no authority to the point that a delay must, in order to discharge a surety, be longer or shorter.

But even this tender into Court would not be a payment to the plaintiff, after he had refused it, such as to give the surety a right at law against the debtor. The debtor might set up still that his money had not been paid to plaintiff; that plaintiff had refused it; that it never had come into plaintiff's hands. The authorities are clear that such a payment would not operate as an assignment of the judgment, so that the surety would have no right to use that remedy. Evidently, no one can force a man to accept money who will not take it, and the only contract of the surety is to pay to the plaintiff. If plaintiff refuses to take the money out of Court, would not the surety have a right to withdraw it? Whose money would it be until accepted? Evidently not plaintiff's, for he has refused to receive it; nor the debtor's. It is still the surety's. And the debtor might set up that the surety had never paid any-

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thing on his account; that he had only tendered it; that it might never be accepted.

S. M. Wilson, and J. P. Hoge, for Respondent.

"A tender does not *bar* or *extinguish* the *debt*, for the debtor is still liable to pay it whenever he is required to do so." (Chitty on Con. 694; *Dixon v. Clark*, 5 C. B. 365-377; *Waistell v. Atkinson*, 3 Bing. 290.)

But it is urged that "the contract of the surety is to pay the debt of another, and that other becomes, when the surety pays the debt, a debtor to the surety—who is immediately entitled to sue him;" that the refusal to receive the money prevents this remedy, and that therefore the surety should be discharged.

It might be a sufficient answer to this to say, that a surety has several remedies. The books are full of cases where the remedies of a surety are spoken of and distinctly specified. The subject is elaborately treated, not only in the reported cases, but in the text books.

The same reasoning resorted to by the learned counsel for the appellant in this respect, has been often before resorted to on the subject of the failure of a creditor to sue a solvent principal, when requested by the surety and when subsequently the principal has become insolvent. The cases of *Pain v. Packard*, 13 Johns. 174, and *King v. Baldwin*, 17 Johns., are based on the same specious but unsound views. They were repudiated in New York, in *Herrick v. Borst*, 4 Hill, 650; and in California, in *Humphreys v. Crane et al.*, 5 Cal. 175; and in *Hartman v. Burlingame*, 9 Cal. 591.

When the creditor refused the tender, the surety had his remedy in a Court of equity to compel a recovery of the debtor.

"It is now considered as a settled rule (see the cases referred to in *King v. Baldwin*, 2 Johns. Ch. R. 562, and 3 Merivale, 579) that a surety may resort to chancery if he apprehends danger from the creditor's delay, and compel the credi-

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tor to sue the principal debtor, though probably he must indemnify the creditor against the consequences of risk, delay, and expense." (*Hayes v. Ward*, 4 Johns. Ch. R. 132.)

See the numerous authorities cited and commented on in that case by Chancellor Kent; also, 1 Story's Eq. Juris. Sec. 639, and cases cited; *Nesbitt v. Smith*, 2 Bro. Ch. R. 682, and numerous cases collected in note *a*.

We may say of this defense here what was said by Mr. Justice Cowen, in *Herrick v. Borst*, 4 Hill, 171: "What principle such a defense could have found to stand on in any Court, it is difficult to see. *It introduces a new term into the creditor's contract.*"

If Josephi "apprehended danger from the creditor's delay," why did he not resort to his remedy to compel an action and recovery? His defense shows that the debtor was not only solvent, but that he was here within the jurisdiction of the Court. Having himself waited until insolvency took place, can he visit the loss on the creditor?

In all cases where sureties are discharged by reason of some act of the creditor, they are discharged independently of the injury which the act may have caused.

Where the creditor gives time to the principal beyond the terms of the contract, that act of the creditor discharges the surety, without regard to the result—it discharges him even when at the termination of the new credit the principal debtor still remains solvent. It is like the case of failure to make demand of an indorsed promissory note, or neglect to give notice of demand and non-payment. The indorser is discharged though he may not in fact have suffered the least injury. The allegation of *the result* of the refusal to accept the tender, is therefore without any legal or logical force whatever, for the defense must be determined upon the act of the creditor, independently of the result. The legal influence which a tender exerts has been already shown, as well as the remedies of the surety in a Court of chancery.

The surety has a remedy under section five hundred and twenty-seven of the Practice Act, which expressly provides

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that an action may be brought "against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security."

So also under section two hundred and eight of the Practice Act the money might have been paid into Court, and the Court would have ordered satisfaction of the judgment to have been entered.

It will therefore be seen, that it was not in the power of the creditor to cause any loss to the sureties, for notwithstanding his refusal, they surely had ample remedies. If he neglected those remedies until his chance for indemnity is gone, he cannot visit the result of his neglect on the creditor—he cannot ask that the debt due from him to the creditor shall be forfeited.

It will be noticed that the action is brought upon the written undertaking of Josephi and Reese, in which Lewis did not join. As between Lewis and the signers of the undertaking, there might have been the relation of principal and surety, but as between the plaintiff, Maguire, and Josephi and Reese, the two latter were principals. By the terms of the undertaking, they do not agree to pay if Lewis does not. They do not guaranty the payment. They absolutely and for themselves, and primarily promise to pay "to plaintiff upon demand the amount of the said judgment," etc.

It is precisely like an undertaking on appeal, and "an undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellants should unite." (*Curtis v. Rickett et al.* 9 Cal. 38.)

It is plain that the appellant is a principal as to the respondent—Lewis would not be a proper party to this suit. Were he joined, and it were alleged in the complaint that he is principal and Josephi a surety, it would be a misjoinder for which a demurrer would lie, and the matter would likewise be stricken out as irrelevant.

That Josephi and Reese are principals on the undertaking so far as the respondent is concerned, though they may be sureties as between themselves and Lewis, see *Humphreys v.*

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Crane et al. 5 Cal. 175; *Aud v. Magruder*, 10 Id. 288-9; *Hunt v. Adams*, 5 Mass. 361; *United States v. Cushman*, 2 Sumner, 436; *Suydam v. Westfall*, 2 Denio, 204; *Hunt, Administrator v. Adams*, 6 Mass. 522.

We respectfully submit, that on principle and authority, the judgment below should be affirmed.

By the Court, SAWYER, J.

John Maguire sued H. M. Lewis, and attached his property. Lewis gave an undertaking in the sum of one thousand three hundred and thirty-four dollars, executed by defendant, Josephi, and one Michael Reese, as sureties, in pursuance of section one hundred and thirty seven of the Practice Act, and thereupon obtained an order releasing the goods from the attachment. On the 10th day of January, 1863, Maguire recovered judgment against Lewis for the sum of one thousand and four dollars and fifty-six cents debt, and one hundred and eight dollars and ninety-five cents costs, and the sureties thereby became liable, on their undertaking, to pay the judgment. The judgment and undertaking were assigned to plaintiff on the 7th of May, 1863. This action is brought upon the undertaking, to recover of Josephi the amount of the judgment and costs recovered against Lewis.

The answer alleges, as matter of defense, that on the 21st day of January, 1864, the defendant, Josephi, tendered to Maguire, and for him to the plaintiff, who was then Maguire's attorney, the sum of one thousand one hundred and twenty-one dollars, which was at that time the full amount of the judgment, interest and costs, in payment of said judgment, and that said Maguire then and there refused to receive it; that at the time of said tender said Lewis was solvent, and able to pay said judgment, and was within the jurisdiction of the Court; that if said Maguire had accepted said money, so tendered, the said defendant might have recovered from said Lewis, the amount, so offered to be paid on said judgment; that after the said tender, and before the commencement of

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this suit, the said Lewis became wholly insolvent, and he has ever since been, and he still is insolvent and unable to pay said sum or any part thereof to said defendant, in case said defendant should now be compelled to pay the same; of all which plaintiff had notice before the assignment. By reason of the premises, defendant claims that he became discharged from all liability on his undertaking.

The Court refused to permit defendant to introduce evidence in support of said allegations contained in the answer, and, on motion of plaintiff, rendered judgment on the pleadings for one thousand three hundred and twelve dollars and twenty-nine cents, to all of which defendant excepted.

The question is whether the surety was discharged by the tender of the amount due on the judgment, and the refusal of Maguire to accept it, under the circumstances stated in the answer?

We think he was. No authority has been cited on either side—and we have not been able to find one—in which the precise point involved in this case was decided, or discussed. There can be no doubt that the contract is essentially one of surety. The defendant undertook, without any valuable consideration moving to himself, to answer upon certain contingencies for the debt of another. True, he undertook to pay the debt, upon the happening of the contingency, and in this sense it was his own contract—his own debt—and it became his duty to pay it; but so it is in every other case of suretyship. The rights of the parties must be determined upon the general principles of law applicable to contracts of sureties.

If the creditor enters into a valid agreement to extend the time of payment, without the assent of the surety, the surety is discharged. It varies the contract to the prejudice of the surety, for the reason that it “deprives the surety of the power of paying the debt, and immediately calling upon his principal.” (*Huffman v. Hulbert*, 13 Wend. 376.) So, if without the assent of the surety, he makes a valid contract with the principal debtor not to sue, the surety will be discharged; for although this will not prevent the debtor from

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at once paying the debt, and then calling upon the principal, or prevent the creditor from suing, yet, in the language of Lord Chancellor Truro, in *Owen v. Homan*, 3 Eng. L. and Eq. R. 112, the "liability to such action (an action for breach of the agreement not to sue) has a tendency to operate on, and to fetter the discretion of the creditor in determining whether to sue or not." Such a contract presents a motive to the creditor to violate his duty to the surety, to proceed promptly against the principal, and is itself a breach of duty, tending to the prejudice of the surety, which the law will not tolerate. (See also *Harbert v. Dumont*, 3 Ind. 346.)

So where the means of satisfying the debt subsequently come into the hands of the creditor, and he does not avail himself of such means, but parts with them without the knowledge or consent of the surety, the surety is discharged. *Baker v. Briggs*, 8 Pick. 121; *Hayes v. Ward*, 4 John. Ch. 122; 8 Sergeant & Rawle, 457; 13 Serg. & Rawle, 157.) Under these authorities, certainly a tender by the principal debtor, and a refusal by the creditor to accept the money, would discharge the surety; but simply because the interests of the surety may be prejudiced by such refusal.

The discharge of the surety in the cases named rests on the principle, that it is the duty of the creditor, so far as he can, consistently with the security of his own rights, to protect the interests of the surety as well as his own. The law requires the creditor to act in the utmost good faith toward the surety, and will not permit him to do anything that will unnecessarily tend to prejudice his interests. The creditor will certainly not be permitted to place obstacles in the way of the surety, which tend to hinder him in the pursuit of such remedies as are guaranteed to him by the law. The surety is entitled to pay the debt, and thereby at once acquire the right to proceed against the principal. This is a right which the law gives him, and it is on the ground that he has this simple and efficient remedy, that it has been held in many States, that where the surety has requested the creditor to proceed against the principal debtor, and the creditor has

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refused to do so, and afterward the debtor becomes insolvent, the surety is not thereby discharged. (Parson's Com. Law, 69.) The right of the surety to pay the debt and at once proceed against the principal, was recognized in this State in *Humphreys v. Crane*, 5 Cal. 173; *Hartman v. Burlingame*, 9 Cal. 561; *Whiting v. Clark*, 17 Cal. 410; and *Dane v. Corduan*, 24 Cal. 157.

If it is the legal right of the surety to pay the debt, and at once proceed against the principal debtor, it necessarily follows, that he is entitled to have the money accepted by the creditor, in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy.

In the language of appellant's counsel, "It is as much the right of the surety to pay as of the creditor to receive; it is the duty of the surety to discharge the debt, but it is also the duty of the creditor to suffer it to be discharged." Upon payment to the creditor, the surety is entitled immediately to enforce payment from the principal, and the law imposes upon the creditor the obligation not to interpose any obstacle to the immediate exercise of this right. But without payment the surety cannot recover against the principal. If the creditor refuses to receive the money when tendered, he as effectually prevents the surety from promptly pursuing his most efficient remedy, as he would by entering into a valid contract with the debtor to extend the time of payment. The reason why a valid contract between the creditor and principal to extend the time of payment discharges the surety, is, as we have seen, because the creditor by his further contract places an obstacle in the way of prompt and efficient action on the part of the surety to protect his interest. The principle applies here with equal force. The obstacle in either case is insurmountable, and the obstruction is placed in the way of the remedy by the act of the creditor, and against the will of the surety.

It is no argument against the views taken, that the defend-

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ant had another remedy under section five hundred and twenty-seven of the Practice Act, which authorizes an action to be brought "against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security." This remedy is more complicated, and less prompt and efficient. By paying the debt, the surety could, in a case like the one under consideration, at once take out an attachment, and thus secure himself against a solvent party. The circumstances of the debtor might require prompt action. An hour's delay might defeat the surety's purpose, and an attachment might be the only remedy adequate to the occasion. At all events, he is entitled to pursue any remedy which the law affords him without hindrance from the creditor.

In the case of the *New Hampshire Manufacturers' Bank v. Billings*, 17 Pick. 89, precisely the same defense was set up by special plea, as is relied on in this case. The counsel for plaintiff did not even demur to the plea as insufficient, but replied new matter in avoidance, to the effect that at the time of the tender a suit had been commenced against the principal debtor, and costs incurred, for which the surety was liable; and that he did not tender enough to cover the costs, nor offer to indemnify the creditor for costs in that suit; that the creditor offered to receive the money if the surety would also pay the costs and indemnify him, which the surety refused to do. There was a demurrer to the replication. The Court expressed no intimation that the plea of tender was not good, but assumed it to be so, and held the matter set up in the replication to be a sufficient answer thereto. The implication, so far as any arises out of the case, is, that the plea was regarded as good.

In the case of *Perre v. Castro*, 14 Cal. 519, cited by respondent to show that no such effect as is claimed follows a tender, the question was, whether a tender after what was formerly, in England, significantly called the law day of the mortgage, discharged the mortgage. The Court, in holding that it did not, after the passage "it would be very harsh to hold that

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the debt is lost—the general effect of losing the security,” cited by counsel, add the following: “by a mere refusal at a particular moment to receive it—that refusal induced, too, as it might be by a variety of circumstances morally excusing it, or at least, not grossly violative of any positive duty, and productive of little or no injury to any one.” In the case we are now considering, taking the answer to be true, the refusal was “grossly violative of a positive duty,” which will result, in all probability, in the loss of the entire amount, which the surety may be called upon to pay.

But even in *Perre v. Castro*, the well established rule at common law that a tender, *on the law day* discharges the mortgage, was not controverted. The reason why a tender *after* the law day, at common law, did not, in England, also discharge the mortgage, was, because the mortgage was a conveyance upon condition, and by a breach of the condition by non-payment upon the day, the conveyance became absolute, and nothing short of a reconveyance would revest the title in the mortgagor. The Court, in *Perre v. Castro*, gave another reason why it is inequitable that a tender after the law day should not discharge the mortgage, viz: “The debtor is as much in default for not paying when the debt is due, as the creditor is in default for not receiving the money afterward when offered.”

In a very late case in New York, (*Kortright v. Cady*, 21 N. Y. 343,) this question has undergone a thorough re-examination, both upon principle and authority, and the Court there hold that in that State, a tender *after*, as well as *on*, the law day discharges the mortgage. And it was put upon the ground that, in New York, a mortgage is merely a security, and passes no title to the mortgagee, and a payment at any time discharges the mortgage, and no reconveyance is necessary to revest the title in the mortgagor; hence the reason for the distinction between payments *on*, and *after* the law day adopted in England does not operate in New York.

It is true that a tender by the *principal* debtor does not discharge the debt, and *he* is bound to keep his tender good, and

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be ready to pay over the money which belongs to the creditor whenever the creditor calls for it. But, then, he loses nothing, and is only put to the slight inconvenience of keeping the money. But there are substantial reasons why a tender should operate as a discharge of a mortgage, or surety, which do not apply to the debtor personally. To continue a mortgage on foot after a tender, might tie up the mortgaged property and greatly embarrass the mortgagor in its full enjoyment, by preventing a sale or mortgage for other purposes, and thus great damage might result to him. So also in the case of a surety, a refusal to take the money when tendered might obstruct the surety in pursuing his remedy against the principal, and in addition to the small inconvenience of preserving the money for the creditor, result in its entire loss to the surety.

We think the Court erred in rejecting the evidence offered by the defendant, and in entering judgment on the pleadings.

Judgment reversed and cause remanded for further proceedings.

SHAFTER, J., concurring:

I concur in the reversal, without, however, fully accepting that portion of the general reasoning which relates to the effect of a tender to discharge a mortgage.

**JAMES FULLER, MARY F. GOUGH, AND HER HUSBAND
RICHARD J. GOUGH v. GEO. N. FERGUSON *et als.***

GRANT TO A HUSBAND OF A LOT IN A PUEBLO.—By the Mexican law in California before its cession to the United States, the grant of a lot in a pueblo made by an alcalde to a married man, vested the title in the husband as his separate property.

MONEY EARNED BY WIFE'S LABOR.—By the Mexican law, money, the fruit of the wife's individual labor, became the community property of the husband and wife.

PROPERTY ACQUIRED BY HUSBAND AND WIFE.—By the Mexican law in force in California prior to its acquisition by the United States, all property acquired by husband and wife during the marriage and while living together,

Points decided.

whether acquired by lucrative or onerous title, and that acquired by either of them by onerous title, belonged to the community.

SAME.—By the Mexican law in force in California before its cession to the United States, property acquired by either husband or wife while living together, by lucrative title solely, constituted the property of the party making the acquisition.

PROPERTY PURCHASED WITH MONEY EARNED BY WIFE.—By the same law, property acquired by the husband alone by onerous title, though the money paid as a consideration was earned by the wife's individual labor, became the separate property of the husband.

PARTNERSHIP BETWEEN HUSBAND AND WIFE.—By the law of Mexico in force in California before its cession to the United States, the partnership relation existed between the husband and wife in all property acquired by the spouses by their labor, and in the income of the individual property of either, and in the gains of the husband by the exercise of a profession or office, and also in the gains from the money of the spouses, although the capital was the separate property of one of them.

CONTROL OF PARTNERSHIP PROPERTY BY HUSBAND.—By the Mexican law, the husband alone could manage or administer the property of the partnership, and he could sell or dispose of it as he deemed proper, provided he did so without intent to injure the wife.

CONTRACT BETWEEN HUSBAND AND WIFE.—By the Spanish and Mexican law, the husband and wife were considered so far separate persons that the contract of purchase and sale, and any other onerous contract entered into between them, was valid, and the wife needed no authority or consent of the husband when dealing with him, other than that implied from the transaction itself.

WIFE'S INTEREST IN COMMUNITY PROPERTY.—By the Spanish and Mexican law, to the wife is imparted during the marriage a fictitious and revocable dominion and possession of one half the property she acquires with her husband, which dominion and possession she cannot assert during the marriage; but after his death she becomes the absolute owner of the one half which he leaves, in the manner prescribed by law between conventional partners.

SAME.—By the Spanish and Mexican law, if the husband, while the conjugal relation existed, obtained a grant of a lot to him in a pueblo from the Alcalde, and used money belonging to the community, but acquired by the individual labor of the wife, to pay the municipal fees, the wife held his estate charged for one half this money, though its payment could not be enforced during the marriage, and it was competent for the husband during the marriage to render the wife an equivalent for her interest in this money by assigning her half the lot in satisfaction thereof, and the assignment or transfer vested in the wife a legal title to the part thus assigned.

DONATION BY HUSBAND TO WIFE.—By the Mexican law in force in California before its acquisition by the United States, the husband could make a donation to the wife during marriage of a portion of the community or his separate property, and the donation was not void but only voidable; and if not revoked before the death of the donor, and the donee survived, the donation became irrevocable.

FORGED INSTRUMENTS.—If the record discloses the fact that a written instrument introduced in evidence in the Court below was a forgery, the objection may be raised in the appellate Court, although the point was not made in the Court below.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Bennett & Love, for Appellants.

Only two questions can possibly arise under the Mexican law on the verdict. One is, what interest in the lot granted, Fuller, the husband, took under the grants? We maintain that Fuller took the land granted as his sole and separate estate. He held it the same as if he had owned it before marriage. He, therefore, could dispose of it in the same way, and only in the same way, in which he could dispose of any other property which he owned separately, and not in common with his wife. And the jury have found that the only way in which he undertook to dispose of any portion of his interest was by the division between himself and wife spoken of by them.

And Febrero alleges as the sixth ground on which a partition of land may be annulled the very condition of things under which this partition was made by Fuller. He says in treating of partition of lands, (Febrero, Vol. 5, p. 500, Sec. 13): "And the sixth cause for which partitions can be assailed and rescinded is, by reason of their having been made with one who was not an heir by any title." And in the same section he gives the reason, saying, "because the *mistake* takes away the *consent* and prevents the acquisition of ownership."

This, it appears to us, is all that is necessary to be said so far as concerns the Mexican law. By that law a *partition* of property not held in common is a nullity. The jury have found a *partition*, or which is the same thing, a *division*. The facts of the case show the property so partitioned or divided to have been *not common* property of Fuller and wife, but the separate property of Fuller, and therefore the partition is a nullity.

In the first place, these fees, though earned by Mrs. Fuller, yet being earned by her during coverture, became the com-

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mon property of the community, just the same as if they had been earned by Fuller himself. This is not disputed. Being common property, these fees constituted no claim *in favor of Mrs. Fuller*, either against the common estate or against the separate estate of Fuller. If any claim whatever could arise on account of the payment of these fees, it was a claim on behalf of the *community*, and Fuller, as the husband, had the entire control over such claim. If due from any one, or to any one, it was due from or to Fuller himself, as such husband, and he thus having the sole charge, control and disposition of the common property, it could in no event be due to Mrs. Fuller individually. Upon the dissolution of the community by the death of either of the parties, a claim might, perhaps, exist in favor of the *common estate* against the separate estate of Fuller. But no such demand could exist until the *legal* dissolution of the relation of husband and wife. No such legal dissolution took place during the life of Fuller—much less at any period prior to the time of the partition or division found by the jury. (See Schmidt's Civil Law, p. 10, Arts. 31, 33; Id. p. 16, Arts. 60, 61; Id. p. 15, Art. 56; Id. p. 257, Art. 1,203.) And *serious difficulties* do not constitute a ground on which even a separation from bed and board can be obtained. (See Art. 31, Sub. 7, above cited.) And there could be no separation from bed and board unless decreed by a competent tribunal; consent of parties was not sufficient. (See Schmidt, Arts. above cited.)

How, then, we ask, can it be presumed or assumed that the partition was made in payment or satisfaction of a claim of Mrs. Fuller, when no such claim in her favor could, from the law and facts of the case, have existed? When the claim, if there was any, must have been on behalf of the community, and which, if due at all, must have been due to, and under the control of, and could be satisfied, and the payment thereof receipted for and acknowledged by Fuller himself, and him only? Mrs. Fuller had no more authority to make a settlement of a claim arising out of the payment of the municipal fees than any other stranger would have had. According to

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the theory of the defendants, Fuller made this partition in satisfaction of a debt due from himself to himself. For, if any indebtedness existed, he, and not Mrs. Fuller, was legally liable for its payment, and he, and not Mrs. Fuller, was the person to whom it was due and payable, and the only person who could legally acknowledge the payment and satisfaction thereof.

That Mrs. Fuller could have had no claim on account of her having earned the money paid for municipal fees, and that such claim, if any existed, was on behalf of the community, see *Noe v. Card*, 14 Cal. 606-7, per Mr. Chief Justice Field.

In the case of *Noe v. Card*, the necessary inference is, though the fact is not expressly mentioned, that the municipal fees were paid out of community funds, as the grants in these cases were made to married persons. Yet the Court, as it would seem, deemed that fact of no importance, for it is not even noticed in either of the cases.

The case at bar must not be confounded with cases in which property is bought and paid for out of community funds. In such case, lands so bought and paid for would constitute community property, and would belong to both the spouses jointly. In our case, the land granted is treated in law as given by Government to the grantee, and not as having been purchased by him. Such is now the settled law of this State, whatever doubts may have formerly arisen on this point.

To put the case in the strongest light in favor of the defendants, suppose Fuller had made a deed of this land to his wife in consideration of her having earned the money during coverture, which was paid for the municipal fees, can there be any doubt that such a deed would have been void as to the creditors of Fuller? No lawyer can hesitate about answering this question in the negative. But a deed void as to creditors would be equally void as to the forced heirs of Fuller; and legitimate children are forced heirs. (*Escrive's Dic. Title "Hereditas Forzosa"*; *Croijet v. Gaudet*, 6 Mart. O. S. 524, 528; *Rachel v. Rachel*, 4 Louis, 501, 502; *Terrell's Heirs v. Cropper*, 9 Mart. O. S. 351; 5 Louis, 488.)

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Again: Even on the theory of the defendants, the plaintiffs are entitled to *one half* of the property in controversy. This position is beyond question, and the reasoning on which it is based is unanswerable, even upon the state of facts supposed by the defendants.

The money paid for the municipal fees was money of the community; consequently it belonged to Fuller and wife—as much to the one as to the other. If this lot was turned out or made over on the partition, in payment or satisfaction of the claim, it was in payment and satisfaction of a *joint* debt, due to both Fuller and wife. The land thus made over must therefore belong to them jointly, or to Mrs. Fuller, or her grantees, jointly with the heirs of Fuller; but the plaintiffs represent and stand in the place of the heirs of Fuller. Thus, on the hypothesis of the defendants, the plaintiffs must recover one undivided half of the premises. From this deduction, we hazard nothing in saying there is no escape.

Again: It is claimed by the defendants, without one word of proof to that effect, and without any finding of the jury to sustain their position, that the partition or division of this lot was made by Fuller to pay off, satisfy, or extinguish the claim which Mrs. Fuller is supposed to have had on the property by reason of the payment of the municipal fees. It is a sufficient answer to this position of the defendants, that there is nothing in the verdict of the jury to support it.

If Mrs. Fuller had any claim on Mr. Fuller or his estate, on the ground of her having earned the small sum of twenty-five dollars, which was paid for the municipal fees, the verdict of the jury shows nothing from which an inference can be drawn that this claim was paid or satisfied by the partition or division. How can it be pretended that such was the consideration for the partition, when not a word can be found in the verdict finding that such claim on the part of Mrs. Fuller was paid, or satisfied, or extinguished, by the partition? And as the verdict does not find the payment of the claim of Mrs. Fuller to have been the consideration for the partition, such cannot be presumed to have been the consideration.

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There having been, then, no consideration for the act of Fuller, the utmost it can be said to have been is a naked donation. But children—forced heirs—are not bound by a donation made to their prejudice. (*Brittain v. Richardson*, 3 R. 78, 81; *Ludwig v. Linderman*, Id. 99.) Even if this could be considered a donation—which it cannot be—the jury have not found the act of Fuller to have been a donation. And it can be taken to be nothing else than what the jury have found it to have been: that is, a partition or division.

Again: There is another argument which completely disposes of this pretense of a claim of Mrs. Fuller for the municipal fees. If she is to be credited with the amount of these fees as between her and Fuller, on the ground that they were expended on his separate estate, or paid out for his sole benefit, then she should equitably, as well as legally, be charged with her share of the benefit derived from the joint occupation and use of such separate estate. From 1837 to 1849 she lived on the property, and is justly chargeable with her share of the value of the joint use and occupation. Further, if such claim ever had a legal existence, and if it has not been satisfied in the manner just mentioned, it still remains a subsisting demand against the separate estate of Fuller, and payment thereof might be enforced by appropriate proceedings; for, as we have seen, it was not paid or satisfied by the partition made by Fuller as found by the jury. But whether it existed or not, and whether its exists now or not, can in nowise affect the question of title raised in this case.

Shafter & Gould, also for Appellants.

The lot being acquired by gratuitous title, became the separate property of the husband, even if the wife had contributed all the funds to pay the Alcalde's fees.

The respondents contend that by this document Madame Fuller acquired one half of the lot granted to her husband. The appellants contend that the document is an absolute nullity; that the lot belonged to Fuller alone, and that a *division*

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of it was impossible. He might have sold, mortgaged, donated, or otherwise conveyed half of it away, but he could not divest himself of it by any such process as is called by the verdict *division*, as the very word implies ownership in two or more persons. He did not donate half of it to his wife; and although he might have gratified her whim or caprice by signing this paper, possibly to silence her, for they quarreled a good deal, he did not, by this process, divest himself of the ownership of one half this lot.

Fuller acquired it by an Alcalde grant. The fees were the property of the community between himself and wife. The acquisition being what is known as a gratuitous, contradistinguished from an onerous title, the property vested in the husband alone. This principle of the Mexican law has been settled in this State, and has ceased to be the subject of discussion. (*Noe v. Cal*, 14 Cal. 106.)

Respondents rely principally upon the following document:

"Francisco De Haro, Constitutional Alcalde of the Jurisdiction of San Francisco:

"Juan Fuller and Concepcion Linares, both married together in the Roman Catholic religion, having a family, appeared before me for the purpose of obtaining between them the right to the lot of one hundred varas square granted to them by the Alcalde, Mr. Martinez, in the Town of Yerba Buena, having agreed upon the same before me and the assisting witnesses to have the same divided in halves, they having paid the fees arising therefrom with their work, there remains to each of them one hundred varas long from north to south, and fifty varas wide from east to west—they mutually agreeing upon their respective portions. And, for their safety, they sign with me, placing the sign of the cross, not knowing how to sign.

"San Francisco, Feb. 4, 1838.

"FRANCISCO DE HARO.

"JUAN FULLER,

"CONCEPCION LINARES, X.

"Witnesses:

"BLAS ANGELINO,

"CIPRIAN SIBRIAN."

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Fuller could not owe his wife a debt resulting from his use of the ganancial funds.

The lot being his, by what contract did he divest himself of it? The respondents say by that which is embodied in the document which is to be construed. It is not pretended that this document is a donation. It is, as is contended, a commutative contract, an onerous contract.

Now, if John Fuller and his wife have been found to have made an onerous contract, what contract was it? There is, under the Mexican system, no possibility of making an onerous contract, unless the agreement be one which may be classified, or which, being not susceptible of a distinct classification, comes within the category of innominate contracts. These, however, require a consideration, present and defined, for, without it, they are treated, as with us, as null and void.

Then, what contract did John Fuller and his wife Concepcion make?

We understand it to be distinctly admitted that this document is not to be considered as a donation. Certainly it has none of the characteristics of that contract. There is seen here no design to give. The parties do not profess to have been moved by the impulses of benevolence or generosity. They say they *divide* the lot. The defendants then must show that the division of property is, under the circumstances developed by the record, valid and binding by the Mexican law. When it is clear, beyond controversy, that the intention to make a certain contract is wanting, no Court will impute such an intention to parties, and thus make for them a contract they never dreamed of making for themselves.

But it is contended that the document may be considered as a giving in payment—*dacion en pago*.

To this the ready answer is, that the very basis of that contract is wanting, to wit: *some debt to pay*. If there was an obligation to pay something, there must have been some one capable of receiving it—some one able to assert and to enforce compliance with the obligation. But could Concepcion Fuller do this as against her husband, John Fuller?

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Certainly not. The argument is that she contributed the fruits of her labors toward the payment of the municipal charge for the acquisition of the lot, and that thus a debt was created in her behalf on the part of her husband. It is too well settled to admit of argument that the earnings of both spouses become absorbed in the community of property between them, and that, with regard to the quantity either may contribute, compared with the contribution of the other, the law is purposely silent. The wife may possibly swell the conjugal earnings to an extent a hundredfold greater than those of her partner. But of this excess the law takes no heed. He cannot owe it to her; for all the social earnings are, in the eye of the law, centered in him. They have no other owner; and he can owe nobody for any portion of them.

Now, the adversary argument is that the sum of money put by her into the conjugal coffers, and taken thence to pay these Alcalde's fees, represented a debt which John Fuller afterward extinguished by resorting to the *dacion en pago*. That she owned a portion of the ganancial property, and he who took it from her became indebted to her for the amount. But we propose to show that the wife could not, under any conceivable circumstances, assert as against her husband, that she owned any—the least, the most insignificant—portion of the acquisition of the conjugal association—the *gananciales*. Not only could she not collect any of them, or be paid any of them, as being due her *individually*, but she was absolutely prohibited from pretending to own any portion of them whatever. They all, each and every part and portion, belonged altogether and entirely to her husband himself, as master of the community. (1st Vol. Febrero, pages 225-6, Chap. 10, Secs. 19, 20; Gom. en la 50 de Toro n. 76; en la 60 n. 1, y en la 77 n., y Lib. 2; Var. cap. 5, n. 3; Gregor, Lop. en la 55, tit. 5; Part. 5, glos. 2, vers. Et facit hoc, Corarr. Lib. 3; Variar, cap. 19; L. 47, al fin tit. 28. Part. 3, en las palabras: Otro si decimos, que toda ganancia; L. 5, tit. 9, Lib. 5, R.; 6 5 tit. 4, lib. 10 N.)

The wife is forbidden to assert—must not say—she owns

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any of the *gananciales* property — *no debe decir la muger que tiene gananciales*. If she must not even pretend to assert that any of the community property was hers, how is it that the use of some of it by her husband constituted a debt in her favor?

The mind cannot appreciate or conceive of the existence of the thing called *debt*, when there is no one who can give a receipt. *Debt*, while it implies the result or offspring of the *aggregatio mentium*, implies also the faculty of enforcing the duty which that tie imposes. The *dacion en pago*, of necessity, implies a debt. Can any one comprehend the idea of a debt without a creditor to collect—without a debtor to pay; without the capacity of executing a receipt—the faculty of extinguishing the obligation by remitting or releasing it; without the right to sue—to stand in judgment—to bring proofs—to object to evidence—to enforce payment? (2 Febrero Mej. 244.)

But there are other considerations, which, we think, go far toward enforcing the rule we rely on.

Under the same general heading, viz.: *De la extincion de las obligaciones*, and while considering the nature of the *dacion en pago*, Febrero says, (p. 245, Vol. 2, No. 12):

“In order that the payment may be held valid there must be, in whose favor the obligation was created, some one, not disabled from administering his own affairs, etc. * * * Thus, a father should be paid that which is due to his son, and to her husband should be paid that which is due to a married woman.”

Now, so far as concerned the conjugal property, Madame Fuller was forbidden by the law to touch one cent. Her husband was the person to manage the partnership business. (1 Escriche, pp. 636-87.)

A creditor is one who has an action, or cause of action, to recover what is due him. He has an action, (*el que tiene accion*,) says the law. And an *accion*, as we have seen, is the process or mode by which what is due the creditor is recovered by proceedings in Courts of justice. But could Concep-

Argument for Respondents.

cion Fuller have maintained against her husband an action (*accion*) for the recovery of twelve dollars and a half, paid the Alcalde for this lot?

An obligation without a creditor! An indebtedness for which nobody can sue—which cannot be the subject of a suit! A debt, and yet no debtor! We have an analogy to this in the law concerning conventional partnerships. It is the familiar rule that no action will lie in favor of one partner against his associate for the collection of a specific sum arising out of their partnership dealings. The demand must be for a dissolution, an account, and for such sum as may be ultimately found due. One partner cannot have an attachment against his partner, because he cannot swear to any sum certain. He cannot select, out of the list of debits and credits in the partnership books, a certain item charged against his associate, however justly so charged, and maintain against him an action to recover it.

Even at the death of the wife there is, in the community property, no *estate* which descends to her children. (*Panaud v. Jones*, 1 Cal. 517.)

E. W. F. Sloan, Daniel Rodgers, and Sharp & Lloyd, for Respondents, discussed the validity of a partition of the lot in dispute, made in the Superior Court of the City of San Francisco, in 1852, between the children of Fuller and his wife, Mrs. C. A. Fuller. This question is not discussed in the opinion of the Court, for which reason the argument is not published.

Sidney L. Johnson, also for Respondents.

Husband and wife, under the Mexican law prevailing in California, could make any contract with one another without restriction, except donations. In the 4 Partida, Title 11, Law 4, the text treats of *donations* between husband and wife, and says that in general they are forbidden; although if the donor die first without revoking them they are valid.

So the Supreme Court of the State of Louisiana, in *Labbe's*

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Heirs v. Abat, 2 La. 553, original edition — 1 La. 548, 555, Morgan's edition — say: "According to these laws, (the Spanish laws), it is clear that husband and wife were considered so far separate persons, that they could validly enter into any onerous contract themselves."

Antonio Gomez, the commentator of the Laws of Foro, in another work of his, entitled *Variae Resolutiones*, Cap. II, Sec. 3, p. 434, *De Emptione et Venditione*, says: "Item valet iste contractus inter maritum et uxorem. quia licet contractus donationis non valeat inter eos, ut in leg. *Et per totum ff. de donat. inter vir. et uxor.* et in leg. 1. *Et per totum eod. tit.* tamen contractus emptionis et venditionis et quilibet alius contractus onerosus bene valet inter illos, etc * * *. Non obstat quod hodie non valet contractus uxoris sine licentia viri; quia intelligo, quando contrahit cum aliquo tertio; secus, si cum marito; quia videtur licentiam praestare."

This may be translated as follows: "This contract" (that of purchase and sale) "is valid likewise between husband and wife; because, although the contract of donation is not valid between them," (citing laws of the Roman Digest and Code,) "yet the contract of purchase and sale, and any other onerous contract whatever, is clearly valid between them," etc.

So in the Mexican Febrero, (2 Lib. on Contracts or Obligations, Title 44, on useful observations for notaries respecting contracts between certain persons, Sec. 16, Vol. 2, p. 267:) "No necessita la mujer dicha licencia cuando litiga ó contrata con su marido en las cosas permitidas por derecho, y son las siguientes:

"1. En todos los contratos onerosos," etc.

Translation: "The wife does not need such authorization when she litigates or contracts with her husband in the cases allowed by law, and they are the following:

"1. In all onerous contracts," etc.

These authorities are doubtless sufficient to establish the truth of the proposition that husband and wife have unlimited capacity, under the Spanish law, to make any contract with one another other than that of donation, unless some conflict-

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ing authority be produced. We assert, unhesitatingly, that no such conflicting authority has been or can be shown.

John Fuller and wife did make a valid contract with one another by the act before De Haro. This lot had been granted to John Fuller under the circumstances found by the jury. The fact that the money applied to the payment of the municipal fees was earned by Mrs. Fuller, did not render it her separate property in law. That money was common to them both, and it was at the time equivalent in value to the lot of ground. It was therefore a sufficient, an adequate consideration for the half of the lot, which her husband agreed she should have. Their agreement to divide the lot between them was based on the fact that it had been paid for by his, her, or their labors or earnings. In law it makes no difference whose labor earned the money. It was equally common under any one of these three readings. Mrs. Fuller's agency in getting the means doubtless stimulated her effort to have the equivalent, and may have had some effect in making her husband yield to her desire. Their contract before De Haro further showed that they had agreed to divide the lot by a north and south line, and that they had agreed with one another which part each should have.

The act before De Haro was not an agreement to separate in bed and board, and to dissolve the community as a consequence of such separation; therefore the authorities cited from Schmidt's Civil Law, to the effect that separation from bed and board cannot be voluntary, that it must be decreed by a competent tribunal, are wholly inapplicable. It was an agreement about property; one piece of property standing in the name of the husband, and by law his separate property, but paid for by Mrs. Fuller's earnings, admitted to be in law common earnings, and shown to be, at the date of the contract, the full equivalent in value of the piece of land in question. It was an agreement that, inasmuch as it was so paid for, she should have one half of the lot. It was, therefore, a commutative contract, an onerous contract, in which

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one thing was given for another, land for its equivalent in money, or in a debt or equitable claim.

If Mrs. Fuller had claimed of John Fuller's estate one half of the amount paid for the lot as a charge in favor of the community, she would have been estopped by the De Haro instrument, which shows that she got one half of the lot itself in satisfaction of that claim. John Fuller's heirs are equally estopped by it from demanding the land. He had given it in consideration of the equitable claim, and had liberated himself from that claim.

This transaction would be giving a thing in satisfaction of a claim, that which in the Spanish law is called *dacion in solutum* or *dacion en pago*. Escriche defines it to be: "The act by which one thing is given in payment of another which is due. This mode of paying a debt can take place only by the consent of both parties, inasmuch as the creditor is not obliged to accept one thing in lieu of another, as will be seen under the word *paga*. The *dacion in solutum* (giving in payment) is in general a contract that is equivalent to a true sale, the essentials of a sale being found in it—that is, the consent, the thing, and the price. Thus it is that the giving of an inheritance in payment is subject to the Alcabala."

This is the whole article of Escriche on the subject. A similar contract is found in the Louisiana Code, Arts. 2,625-9.

The thing given in this case is half the lot; the consideration, half the amount that had been paid in its acquisition.

This, we say, clearly results from the instrument itself, and the facts found respecting the acquisition of the lot, and the payment of the municipal fees. The validity of a sale depends not on a price being expressed with certainty in the act, but that a price certain should be agreed on by the parties. (*Walker v. Fort*, 3 La. 538, Morgan's edit., Vol. 2, p. 344.)

If there were a real consideration, whether it be expressed or not, or if a different one were expressed, the contract would be a valid one. (*Louisiana College v. Keller*, 10 La. 164, 167, Morgan's edit. Vol. 5, pp. 478, 480.) Even if the contract were

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not strictly a *dacion en pago*, it would still be a good commutative or onerous contract, provided an equivalent were given in anything else than money. The delivery of the half of the lot followed as a consequence of their contract, inasmuch as they were both living together upon it. Possession followed the title. (*Richards v. Nolan*, 3 Martin La. N. S. 337, Morgan's edit. Vol. 7, p. 534; *Wederstrandt v. Marsh*, 11 Robinson La. 533, 538.)

The most elaborate effort of the counsel for the appellants, in opposition to our view of the law, is made in the second point of the brief of Messrs. Shafter & Goold, which is stated in these words: "Fuller could not owe his wife a debt resulting from his use of the ganancial funds." This point does not deny the capacity of the husband and wife to contract, but denies the consideration in this particular case. It may freely be admitted that Mrs. Fuller, during the existence of the matrimonial partnership, could not demand the payment, settlement, or delivery of any item, or of her share of any item, of the partnership assets; that she could not even, without just cause, demand a dissolution of that partnership, and thus bring about indirectly a settlement of accounts and a distribution of the common effects. Her husband was not a debtor, nor she a creditor, in this sense, of any portion of the common earnings—no more so than any conventional partner of his associate, to adopt the illustration of our learned antagonist. A debtor who has a term for payment cannot be sued for the debt before the term expires, and, not being in default, may be said in a certain sense not to be a debtor. Such is the meaning of the French maxim: *Qui a terme ne doit rien*—One who has time owes nothing. But that which a partner or a creditor cannot demand, or has no legal remedy to enforce, may be done by consent of the other parties. The delay between parties able to contract may be waived. If one partner, in settlement of a single item due by him to the partnership, were to give, and his co-partner were to accept, a portion of the former's private estate, the settlement would be valid, and that item would disappear from the partnership

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accounts, although neither could have compelled the other to such settlement. That item, so settled, might, if left unsettled, be found neutralized at the final liquidation by some counterclaim of the other partner, as supposed by the ingenious counsel. But that possibility, it will hardly be contended, would render this prior settlement invalid.

By the Court, CURREY, J.

Ejectment for the recovery of the western half of one hundred vara lot, No. 24, in the City of San Francisco, excepting a small portion of the same. The lot is described on three sides of it by Sacramento, Kearny and California streets. It was granted to John Fuller by the municipal authorities of the Town of Yerba Buena on the 14th of November, 1837. At that time Fuller was a married man, having a family. On the 4th of February, 1838, he and his wife appeared before the Alcalde of the jurisdiction of San Francisco for the purpose, as they declared, of dividing this one hundred vara lot between them. An instrument in writing was drawn up by the Alcalde, which was signed by the husband and wife in his presence, who, with two assisting witnesses, also signed it. This instrument sets forth that Fuller and his wife were married in the Roman Catholic religion, had a family, and that they appeared before him, the Alcalde, and agreed in his presence and in the presence of the assisting witnesses to have the lot "divided in halves, they having paid the fees arising therefrom with their work;" and then follows the declaration of the Alcalde that "there remains to each of them one hundred varas long from north to south and fifty varas wide from east to west—they mutually agreeing upon their respective portions. And for their safety they sign with me, placing the sign of the cross, not knowing how to sign."

John Fuller died on the 10th of June, 1849, leaving him surviving his wife, Concepcion A. Fuller, and four children, the eldest of whom was then about fifteen and the youngest about eight years of age. One of the plaintiffs in this case is

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one of these children, and the other the legal representative of another of them, who claims the right to recover the property as heirs at law of John Fuller, deceased. The defendants claim the same property by titles derived from the widow, Concepcion A. Fuller, and rely upon the written document which was executed in the presence of the Alcalde, and also upon matters which transpired subsequently to that time, in justification of their alleged title and right to the possession of the property.

The cause was tried before a jury who, under the direction of the Court, rendered a special verdict, upon which the Court gave judgment for the defendants. By the special verdict the jury found that the money which was paid for the grant was merely municipal fees, and that the same was of moneys earned by Mrs. Fuller while she was the wife of John Fuller, in the capacity of nurse in the family of a stranger. That after the grant was made, and in the same month, the proper magistrate gave to John Fuller juridical possession of this one hundred vara lot. That after the 4th of February, 1838, Fuller and his wife lived together on the eastern half of the lot. That during this time they had serious family difficulties, and separated, living apart from each other at various times, and finally separated in 1847, and continued to live apart until Fuller died. That while Fuller was living on the east half of the lot he stated that the extent of his interest in it was the eastern half thereof; that the lot had been divided between himself and wife, and the eastern half of it had been allotted to him and the western half to her, and that he did not claim any interest in the western half. That in November, 1847, Fuller caused a line to be run by a surveyor through the centre of the lot from Sacramento to California streets, and caused stakes to be set at the extremities of such line, and also caused a brush fence to be constructed on the line as far as the hill then toward California street. The jury also found that Fuller and his wife divided the lot between them by the document executed before the Alcalde and also by parol, and that in the division the west half of the premises was allotted to

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her and the east half to him; and that for a long time previous to his death he recognized and acquiesced in Mrs. Fuller's occupation and possession of the premises in controversy with claim of title to it on her part, and on the part of those claiming under her. That since November, 1847, Mrs. Fuller and those claiming under her, including the defendants in this action, had continuous possession of the premises in question, claiming title thereto, and had improved the same. The jury also found as a fact that in 1838 there were no Notaries Public in California, and that the officers who at that date received the declarations of parties stating their contracts, and who authorized and authenticated them as contracts made and passed before them, were Alcaldes or chief magistrates, and also that on or about May 19th, 1847, Edwin Bryant, then the Alcalde of San Francisco, made and issued to John Fuller a document purporting to be a grant embracing the demanded premises — a record of which was introduced in evidence by the plaintiffs as the foundation of their alleged title.

The plaintiffs maintain in argument that by the grants made to John Fuller he became seized in his own right of a sole and separate estate in the lot of land so granted; and further, that the fact that the money which was paid as municipal fees for the grant was earned by Mrs. Fuller or was the common earnings of the spouses, constituted no claim or consideration in her behalf for the divided moiety of the premises which the defendants claim passed to her by the division attempted to be made of the property between herself and husband. The defendants on their part maintain that by the law in force at the time, a husband and wife could enter into and make contracts with each other respecting property as fully and amply as it was competent for persons holding no such relation to each other to do, except as to donations.

We shall consider the position assumed by the defendants at the outset, because if it be tenable it disposes of all other questions in the case and justifies the judgment rendered.

It is agreed by the counsel for the respective parties that

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according to the decisions of the Supreme Court in *Scott v. Ward*, 13 Cal. 458, and *Noe v. Card*, 14 Cal. 576, the lot granted to John Fuller, vested in him as separate property, and hence we shall consider the case upon this hypothesis. The counsel also agree that the money which was advanced for the grant made, was the common or community property of the husband and wife, though the same was the fruit of the wife's individual labor.

In 1 *Febrero Mexicano*, Chapter 10, section 19, it is said: "To the married woman is imparted and transferred by usage and legal authority, the dominion and possession, revocable and fictitious, of the one half of the property which, during the marriage, she gains and acquires with her husband, but after he dies the same passes to her irrevocably and effectively, so that after his death she becomes the absolute owner in possession and property of the one half which he leaves, in the manner prescribed by law, between conventional partners. For this reason the wife is prohibited not only from giving away her dotal and ganancial property during the marriage, but also from giving alms without the license of her husband except in four cases."

The four excepted instances it is not necessary to mention, as they do not affect any question involved in this case. Again, at section twenty: "A dissolution of the marriage is not necessary to constitute the husband the real and true owner of the property acquired after marriage, for during it he has in effect the irrevocable dominion thereof, and thus he can manage, barter, and even though they be neither military earnings nor *quasi* military earnings, can sell and alienate the same at his pleasure in the absence of an intent to defraud his wife as may be proved by law. Wherefore, while the husband lives, and there is no divorce or dissolution of the marriage, the wife ought not to say that she has any *gananciales*, nor to hinder him in the lawful use of the property acquired, upon the pretext that the law allows her half of it; because this allowance refers to the cases expressed and no others."

By the Mexican law in force in California prior to its acqui-

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sition by the United States, all property acquired by husband and wife during the marriage, and while living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; while property acquired by either of them by lucrative title solely, constituted the property of the party making the acquisition. An onerous title, as defined by the Mexican law authorities, was that which was created by the payment or the rendering of a valuable consideration for the property acquired. A lucrative title, by the same law, was that which was created by donation, inheritance or devise. (*Noe v. Card*, 14 Cal. 596; 2 *Pandectas Hispano-Mejicanos*, 447; *Novissima Recopilacion*, Book 10, Title 4.)

The municipal fees which Fuller paid on receiving the grant, whether the same was the fruit of the wife's industry or of his own, or that of both, was community property; and though the lot was obtained by the necessary expenditure of the community fund, still, according to the doctrine of *Noe v. Card*, this circumstance in no respect affected the separate character which became impressed upon the property so acquired as the separate property of Fuller. The doctrine laid down in *Noe v. Card*, exhibits the title thus derived in its naked legal attitude, without reference to the equity which exists by the rules of an enlightened and just jurisprudence, in which the Spanish-Mexican law had its foundation, controlling the title for the benefit of the person whose means were used in the acquisition of the property.

In Book 1, Title 1, Chapter 4 of Schmidt's Civil Law of Spain and Mexico, it is laid down that "the law recognizes a partnership between the husband and wife as to the property acquired during marriage, and which exists until expressly renounced in the manner prescribed" in the same chapter. To this community or partnership belongs:

First—All the property, of whatever nature, which the spouses acquire by their own labor and industry.

Second—The fruits and income of the individual property of the husband and wife.

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Third — Whatever the husband gains by the exercise of a profession or office.

Fourth — The gains from the money of the spouses, although the capital is the separate property of one of them.

Each of the spouses is entitled to an equal share in the community property, and they are liable equally to the losses and debts incurred during the existence of the conjugal partnership. During the existence of the marriage the husband alone manages or administers the property of the partnership, and he can sell and dispose of it as he deems proper, provided he does so without intent to injure his wife.

In *Labbe's Heirs v. Abat et al.* 2 La. 565, the Court, referring to the Spanish laws relating to this subject, say: "According to these laws, it is clear that husband and wife were considered so far separate persons that they could validly enter into any onerous contracts between themselves. A sale is the example given to illustrate this doctrine. They seem to have been prohibited only from making donations to each other, during the marriage, of property actually in possession." By the Spanish-Mexican law, the contract of purchase and sale, and any other onerous contract whatever, entered into between husband and wife, was valid, and she needed no authority or consent of her husband when dealing with him, other than that implied from the transaction itself. (4 Partida, Title 11, Law 4, and the annotations of Gregorio Lopez; Varias Resoluciones, Chap. II, Sec. 3, by Antonio Gomez; 2 Febrero Mexicano, Title 44, Sec. 16.)

Conceding that the acquisition of the one hundred vara lot in question was by a gratuitous as contradistinguished from an onerous title, which vested the title to the lot in the husband alone, the effect of the verdict is that the fees or charge exacted by the law for the grant was the joint or common property of the husband and wife. This sum thus withdrawn by the husband from the funds of the community or partnership, and used by him for his individual benefit, constituted a claim in favor of the community against the separate estate of the husband, without the power, however, on the part of the wife,

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to enforce its payment while the conjugal relation existed. (Schmidt's Law of Spain and Mexico, *supra*; *Noe v. Card*, 14 Cal. 606; *Barbet v. Langlois*, 5 La. Ann. 212; *Lawson v. Ripley and Wife*, 17 La. 251.)

Fuller, the grantee of the lot, being thus under a pecuniary obligation to the community, the defendants maintain that it was competent for him and his wife, between whom the relation of a property partnership subsisted, to adjust and liquidate his obligation by the arrangement which it is found they consummated by a division of the lot between them. This arrangement the defendant's counsel denominates, in the language of the Spanish law, *dacion in solutum*, or *dacion en pago*, which Escriche defines to be: "The act by which one thing is given in payment of another which is due. This mode of paying a debt can take place only by consent of both parties, inasmuch as the creditor is not obliged to accept one thing in lieu of another, as will be seen under the word *paga*. The *dacion in solutum* (giving in discharge) is in general a contract that is equivalent to a true sale, the essentials of a sale being found in it—that is, the consent, the thing and the price." The plaintiffs' counsel controverts the position thus assumed on the part of the defendants, denying that Fuller could be a debtor to the community, and therefore also denying that there existed any debt to pay or satisfy; and the negative of the defendants' position is sought to be demonstrated by the argument that if there was an obligation to pay or do some thing on the part of Fuller, then there must have been some one capable of receiving payment or accepting performance, and of asserting and enforcing the obligation in case its performance was refused. It is also denied that the wife could, under any circumstances, assert as against her husband, that she owned any portion of the acquisitions—the *gananciales* of the conjugal partnership; and the passage of the law which we have quoted at length from *Febrero* are relied on as establishing the doctrine which the plaintiffs maintain. This law, it may be observed, recognizes the wife's interest to the extent of one half of the *gananciales*, or community property, while it incul-

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cates the duty on her part of remaining silent respecting her portion of it during the continuance of the conjugal relation. This monition to the wife, it may be presumed, presupposes the capacity and prudence of the husband, and at the same time is designed to preserve domestic harmony.

Though the husband in the case under consideration might not have owed his wife a debt in the ordinary sense of the term, it does not therefore follow that he was not under an obligation to the community of which she was a member, in whose property she was equally interested with himself. He had used the money belonging to himself and his wife, which was necessary to obtaining a lot of land which by the grant became his separate property. This money was due from him to the community, and though the law afforded no means for enforcing its payment, it was not for that reason any the less due. The contingency, it may be presumed, he knew might occur when it could be enforced as a claim against his separate estate; and we see no reason why he could not satisfy this obligation, if it was agreed to by his wife, by assigning to her the half of the lot which it is found by the jury was worth the half of the community funds used by him to obtain it, and to which she would have been entitled had the marriage become dissolved by his death immediately after he had become invested with the title to the lot. It is said every payment presupposes an existing debt, and as a corollary, it is then said, if something should be given as a payment, and yet had been preceded by no obligation either natural or civil, there will result the right to reclaim it as a thing not due. (2 Febrero Mej. 244.) In the case in judgment there existed an obligation on the part of Fuller to restore to the community that which he had taken from it for his individual advantage, and though, perhaps, while he lived and the relation which he and his wife sustained to each other might continue, he could not have been compelled to perform it, yet he was competent to perform it voluntarily, and thus discharge it in anticipation of the time when his separate estate might

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he required to reimburse the amount withdrawn by him from the property of the community.

It is argued that if Mrs. Fuller acquired title to half the lot, the acquisition was by onerous title, and therefore what was so acquired became *eo instanti* the common property of the husband and wife, and of consequence the undivided moiety to the portion of the lot so acquired as community property, became vested in him as a member of the matrimonial partnership — that is, that by the transfer of the half of the lot by the husband to his wife, in satisfaction of the wife's interest in a demand which existed as a charge against him in favor of the community, the half so transferred upon that event was transformed into common property. This argument assumes that the charge or claim which the community had against Fuller for the money he had withdrawn from the partnership, was incapable of division and satisfaction so long as the marriage relation might last, though the parties, having the power to enter into contracts with each other, desired to make the arrangement. The result of this doctrine would be that the parties could not, if they would, adjust and settle an obligation existing as a charge against the husband in advance of the contingency which might or might not happen, rendering it absolute and enforceable by legal remedies. But this argument necessarily assumes that the law affecting the property relations of husband and wife, interposed a barrier to her acquiring by onerous cause property in her own right during the marriage. But was this so without limitation? Could she not acquire separate property by purchase, provided she paid the price out of her separate funds? And if she could, was it not competent for her to do so, with the consent of her husband, by the use of her share of the community money allotted to her upon a division of it between the conjugal partners? That she could acquire separate property by purchase with her separate money, there is no reason to doubt (1 Domat, Secs. 889-92), and that the matrimonial partners could divide their common estate between them appears by the case of *Labbes' Heirs v. Abat and others*. In that case the plaintiffs

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claimed from the defendants an account of the estate of their deceased mother, which they alleged was held in community with her husband, and they prayed judgment for whatever amount might have been the property of the deceased. In the case here referred to the plaintiffs were the heirs of their mother, who by a second marriage, in 1781, became the wife of Jean Pierre Descuirs. Prior to this marriage and in contemplation of it, the parties entered into a marriage contract respecting the property which they respectively had at the time, by which they formed a community of property, and thereupon they were married, and thereafter lived together, holding their property in community, the wife having the right to one half the *acquets* and gains, until 1805, when they agreed to a dissolution of the community or partnership and a separation of property. Accordingly, all the property, both as to the *biens propres* and the *gananciales*, was divided between them, he taking possession of the property assigned to him and she that assigned to her. This separation continued until the wife died, during which time each party had the separate use and enjoyment of the property as assigned. The Court held that this division of the community property was lawful and valid, saying: "The contract by which Descuirs and his wife agreed, in 1805, to a separation of property and dissolution of the matrimonial community which had existed between them, may be considered as partaking strongly of a contract of exchange, by which each one of the parties gave up his common right or claim to all the property in consideration of his having obtained a separate and distinct title as to a part." In respect to the case here cited, the plaintiffs' counsel say: Descuirs and his wife, being the owners of the property, did what they had a right to do when they divided it and each took the half of it. But it is maintained that the case of Fuller and his wife bears no resemblance to the one cited, because Mrs. Fuller owned no part of the lot which the defendants claim was divided between herself and husband. In this connection it is admitted by the counsel for plaintiffs that if Fuller and his wife had acquired this lot by *onerous* contract, they

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could have divided it between them. There is no doubt as to the correctness of this admission. In it is recognized the right of the wife to one half the *ganancial* property, and also the power of the parties to contract with each other. Though Mrs. Fuller did not own one half the lot by reason of the grant to her husband, she did own one half the sum which was paid as fees for the grant made. (Azo and Manuel's Institutes of the Civil Law of Spain, Book 1, Tit. 7, Chap. 5.) For her half of this sum of money she held his estate charged, though her remedy to compel its payment may have been in abeyance, depending for the power to exercise it upon the dissolution of the marriage during her life by divorce, or the death of her husband. While Fuller lived and the conjugal relation subsisted it may be he could not have been obliged *in invitum* to restore to the community that which he had withdrawn from it for his private gain; but, nevertheless, we see no reason, nor are we aware of any rule of law, which would incapacitate him from rendering an equivalent to his wife for her interest in the community funds converted by him to his own use. Whether the assignment of half the lot to her in satisfaction of her interest in the community claim against the husband was a *dacion in solutum*, or was of the nature of a contract of exchange, is not a matter of any special importance. If it was either it operated in satisfaction of the demand which existed against him for the money of the community which he had used. This, in our judgment, was a consideration sufficient to support the assignment of the half of the lot by Fuller to his wife. The exchange effected by the contract between the parties was the assignment or transfer by him of the west half of the lot to her in consideration of her interest in the demand which the community held against him, and which interest became in legal effect assigned to him by this contract.

In the case of Descuirs and his wife the property, both as to the *biens propres* and the *gananciales*, was divided between them, yet there was no dissolution of the marriage, and that division of property was said by the Court to partake strongly

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of a contract of exchange by which each party obtained a separate and distinct title to a part. In the case of Fuller and his wife, there was not a division of community property, but an assignment of a portion of his separate property for her interests in one of the items of the *ganancial* assets. This transaction, as was said in *Labbes' Heirs against Abat and others*, may be considered as partaking strongly of a contract of exchange.

If it were assumed that our understanding of the Mexican law is radically at fault respecting the validity of the assignment of the west half of the lot to Mrs. Fuller for a valuable consideration rendered by her to her husband for it, even then it would not follow that she did not thereby become the owner of the property in controversy. There can be no doubt upon the finding of the jury that Fuller designed to transfer this property to his wife, and to do it effectually; and as to both himself and wife was imputed a knowledge of the law of the land at the time, and consequently also an understanding of the legal effect of the transaction, it cannot be presumed what they did was designed to be abortive or without effect, but rather that he intended she should have the one half of the property while he retained the other; and assuming that the parties knew he could not transfer any portion of the lot to his wife as a *dacion in solutum* or *dacion en pago*, nor by contract of exchange, we are left to discover if they could have intended anything by the execution of the document before the Alcalde and by their subsequent conduct in reference to the subject to which it related; and if we can justly conclude they designed the same to have effect, then the inquiry is suggested, what effect?

In the case of *Labbes' Heirs* it is said that husband and wife "seem to have been prohibited only from making donations to each other during the marriage, of property actually in possession." But we are not to understand from this that a donation by one of the spouses to the other was absolutely void, but rather voidable or revocable. Donations so made are declared voidable or revocable by Law 4, Title 11 of the

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4th Partida. This law says, "Such donations are prohibited in order that the parties may not be prejudiced thereby, and dispossess themselves of their property, through their mutual affection; and also because the one who was the most avaricious would be in a better condition than the other who gave freely. And if they do make any such gifts after marriage they will not be valid, if one of the parties become thereby poorer and the other richer, unless he who made the donation did not revoke or annul it during his life, for then it would remain valid. But if the party making the donation revoke it during his life by expressly saying, 'I do not wish such a donation made to my wife, should be valid;' or if he observe silence in this respect, and afterward give or sell the same thing to another person; or if the party receiving the donation die before the party who made it; in either of these cases the first donation will become void."

By this law, and others of like import, a donation made by a wife to her husband or by a husband to his wife, was revocable during the life and at the instance of the donor; and conversely it became valid if not revoked at the death of the donor, if the donee then survived. (*Labbes' Heirs v. Abat and others*, 2 La. 567; *Escriche—Verbo, Donaciones entre conyuges; Gomez ad leges Tauri*, Laws 50-53, Sec. 65.)

Then upon the theory that Fuller and his wife knew the law to be as subsequently decided in *Noe v. Card*, and also that he could not assign and transfer to her half the lot in satisfaction of her interest in the sum of money which was expended to obtain it, the question again recurs what effect did they intend should follow as the result of their conduct? To this inquiry the answer seems to us to be suggested by the very conditions of the circumstances of the case, and therefrom to result naturally and logically, if not inevitably. Fuller had withdrawn from the community treasury twenty-five dollars for his private use, by which act the community was rendered poorer and he richer. His conjugal partner had suffered by the loss which the community had thus sustained and he was disposed to reverse it by a donation to her of half the lot.

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Here was a consideration or motive of sufficient potency to prompt him to the just act which he performed. Fuller, in whose power it was to defeat the donation which he intended for the benefit of his wife, was, as the jury in effect found, faithful to the last, and died leaving his wife surviving him his donee of the west half of the lot.

Our conclusion is, that Fuller and his wife intended that the agreement which they entered into before the Alcalde should be operative and effectual, and that if it did not, by reason of some legal impediment, amount to a *dacion in solutum* or *dacion en pago*, nor to a contract of exchange, the same was effectual as a donation by the husband of the west half of the lot to his wife, and that upon his death the donation became irrevocable. (*Holmes v. Patterson*, 5 Martin, 693.)

We have thus far assumed that the document purporting to have been executed by Fuller and his wife, in the presence of the Alcalde and witnesses, was genuine, and also that the verdict of the jury was based on evidence which authorized it. But it is now insisted on the part of the plaintiffs that such document was a forgery, and the instrument itself and the other documentary evidence in the case is relied upon as establishing this charge. The record fails to disclose that the point was made on the trial of the cause, and it is not pretended that this objection was suggested until after the case came to this Court. But notwithstanding the omission, if the record itself contains internal evidence that the document is a forgery, it is not too late to raise the objection for the first time in this Court.

The internal evidence on which it is sought to impeach this instrument does not seem to us to create any reasonable suspicion as to its genuineness. The fact that it does not affirmatively appear that Mrs. Fuller had the west half of the lot in her actual possession until 1847 does not establish or tend to establish the fact that this document was forged. The whole lot at the time was worth only twenty-five dollars, and continued without change in this respect until 1846, when it became worth one hundred dollars, and from that it

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increased in value in the course of a year to a sum between two hundred and three hundred dollars, and then it was that the division line was surveyed between the east and west halves of the lot, and a brush fence built upon a portion of it. It is not probable that the west half of the lot was esteemed of sufficient value by Mrs. Fuller during the interval between 1838 and 1847 to induce her to fence it, in order to preserve it, as at that period, so far as we are informed, there were no squatters in the country. Nor does the fact that Fuller, in 1847, upon his application to the Alcalde for a new title deed to replace the lost or mislaid original, which he represented was obtained by him in 1842, together with the statements made in his behalf at the time by De Haro and Sanchez, prove that the original grant was not made in 1837. In reference to it Sanchez said it was issued when Don Ignacio Martinez was Alcalde, and himself Secretary. De Haro certified that "the citizen John Fuller is the owner of Lot 24 in the place of Yerba Buena, which consists of two hundred varas in length and fifty varas in width, * * * which lot was petitioned for by the said Fuller, and granted to him by the civil authorities of this jurisdiction in the year 1842." In this certificate De Haro was mistaken as to the form of a hundred vara lot, and it is quite probable that he and Fuller were equally mistaken in respect to the year when the original grant was made, as its date does not seem to have been a matter of any particular importance. Either they were mistaken or Sanchez was. Sanchez said the original title was issued when Don Ignacio Martinez was Alcalde. Martinez held this position in 1836 and 1837, and not in 1842.

The charge of forgery is also sought to be maintained on the ground that Fuller could not write his name in 1847, while his name appears as if written by himself to the instrument executed in February, 1838. This instrument states that Fuller and his wife signed it with the Alcalde, "placing the sign of the cross, not knowing how to sign." There appears to be one sign of the cross upon the record produced in evidence, and that stands opposite the name of Mrs. Fuller.

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which of the parties placed it there is not proved unless by the document itself. It may be that each contributed to it, or, if only one of them made it, the other may have adopted it as his or her sign. A literal interpretation of the words "placing the sign of the cross" would exclude the idea that more than one sign of the cross was intended to be written, and would impute its creation as it appears on the face of the instrument itself to the joint effort of the parties.

The other reasons assigned in argument for the belief that the document in question is a forgery are of less weight even than those here noticed, and therefore they are passed by without further consideration. We think there is no good reason to suspect the genuineness of the instrument.

The conclusion to which we have arrived respecting the effect which the law attached to the agreement entered into between Fuller and his wife, and the assignment by him to her of the western half of the lot, renders it unnecessary to consider the other points contained in the record. We are satisfied that by the Mexican law relating to the questions involved, and also upon the principles of equity, the judgment ought to be affirmed.

Judgment affirmed.

SHAFTER, J., concurring specially:

I concur in the decision for the reason that the document of February 4, 1838, may take effect as a donation on the ground stated in the opinion.

ALEXANDER G. MAUGE v. BERNARD HERINGHL

PLEDGEE AND PLEDGER.—A pledgee of chattels has a right at common law, if the pledge is not redeemed within the stipulated time, to sell the property pledged, at auction, by giving public notice of the time and place of sale, and if the sale does not satisfy the debt, he may recover the deficiency from the pledgor by an action at law.

Argument for Appellant.

RIGHT OF PLEDGES TO SELL THE PLEDGE.—The common law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by Chapter 1 of Title 8 of the Practice Act.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The money was loaned to the defendant on the 14th of April, 1862. On the first day of October, 1862, the plaintiff gave written notice to the defendant that on the 7th day of October, 1862, he would sell the pledged property at auction, and also gave notice of the hour and place. Plaintiff also published in a daily paper in San Francisco, on the 4th, 5th, 6th, and 7th days of October, notice of the sale.

Defendant recovered judgment in the Court below. A new trial was granted, and defendant appealed from the order granting a new trial.

The others facts are stated in the opinion of the Court.

W. P. C. Whiting, for Appellant.

The two hundred and forty-sixth section of the Practice Act declares that there shall be but one action for the recovery of any debt secured by a mortgage or lien upon real or personal property, which action shall be in accordance with the provisions of that chapter. That chapter (Chap. 1, of Title VIII,) provides exclusively for *foreclosures*, and gives a personal judgment *only* when the subject of the lien or mortgage being exhausted in the manner pointed out, a deficiency remains.

If the debt in suit was a debt secured by a *lien* on personal property, it seems perfectly apparent that a personal judgment upon it could not be had, without first exhausting the subject matter of the lien, any more than a personal judgment could be had upon a note accompanying a mortgage, without first exhausting the mortgaged premises.

Nor is it an answer to this position to say that the subject matter of the lien was exhausted by the sale of the property

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pledged, at auction; for it is only after a deficiency is ascertained in the mode pointed out in this chapter, that a personal judgment is authorized on a debt secured by a lien.

Sidney V. Smith, for Respondent.

The two hundred and forty-sixth section of the Practice Act has no application to the case at bar, because at the time this suit was commenced there was no pledge or lien in existence—the property having been already sold and the lien thereby destroyed.

The suit was not to recover a debt secured by a lien, but to recover a balance due after subjecting the pledged property to sale.

A pledgee has the right at common law to sell the pledged property, if it be not redeemed within the stipulated time. (Story on Bailments, Sec. 308.) And if the sale does not satisfy the debt, then to recover the deficiency from the pledgor. (Id. Sec. 314.) And there is nothing in section two hundred and forty-six of the Practice Act which takes away that common law right to sell or to recover the deficiency after a sale.

By the Court, SANDERSON, C. J.

This is an appeal from an order granting a new trial. The action was brought to recover a balance due on a loan of one thousand dollars for one month, with interest, at the rate of three per cent. per month, secured by a pledge of certain personal property. The contract or obligation was in writing, and in the French language. The complaint admits part payment, and asks judgment for the balance due.

The answer denies specifically all the allegations of the complaint, and then proceeds to aver in substance that the transaction in question was had by the defendant with one Silvy, who was a pawnbroker, as he avers, and who was the real party in interest. That at the time he received the money from Silvy, he left with him in pawn and pledge, goods of the value of fifteen hundred dollars. That the obligation in ques-

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tion was in the French language, of which defendant was ignorant, and that he was induced to sign the same by the false and fraudulent representations of Silvy, to the effect that it was a receipt to him (Silvy) for the money, whereas in fact it was a receipt in favor of the plaintiff; all of which, as he avers, was done to cheat and defraud him.

It appears that the plaintiff, the money being unpaid at the maturity of the obligation and in less than six months thereafter, (Statutes of 1861, p. 184, Sec. 4,) duly notified the defendant, after demand duly made, that he would at a certain time and place sell the goods which he held in pledge at public auction. This was done and the amount realized was duly indorsed on the obligation, and this suit was brought to recover the amount remaining unsatisfied by the sale of the pledge.

The real question in controversy, and the one upon which the whole case turned, was whether this transaction was had with the plaintiff, who was not a pawnbroker, through Silvy acting as his agent, or with the latter in his alleged capacity of pawnbroker? The jury in effect found that the latter was the case. The Court below granted a new trial, but upon what particular ground does not appear. But we think the order can be fully sustained upon the ground that the verdict was contrary to the evidence. Upon the question as to whether the money loaned belonged to Silvy or plaintiff, the testimony, except that of the defendant (which is very unsatisfactory), is all one way and contrary to the verdict. But admitting this to be so, it is insisted, on the part of the appellant, that this case falls within the two hundred and forty-sixth section of the Practice Act, and cannot be maintained upon the facts disclosed by the evidence, because it is an action for a personal judgment without first exhausting the mortgage lien in the manner pointed out in Chapter 1, Title 8, of the Practice Act, and the motion for a nonsuit made by him ought therefore to have been sustained.

This case does not fall within nor is it governed by the provisions of that chapter. It is not an action for a debt secured by a lien, but for a balance due after the lien has been

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exhausted and its proceeds applied in a manner authorized at common law. (Story on Bailments, Sec. 308, and Sec. 314.)

This common law right of a pledgee to sell the pledge, upon the default of the pledgor, in the mode adopted in this case, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by Chapter 1, of Title 8, of the Practice Act.

The granting of a new trial rests very much in the discretion of the Court below, and this Court will not reverse such an order except in a case of gross abuse. (*Peters v. Foss*, 16 Cal. 357.)

Order affirmed.

E. V. HATHAWAY v. LEWIS BRADY, W. W. STOW,
AND WM. H. PATTERSON.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—Sections two hundred and forty-one, two hundred and forty-two, and two hundred and forty-three of the Practice Act, relating to proceedings supplementary to execution, do not authorize the Court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action.

MONEY DEPOSITED WITH SHERIFF TO RELEASE ATTACHED PROPERTY.—Where the defendant in an action, whose property had been attached by the Sheriff, deposited with the Sheriff a sum of money in gold coin, in lieu of an undertaking, to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the Sheriff and loaned out pending the litigation, and a note drawing interest taken therefor payable to plaintiff's attorney—*held*, that after plaintiff recovered judgment, the persons who borrowed the money did not hold it in the character of bailees of the Sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution.

JUDGMENTS PAYABLE IN COIN.—The two hundredth section of the Practice Act, as amended in 1863, making provision for the entry of judgments in certain cases, payable in a specific kind of money, confers a special authority on Courts not known to the common law, or Courts of equity, and must be strictly construed.

Argument for Appellants.

SAME — PROCEEDINGS SUPPLEMENTARY TO EXECUTION.— If, pending a litigation to recover a money judgment, gold coin of the defendant which is in the custody of the Sheriff, is, by consent of parties loaned out, and a note of the borrower is taken therefor, payable in gold coin, the Court cannot, after plaintiff recovers judgment, and while the note is outstanding in the hands of third parties, and not under the control of the Court, make an order, in proceedings supplementary to execution, that the borrower pay over the money in gold coin. The mode of enforcing a contract payable in coin is, under the statute, by an action or proceeding upon the contract itself.

JURISDICTION OF COURT IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.— In proceedings supplementary to execution the Court has no jurisdiction to make orders relating to persons who are not parties to the proceeding, nor has it power to make an order, that one who has, by consent of plaintiff and defendant, borrowed money, deposited with the Sheriff by defendant to release an attachment, and given his note to a third party therefor, payable when plaintiff recovers judgment, shall pay the money to the plaintiff, when the person who holds the note is not a party to the proceeding, and the note is still in his hands and not under the control of the Court.

RECEIVER IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.— In proceedings supplementary to execution, the Court has power, when it has all the parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt.

MONEY TAKEN BY CONSENT OF PARTIES FROM THE CUSTODY OF THE LAW.— Money deposited with the Sheriff by a defendant to procure the release of an attachment is in the custody of the law, but where the parties by a mutual agreement take it out of the hands of the Sheriff, without any order or permission of the Court, and loan it out to third parties, these parties are not the bailees of the Sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

The Court below erred in ordering *Patterson & Stow* to pay the funds in their hands in gold coin. The order should have been to pay the sum, leaving it to be complied with by the payment of any "lawful currency" which by law will discharge a debt or obligation.

Patterson & Stow made no contract with plaintiff. The judgment in *Hathaway v. Brady* is not payable in any specific currency; it may be discharged by the tender of United States Treasury notes.

Argument for Appellants.

To require the defendant in this judgment, or his trustees, Patterson & Stow, to pay in a specific currency, was not warranted by the judgment nor by any statute of this State. The execution only requires the collection of money; the proceedings supplementary to execution cannot require anything beyond what the judgment and execution required. The defendant might have paid the judgment in Treasury notes. The execution would have been satisfied by payment of legal tender notes.

The action of the Court below was based on the theory that Patterson & Stow, having received coin, must pay plaintiff coin—the premises being admitted, the conclusion does not follow:

1st. Because they made no contract with plaintiff.

2d. Because plaintiff's judgment was not payable in coin.

3d. Because the statute of this State providing that a contract made by its terms payable in coin, shall be enforced by a judgment payable in the same coin, contravenes the Act of Congress making legal tender notes, money, and the payment thereof at their nominal value a satisfaction of all debts.

It cannot be denied that Congress has the exclusive power to provide for the coinage of money, and to regulate the value thereof; nor can it be denied that Congress has made no legal difference between the value of greenbacks and gold—either is a lawful tender, by the legislation of Congress, for the payment of any or all debts. The one is money, and so is the other; the one bears the impress of sovereignty, and so does the other; the value of the one is regulated by the Government as much as the other. As money, there is no difference between them; as an article of merchandise, the one has a value greater than the other; but wheat, barley, lumber, a horse, bullocks, etc., are articles of merchandise, have a value, and market price.

But we are not without authority on this point. In the time of Queen Elizabeth, mixed or base money was coined by authority of the sovereign, who, by proclamation, ordered it to pass

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current. A person in Ireland had borrowed £100 sterling, and had given a bond to repay it on a certain future day. In the meantime, Elizabeth, for the purpose of paying her armies and creditors, had coined the base money. The debtor, on the appointed day, tendered £100 in this base coin, and it was determined, upon great consideration, that it was a legal tender, and that the lender was obliged to receive it. (Davies' Irish Reports, 48; see pp. 278, 208, Vol. 1, Book 1, Black. Com. note 33; 1 Hale, P. C. 194.)

Once admit that Congress can make the legal tender notes a lawful tender, and there is an end of the argument in support of the proposition that State legislation can determine they are not legal tenders for some debts and obligations, but are for others. If money for one purpose, they must be for all.

On the 25th day of February, 1862, Congress passed another Act, entitled "An Act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States."

The first section of this law provides, among other things, that the Secretary of the Treasury is authorized to issue, on the credit of the United States, one hundred and fifty millions of dollars of United States notes, which notes, "shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties upon imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be *lawful money and a legal tender in payment of all debts, public and private*, within the United States, except duties on imports and interest as aforesaid." (Statutes 1861-1862, p. 345.)

The law of 1862 neither repeals the Act of 1792, nor provides that the treasury notes issued under it shall be *exclusively* a lawful money or legal tender.

There are thus presented to the citizen two kinds of currency which he can use as a medium of exchange, or in which he can make his payments. They are both lawful money; neither, in the estimation of the law, superior to the other.

Argument for Respondent.

Where individuals enter into contracts which are to be cancelled by the payment of money generally, both of these Acts of Congress enter into and form a part of the contracts, and the cancellation can be accomplished by the tender of either class of currency.

The privilege is given the debtor to select either the gold or the paper, and discharge his obligation with the kind of money chosen. In fact, the idea of a legal tender involves the idea of a privilege given to a debtor to pay his creditor without a concurrence by the latter, except a concurrence forced by the law.

If the right to pay a debt with an article stamped by the Government, and denominated money, be a privilege given the debtor, then the latter can waive that privilege. The privilege of the debtor is statutory, and it has been repeatedly held that a person can waive, not only a statutory, but even a constitutional right. (*Lee v. Tillotson*, 24 Wendell, 338; *Van Hook v. Whitlock*, 26 Wendell, 43; *People v. Murray*, 5 Hill, 468; *Baker v. Braman*, 6 Hill, 47; *Embury v. Connor*, 3 N. Y. 511; *Toombs v. Rochester R. R. Co.*, 18 Barbour, 583; *Buel v. Trustees Lockport*, 3 N. Y. 197.)

If he can choose at the time of payment, which of the two kinds of currency will satisfy his debt, why cannot he make the choice at the time he agrees to pay? If at the time he proposes to pay, he tenders gold, and thereby waives his right to tender Treasury notes, why cannot he make the waiver in advance?

W. W. Crane, Jr., for Respondent.

The respondent claims that the law commonly called the Specific Contract Act, is not in conflict with any of the laws of Congress, but, on the contrary, is in perfect harmony therewith, and that it is competent for the Legislature of this State to authorize the enforcement of the payment of express contracts in the kind of currency expressed in the contract.

Congress, on the 2d of April, 1792, passed an Act entitled

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"An Act establishing a mint and regulating the coins of the United States." (Statutes at Large, Vol. I, p. 250.) Section sixteen of this Act is as follows:

"That all gold and silver coins which shall have been struck at and issued from the said mint, shall be *a lawful tender in all payments whatsoever*, those of full weight according to the respective values hereinbefore declared, and those of less than full weight at values proportioned to their respective weights."

By the Court, SAWYER, J.

Hathaway sued Brady and attached certain personal and real property. For the purpose of releasing the personal property, Brady gave an undertaking, and deposited with Edmondson, the Sheriff, five thousand dollars in gold coin, and the personal property was thereupon released from the attachment. After judgment, and pending an appeal, Edmondson's term of office being about to expire, an arrangement was made by the parties interested, through their attorneys, that the five thousand dollars in gold coin should be withdrawn from the custody of Edmondson and placed in the hands of Stow, defendant's attorney, and one of the appellants, to be held by him as custodian, subject to all the rights of plaintiff in all respects the same as if it had remained in the hands of Edmondson. In pursuance of this arrangement, and on the joint order of the attorneys of the respective parties, the said coin was delivered by Edmondson to Stow. It was at the same time agreed, that the funds so received by Stow should be deposited or loaned, as the parties might agree. Afterward the plaintiff, through his attorney, proposed to Stow to take the money as a loan at a reasonable rate of interest, giving security for its repayment. This proposition being declined, it was finally agreed by the parties, on the 26th of August, 1863, that pending the litigation, said Stow and his partner, Patterson, should take twenty-five hundred dollars of the sum, and W. W. Crane, attorney for plaintiff, the remainder, and pay interest therefor at one and one fourth

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per cent per month. In pursuance of this arrangement, Patterson & Stow executed and delivered to Crane an instrument, as follows:

"[\$2,500.] SAN FRANCISCO, August 26, 1863.

"One day after an entry of an order in the Supreme Court affirming judgment in Third District Court, Alameda County, of *Hathaway v. Brady*, or if said judgment is not affirmed, one day after demand, without grace, we promise, for value received, to pay W. W. Crane, at our office in San Francisco, in United States gold coin of the present standard of fineness and value, two thousand five hundred dollars, with interest, payable in like coin, at one and one fourth per cent per month.

"PATTERSON & STOW."

[United States Revenue Stamps.]

Stow paid over to Crane two thousand five hundred dollars, taking from Crane an instrument similar to that executed by Patterson & Stow. Patterson & Stow also, at the same time, and as a part of the same transaction, executed a written acknowledgment, that they held the said five thousand dollars in coin "in the same manner, and with like effect as if the same continued in the hands of said Edmondson."

The judgment in the action having been subsequently affirmed, said Crane requested said Patterson to pay said sum of two thousand five hundred dollars, and Patterson refused. An execution was then issued, and the Sheriff of the City and County of San Francisco returned that he had attached "all moneys, goods, credits and effects, debts due or owing, or other personal property, in the possession of W. W. Stow and W. H. Patterson, and belonging to defendant," by delivering copy, etc.; that statement was demanded and no answer given.

The money not having been obtained, said Crane, on behalf of plaintiff, made an affidavit in the cause of *Hathaway v. Brady*, setting forth substantially the foregoing facts, the issue and return of execution unsatisfied, and adding: "Deponent therefore avers that said Patterson & Stow have property,

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to wit: The sum of two thousand five hundred dollars in United States gold coin of said Lewis Brady, and refuse to pay the same upon said execution or to apply the same to the satisfaction of said judgment." Upon this affidavit he asked and obtained an order upon Patterson & Stow, to show cause, why they should not pay over said two thousand five hundred dollars, with interest thereon at one and one fourth per cent per month in United States gold coin, and why they should not deliver up and cancel the said note for two thousand five hundred dollars given by Crane. At the hearing Patterson & Stow were not examined, but they resisted the application, and read in opposition a copy of the judgment and execution in *Hathaway v. Brady*, and other portions of the record, from which it appeared that the judgment was the ordinary money judgment, and not a judgment for coin, and that the execution followed the judgment. The Court ordered "that said W. H. Patterson and W. W. Stow do upon demand pay over to the plaintiff, or his attorney of record, the sum of two thousand five hundred dollars in United States gold coin, with interest thereon, payable in like gold coin, at one and one quarter per cent per month from the 26th day of August, 1863, and that upon the payment thereof, the said W. W. Crane, Jr., deliver to said Patterson & Stow their memorandum note aforesaid held by him and said Patterson, and said Patterson & Stow deliver to said Crane his memorandum note aforesaid, upon the application of the two thousand five hundred dollars, with interest at one and one quarter per cent per month from said August 26, 1863, now in said Crane's hands, toward the payment of said judgment."

From this order Patterson, Stow and Brady appeal.

The appellants insist that the Court had no power to make said order or any part thereof; that said order is not authorized by law; that said order is erroneous in ordering Patterson & Stow to pay said sum and interest in gold coin; and that it is erroneous in directing said Patterson & Stow to surrender to Crane his note.

It is not clear from the record what the character of these

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proceedings was intended to be. But the respondent's counsel, in his brief, claims that they were had under sections two hundred and forty-one, two hundred and forty-two and two hundred and forty-three of the Practice Act relating to proceedings supplementary to execution. But the provisions of those sections have not been pursued. There is nothing in those sections, that authorizes the Court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of the judgment, without first ascertaining, by an examination of the party alleged to have the property in his possession, the truth of the allegation. When it is made to appear to the satisfaction of the Judge, that any person has the property of the judgment debtor, or is indebted to him in an amount exceeding fifty dollars, "the Judge may by an order require such person * * * to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same." He can be compelled to answer, but there is nothing authorizing the Court to make any order to pay till he has answered. In this case Patterson & Stow have never, so far as shown by the record, been examined, or answered, or admitted that there was anything in their hands due or belonging to Brady. They appeared to the order to show cause and opposed the application. But they were not called upon to answer whether they had any property of Brady or not, and did not answer. It appears by the record that the Court acted only upon the affidavit of Crane, made for the purpose of obtaining the order to show cause, and the execution introduced by him.

There was no admission by Patterson & Stow, that they had any money, or property of Brady's in their possession, and no answer by them. There was no evidence of the fact other than the moving papers referred to. The affidavit of Crane was, perhaps, sufficient to authorize the Judge to make an order requiring Patterson & Stow to appear and answer; but it performs no other office than to serve as a basis to set the Court in motion. It is not a pleading like a complaint, to which the party summoned is to plead, and in default of pleading

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thereto to be taken in the proceeding as true. No default can be entered upon it. It is simply the basis for the order of the purpose of acquiring jurisdiction of a party who was before a stranger to the case. The order to apply property to the satisfaction of the judgment must be based upon the answers of the party summoned, and such other testimony as may be adduced in connection with the answer. There was no examination of Patterson or Stow in this case, and neither answer or admission, with or without other testimony, upon which the Court could be authorized to enter the order. These statutory proceedings must be strictly pursued. The proceedings were, therefore, irregular.

But, for the purposes of this decision, we will assume that proceedings supplementary to execution were regularly had under the provisions of the Practice Act.

It is claimed by the respondents, that, Patterson & Stow were simply bailees of coin owned by Brady, holding it as a special deposit, and that the Court is authorized to order it to be delivered over in the same manner, as if it were any other specific piece of personal property capable of manual delivery. Conceding this to be the position of Patterson & Stow on the receipt of the money from Edmondson, such was clearly not their relation to it after the further arrangement of the 26th of August. The parties appear to have been unwilling that so large an amount of money should be idle pending a protracted litigation. They were anxious that it should draw interest. The plaintiff offered to take it upon interest and give security. The proposition was not acceded to. It was finally agreed that Patterson & Stow should take two thousand five hundred dollars, and Crane two thousand five hundred dollars, each to pay interest at one and a quarter per cent per month, and the instruments referred to in the record were executed in pursuance of this agreement. It was certainly not contemplated that Patterson & Stow should keep the coin in their safe, as a special deposit, after this arrangement. Admitting them to have been bailees before the 26th of August, this agreement converted them from mere bailees into debtors,

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but without changing the rights of the plaintiff and defendant as between themselves, so far as their interest in the fund was concerned. The fund from that time, at least, lost the character of specific personal property capable of manual delivery, subject to be delivered over, as such, on the order of the Court, and acquired the character of a debt, subject to be applied by the Court on proceedings subsequent to execution, only in the mode applicable to other debts. The respondent and the Court so treat the matter, for the respondent asks, and the Court orders, that Patterson & Stow shall "pay over to plaintiff, or his attorney of record, the sum of two thousand five hundred dollars in United States gold coin, with interest thereon, payable in like gold coin, at one and one quarter per cent per month, from the 26th day of August, 1863." No interest was deposited with Patterson & Stow. The demand for interest necessarily arose from the use of the money in the character of debtors. There was, then, no specific coin belonging to Brady in the hands of Patterson & Stow, upon which the order of the Court could operate.

But it is insisted, that, under section two hundred of the Practice Act, as amended in 1863, the Court was authorized to order Patterson & Stow to pay the amount due in gold coin. That section provides, that, "in an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default, or after verdict, may be made payable in the same kind of money or currency so received by such person."

This section confers a special authority to enter a peculiar judgment not known to the common law, or even to Courts of equity in certain specified "*actions*." It must be strictly construed and cannot be extended beyond the case prescribed.

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The case under consideration is not one of the specified cases. It is true there was a contract in writing made by Patterson & Stow. But this is *not an action upon that contract*. The written contract is now outstanding in the hands of some person not a party to this suit, who himself holds it as trustee for the benefit of the parties interested. Had the action been brought on that instrument by him, as trustee, or by some person under the direction of the Court, the question would have arisen as to what power the Court could exercise under this provision of the statute. Nor is this "an action against a person for the recovery of money received by such person in a fiduciary capacity," within the meaning of the statute.

This is a summary proceeding in the nature of a garnishment, collateral to another action, in which the plaintiff seeks to charge Patterson & Stow as debtors of Brady, or as having property of Brady, the judgment debtor. It is not an action by the beneficiary in his own right against his trustee to recover money held by the trustee for his benefit, nor a proceeding to enforce his right to the fund under the stipulation withdrawing the money from the hands of Edmondson. It proceeds upon a different theory, and is not the case contemplated by the statute. The plaintiff chose to proceed under the statute relating to proceedings supplementary to execution, and charge Patterson & Stow as debtors of Brady for money loaned at interest, and he must be limited to the remedies afforded by those provisions. Such proceedings are only adapted to reaching funds of the judgment debtor. Any interest the plaintiff may have acquired against Patterson & Stow by virtue of his agreement with them must be enforced in some other mode.

Plaintiff's judgment against Brady, and the execution issued on it, do not call for gold coin. They may be satisfied by any other coin, or money which the Constitution and laws of the United States make a legal tender. It may be doubtful whether the plaintiff can acquire a right, by proceedings supplementary to execution, to a judgment or order more favor-

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able to himself than he has against Brady. But if he can, it must be through an action directly upon the contract of Patterson & Stow, to enforce it according to its terms. But it is enough to say that this proceeding is not "an action," etc., within the meaning of the Act relied on, and the plaintiff can receive no aid from the statute. Conceding, therefore, the propriety under the circumstances disclosed by the record, of making an order requiring Patterson & Stow to pay over the money due from them, the order was erroneous in requiring it to be paid in any specific kind of money. The Court was not authorized to make the order in this proceeding, upon the case presented by the record.

The order is erroneous in requiring Patterson & Stow to deliver up to Crane his note of August 26th, upon Crane's applying the two thousand five hundred dollars due from him on the instrument, in satisfaction of plaintiff's judgment. Crane was no party to this proceeding, and the Court had no jurisdiction to make the order. The note was not ordered to be delivered to him as receiver, but as maker.

The Court ought not to have made the order requiring Patterson & Stow to pay over the two thousand five hundred dollars, while their note was outstanding in the hands of a third party, and not under the control of the Court. The order, that Crane deliver up the note after Patterson & Stow should have complied with the order on their part, was a nullity, for the reason, that Crane was not a party, and the Court had no jurisdiction over him or the paper. Crane, in his affidavit made on behalf of plaintiff, avers a willingness to surrender the note on the payment to plaintiff of the money due on it; but this, without placing the note on the files or in the custody of the Court for that purpose, did not give the Court control of the instrument. The Court had power to appoint a receiver and direct Patterson & Stow to deliver the note of Crane to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt. So, also, it might have ordered Crane, in a proper proceeding against him, to deliver up the note of Paterson & Stow to be

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collected in the same manner. But it had no authority to order either to deliver up the notes held by them respectively to the other, or to any other party having no such relations to the Court.

It is also insisted, that, under the stipulations set out in Crane's affidavit, Patterson & Stow stood in the position of the Sheriff, and could be required to pay over the money on motion, in the same manner as the Sheriff could be required to pay over, had the money remained in his hands. Whatever the rights of the parties in the money may have been, it does not follow that the remedy is the same that it would have been had the money remained with the Sheriff. In his hands it was in the custody of the law. But the parties, by mutual agreement, took it out of the hands of the Sheriff, and placed it in the hands of private parties. This was not done under an order, or by the permission, or under the sanction of the Court. The Court took no action whatever in the matter. Nor did the Sheriff, either on his own motion, or at the suggestion of the parties, appoint Patterson & Stow his keeper. They were not the bailees of the Sheriff, and were not in any manner accountable to him for the deposit. The parties interested, by a private arrangement between themselves, independent of any official action of the Court or Sheriff, took the money out of the custody of the law, thereby relieving the Sheriff from any further responsibility in the matter, and placed it in the hands of Patterson & Stow, who thus became trustees for the benefit of all the parties interested in the money — the plaintiff and defendant under the stipulation retaining the same pecuniary interest in the fund as if it had remained in the custody of the law; and by a subsequent agreement the deposit was converted into a loan — the interest of the parties in the fund also remaining unchanged. But the remedies for making that interest available are necessarily different. The money is no longer in the custody of the officers of the law. It has been intrusted to private parties, and the remedies must be such as are applicable to other funds held in a similar manner upon like trusts.

Points decided.

From the views expressed, it follows that the order appealed from must be reversed, and it is so ordered.

DANIEL GREEN v. JOSEPH E. BUTLER, JOSEPH S. LEAVITT, R. MORTON, — VANDYKE, AND W. POLAND.

REVIEW OF EVIDENCE BY APPELLATE COURT.— If no appeal is taken from an order denying a new trial, the appellate Court cannot review the evidence to determine whether the verdict or findings are sustained by it. The practice is the same in all cases, whether at law or in equity.

PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE.— A mortgagee can make a *bona fide* purchase from the mortgagor of the equity of redemption, and thereby become vested with an irredeemable estate, and obtain an absolute ownership of the mortgaged property.

CANCELLATION OF A DEFEASANCE.— Where a deed and defeasance are in separate instruments, thus constituting a mortgage, a purchase of the equity of redemption by the mortgagee from the mortgagor for its full value, and a surrender of the defeasance to the mortgagee to be cancelled, and the retention of it by the mortgagee, is in law a cancellation of the defeasance, though not actually destroyed.

SAME — EFFECT OF.— G. executed to B. a deed absolute on its face, but intended as a security for money. B. subsequently executed an instrument whereby he agreed to reconvey to G. upon payment by G. at a specified day of a certain sum of money due from G. to B., and B., by consent of G., went into possession. Afterwards there was an accounting, and B. purchased of G. his interest in the land, and paid therefor its full value, the money due being a part of the purchase money; and thereupon G. surrendered up to B. the said last named instrument to be cancelled, upon an understanding between the parties that such surrender and cancellation should and would vest the absolute title to the lands in B., and B. continued in possession in pursuance of his purchase. Afterwards G. brought suit against B., claiming that said surrender and cancellation of said instrument did not vest the title in B.; that said conveyance was still only a mortgage; that the indebtedness had been paid by the rents and profits; and asking that B. be adjudged to convey to G. *Held*, that under such circumstances a Court of equity would not compel a conveyance.

WHEN A CONVEYANCE IS A TRUST DEED AND NOT A MORTGAGE.— Where the owner of a tract of land executes an absolute deed of it to another person to enable the other person to mortgage the same to raise money to pay off liens against it, the transaction is not a mortgage, but passes the fee which the grantee holds in trust for the grantor.

DEFEASANCE EXECUTED AFTER DEED.— If a deed is executed, conveying and intended to convey an absolute title, the subsequent execution of a defeasance by the parties will not turn the deed into a mortgage.

Argument for Appellants.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

This action was brought to compel an accounting and a reconveyance of the property. Plaintiff claimed that the deed and defeasance constituted a mortgage, and that Leavitt, unknown to plaintiff, had paid Butler a large portion of the sum mentioned in the defeasance before the execution of the same, and that the amount thus paid by Leavitt, and the proceeds of the property received by Butler as mortgagee in possession, had satisfied the mortgage, and that Leavitt and Butler had combined together to defraud plaintiff.

The other facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellants.

The settled doctrine of equity now is, that a mortgage is mere security for a debt, *and passes only a chattel interest*. That the debt is the principal, and the law the incident; that the mortgage constitutes simply a lien or incumbrance, and that the *equity of redemption* is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor, subject only to the lien of the mortgage, in any of the ordinary modes of assurance. (*McMillan v. Richards*, 9 Cal. 365; *Heffens v. Myer*, 13 Cal. 13; 2 Story's Equity, 1,013, 1,015; *Wilson v. Troupe*, 2 Cowen, 95; *Alexander v. Greenwood*, 24 Cal. 505; *Harlan v. Rackerby*, 24 Cal. 561.)

An equity of redemption, or other interest in land, cannot be surrendered except by writing signed by the party. (*Chitty on Con.* 270; *Varrish v. Koons*, Parsons S. Equity, C. 89; *Gouche v. Martin*, 9 Watts, 106; *Harrison v. Owen*, 1 A. T. K. 520; *Cupit v. Jackson*, 13 Price, 721; *Sanders v. Leslie*, 2 Ball & Beat. 49; *Dexter v. Arnold*, 3 Sum. 152.)

"Once a mortgage, always a mortgage," is a universal rule in equity, and no agreement in the mortgage to change it into an absolute conveyance, upon any condition or event whatever, will be allowed to prevail. (*Clark v. Henry*, 2 Cowen, 324; *Wheeland v. Sumpty*, 1 Yates, 584; 2 Equity Digest,

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1,463-1,466; *Wilson v. Troupe*, 7 John. C. 25; *Holdridge v. Gillespie*, 2 John. C. 34; *Hicks v. Hicks*, 5 Gill. & John. 75.)

So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed even by an express agreement of the parties. (2 Story Eq. Jur. 1,019; *Flagg v. Mann*, 2 Sum. 490; *Crane v. Bonnet*, 1 Green. C. 264.)

Mere delivery of the defeasance could not operate as a conveyance of the equity of redemption. (*Jackson v. Pulver*, 8 John. 370; *Jackson v. Anderson*, 4 Wend. 474, citing: 2 John. 884; 9 John. 55; 12 John. 73, 488, 355; 2 H. B. C. 260; 4 Crois. 497; 6 East. 86; *Jackson v. Paige*, 4 Wend. 485, citing 3 Term Reports, 1 John. C. 340.)

Taylor & Hastings, for Respondents.

A mortgagee may always purchase the equity of redemption of the mortgagor, if such purchase be *subsequent* to the making of the mortgage, for an adequate consideration, and free from fraud. (1 Washburn on Real Property, 496, Sec. 24; 4 Kent Com. 160, 9th edition; *Schekell v. Hopkins*, 2 Md. Ch. R. 90; *Dougherty v. McColgan*, 6 Gill. & Johns. 275; 18 Ala. 698; *Remson v. Hay*, 2 Ed. Ch. 535; *Russell v. Southard*, 12 How. U. S. 154.)

The agreement for the purchase of the mortgagor's interest presented by this record was not made *in* the mortgage, not *cotemporaneous* with the security, but long *subsequent* thereto. All that this point of appellant states, and all that the authorities cited in support of it state, is, that a mortgagee shall not at the *time* of making the mortgage agree for the purchase of the equity of redemption — that any *such* agreement, for very good reasons, is presumed to be fraudulent — a principle which we have no desire to contest. If the agreement for the purchase of the redemptionary interest had been made between Butler and Green at the time of the making the mortgage, the 14th day of August, 1854, there would be some force in the proposition, but the same being made subsequently, on the 27th of February, 1855, it is destitute of application.

Argument for Respondents.

The case of *McMillan v. Richards*, 9 Cal. 385, cited by appellant, has no bearing upon this issue. The words "the owner of a mortgage in this State can in *no* case become the owner of the mortgaged premises, except by a purchase after sale, under a judicial decree, consummated by conveyance," applied to the facts in that case — i. e., that a mortgage of itself does not convey any estate, but is simply a security — are perfectly true. But the strong expression is, of course, limited to those facts. Obviously, there are *many* cases where the owner of a mortgage can become the owner of the mortgaged property other than by a purchase after sale, under a judicial decree, consummated by conveyance. Can he not take by devise? Can he not receive by gift? Could he not become owner either as heir or next of kin by descent or distribution? Equally can he become owner by a fair and equitable purchase, when the agreement is made subsequent to the mortgage. The rule is clearly stated in Washburn on Real Property — the latest and best work we have on realty:

"If the transaction between the parties be, in fact, a mortgage, its character cannot be affected or changed by any agreement entered into at *the time* between them, as to redemption or other incidents of a mortgage. The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at *the time* of the execution of the deed, nor upon any contingency whatever.

"*The mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title.* This, however, will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. *It will be sustained if perfectly fair and for an adequate consideration.*" (Washburn on Real Property, Vol. I, p. 496, Secs. 23, 24.)

The surrender and the cancellation of the defeasance, by and with the consent of the mortgagor, for the very purpose of passing the estate, operates in equity to estop the mortgagor from showing the deed absolute to have been intended as

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a mortgage, and thus avoids the Statute of Frauds. (Brown on Statutes of Fraud, pp. 60-62, Secs. 60, 61; 1 Hilliard on Real Property, 395, Sec. 17; *Thrull v. Skinner*, 17 Pick. 214-16; *Harden v. Phillips' Academy*, 12 Mass. 464-5; *Mussy v. Holt*, 4 Foster N. H. 252; *Wiley v. Christ*, 4 Watts' Penn. 199, 200; *Farrar v. Farrar*, 4 N. H. 191; *Thomson v. Ward*, 1 Id. 9; 1 Green's Ch. 250; 6 Ala. 801; *Mason v. Grant*, 21 Maine, 160; *Waters v. Bandell*, 6 Metcalf, 484; *Baker v. Pratt*, 15 Ill. 570, 571; *Holbrook v. Terrell*, 9 Pick. 104; *Jackson v. Gardner*, 8 Johns. 403; *Stetson v. Gulliver*, 2 Cush. 499; *Rice v. Rice*, *Rice v. Bird*, 4 Pick. 352, and note.)

We do not claim that at law the surrender and cancellation of the deed by the grantee revests the title in the grantor; that such an act constituted a technical conveyance at law, signed, sealed and delivered, which passed the interest of Green in the land to Butler. Though numerous authorities of respectability and weight countenance such view, such a cancellation does not operate by way of transfer, nor yet of technical release, but it does operate in equity as an estoppel, not allowing the grantee or the mortgagor to claim any benefit from the surrendered deed, on the one hand, or the surrendered and cancelled defeasance on the other.

By the Court, SAWYER, J.

A large portion of the briefs on both sides is devoted to a discussion of the evidence. But no appeal has been taken from the order denying a new trial, and the parties must be presumed to have been satisfied with the facts as found. Whether they were or not, the appeal is from the judgment alone, and, on such appeal, we cannot review the evidence. The practice is the same in all cases, whether at law or in equity. (*Allen v. Fennon*, 27 Cal. 68.) Whatever doubt there might formerly have been on this point as to cases in equity, there can be none since the passage of the Act of 1861, the first section of which provides "that no distinction as to the mode of taking or perfecting appeals, or as to the

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effect of them, shall be made between cases at law and cases in equity, but the provisions of the Practice Act shall apply in like manner to all cases of appeal." (Laws 1861, p. 589.) Nor did the parties, when the appeal was taken, seem to contemplate that we should re-examine the evidence. It is stipulated that certain papers on file shall constitute the statement on appeal (there does not appear to have been any statement on motion for new trial), and the grounds of appeal specified in the statement are, substantially, that the referee erred in his conclusions of law, and, as a consequence, that the judgment is erroneous. No error as to the facts found is alleged in the statement as a ground of appeal.

The referee finds, among other facts, that, prior to the 14th of August, 1854, the plaintiff was in possession of the lands described in the complaint; that on that day, for a valuable consideration, he conveyed the said lands and improvements thereon by a deed, absolute on its face, to the defendant, Butler; that, although the deed was absolute on its face, it was intended as a mortgage, to secure to said defendant certain moneys, due and to grow due, for erecting buildings and improvements thereon, for a firm composed of plaintiff and defendant, Leavitt; that on the 20th of October, 1854, the said firm of Green & Leavitt had an accounting with defendant, Butler, and that upon said accounting it was found and agreed by all parties that said firm was indebted to said Butler for constructing said improvements in the sum of eight thousand five hundred dollars; that on said 20th day of October, said Butler executed and delivered to said Green & Leavitt, a written defeasance, whereby he bound himself, upon the payment by them to him on or before March 1, 1855, the said sum of eight thousand five hundred dollars, to convey, by quitclaim, to said Green & Leavitt, the said premises, and covenanted in said defeasance that if, after said 1st day of March, he should sell said premises he would pay over to said parties any surplus that might arise over his debt and costs; that said defendant, Butler, on the 1st of February, 1855, with the consent of said plaintiff and said defendant, Leavitt,

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entered into possession of said premises, and continued in possession till the 27th day of February, 1855.

"That on the said 27th day of February, A. D. 1855, at said city and county, the said plaintiff and the said defendant, Joseph E. Butler, had an accounting and settlement of and concerning the said plaintiff's interest in and to the land described in said complaint, and the improvements then thereon, and of the furniture then in said 'Ocean House;' on which accounting and settlement the said defendant, Joseph E. Butler, paid to the said plaintiff the sum of two thousand dollars, in four promissory notes, for said plaintiff's interest in and to said land and the improvements thereon, and the furniture then in said house, which said notes were subsequently paid; and the said plaintiff then and there, in consideration of said sum of two thousand dollars, surrendered the said written defeasance to the said defendant, Joseph E. Butler, for cancellation, and the same was thereby cancelled as against the said plaintiff."

The only question arising on the record is, as to the effect upon the rights of the parties as to the relief sought in this action, of the surrender of the defeasance to be cancelled, under the agreement found by the referee. The principles stated in the numerous cases cited by appellant's counsel are generally admitted to be correct. But there can be no doubt that a mortgagee can make a *bona fide* purchase of the equity of redemption — if, indeed, we may use these terms in the present condition of the law as to mortgages in this State — and thereby acquire an absolute title. The principle is well stated in *Remsen v. Hay*, 2 Edw. Ch. Rep. 535, in the following terms: "There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership by purchase from the mortgagor at any time subsequent to the taking of the mortgage, and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealings between the mortgagor and mortgagee to extinguish the equity of redemption; but if it be fair and honest on the part of the mortgagee, the purchase will not be disturbed."

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The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed, or of some covenant or agreement, forming part of the same transaction with the loan and the taking of the security, by which he shall attempt upon the happening of some future event or contingency to render the estate irredeemable and obtain an absolute ownership. In such cases the maxim applies of once a 'mortgage always a mortgage.' (*Henry v. Davis*, 7 John. Ch. R. 40; *Clark v. Henry*, 2 Cow. 332.) But it cannot interfere with the right to foreclose when the mortgage has become forfeited, nor with any fresh contract which the mortgagor may choose to make with the mortgagee for a sale or relinquishment of the equity of redemption and vesting the latter with an irredeemable estate." There are numerous authorities to the same effect. (1 Wash. Real Prop. p. 496, Secs. 23, 24; *Dougherty v. McColgan*, 6 Gill. & Johns. 275; *Russell v. Southard*, 12 How. U. S. C. R. 154; *Adams v. McKenzie*, 18 Ala. 698.)

Independent of authority, no argument is necessary to show that, upon principle, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged property that he has in respect to any other property. Nor has section two hundred and sixty of the Practice Act, or any of the former decisions in this State relating to mortgages, placed any restriction upon the authority of the mortgagor to make other and further contracts affecting his title to the land, subsequent to the execution of the mortgage. The language of Mr. Justice Field, in *McMillan v. Richards*, (9 Cal. 365), cited by counsel, that "The owner of a mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance," must be limited to the question then under discussion. He was simply endeavoring to show that no title passed by the mortgage alone, either before or after default, or could be acquired under it by strict foreclosure, or in any other manner than by a sale under a decree of a Court, and that in such case the title did not vest till consummated by a convey-

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ance, after the period for redemption had expired. He had no reference to a contract affecting the title, made by the mortgagor himself subsequent to the making of the mortgage. Reference was only made to the possibility of acquiring title through the mortgage, independent of any further action on the part of the mortgagor.

In this case, according to the finding of the referee, there was a settlement between the plaintiff and defendant Butler, by which the said Butler paid to plaintiff for his interest in the lands and improvements in dispute, and the furniture in the Ocean House, situated on the premises, the sum of two thousand dollars, and the plaintiff, in consideration thereof, surrendered the defeasance to defendant Butler "for cancellation, and the same was thereby cancelled as against the said plaintiff." According to the finding the sum of eight thousand five hundred dollars was secured on the premises, which premises, on said 27th of February, 1855, were only worth seven thousand five hundred dollars.

The referee found that there was no fraud in any of the particulars charged in the complaint, and the finding in respect to the charges of fraud are sufficiently specific, as it negatives every allegation of fraud.

He does not say, in so many words, in his finding, that the mortgage debt remained unpaid; but it is the necessary result of the findings that such was the case, and that the full amount was due. If we were permitted to re-examine the evidence in the record, we are not prepared to say he erred. The parties, at the time of the execution of the defeasance, struck a balance themselves, and the evidence to disturb their own settlement is exceedingly loose and unsatisfactory.

The surrender of the defeasance to be cancelled with an intent to vest the entire estate in Butler, did not in law convert the mortgage into a deed or operate as a conveyance of Green's title to Butler. Whether it operated by way of estoppel in equity, to vest the title in Butler, or not, it is not now necessary to determine. The deed to Butler being absolute on its face, the title upon the record is apparently in him.

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The plaintiff seeks the aid of a Court of equity to compel a conveyance of the land in controversy on the ground that the conveyance to Butler was a mortgage, and that the mortgage has been satisfied. The defendant Butler contests the claim and shows that, instead of the mortgage being satisfied, he had paid the full value of the premises, with the understanding that he had purchased the plaintiff's interest, and that the defeasance was surrendered to be cancelled in pursuance of the agreement between the parties. Butler afterward continued in possession as owner.

If Butler did not obtain the title in law, he paid for it its full value, and supposed the title to be vested in him by the surrender and cancellation of the defeasance with the intention of so vesting it. The surrender of the defeasance to Butler to be cancelled, and the retention of it by him, is in law a cancellation of that instrument, though not actually destroyed.

A Court of equity will not aid plaintiff to obtain a conveyance, under the circumstances of this case, in direct violation of his own agreement, and in fraud of the rights of defendant Butler.

Upon the allegations of the plaintiff's complaint, it is at least extremely doubtful whether the conveyance to Butler can be regarded as a mortgage at all. The distinct allegations of the complaint are, not that the land was conveyed by plaintiff to secure the amount due Butler, but that Butler represented that there were certain mechanics' liens on the Ocean House which the claimants were pressing and threatening to foreclose—that "said Butler was unable to procure the money from his own means to satisfy the said demands, and could not procure the money for that purpose, unless the said plaintiff would convey to the said Butler the said twenty-five acres of land, in order that the said Butler might mortgage the said land and buildings to procure the necessary funds; and that the said plaintiff, confiding, etc., did, on the said 14th day of August, 1854, make, execute and deliver to the said Butler a deed of the said twenty-five acres of land, for the purpose aforesaid, and not absolutely, nor for any other purpose," and

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plaintiff's counsel contends that the testimony really established these very allegations, and nothing more, with respect to the object of the conveyance at the time; and if we could look at the testimony, it does seem to tend strongly in that direction. Now if this was the only object of the conveyance at the time it was made, it certainly was not at that time in any sense a mortgage. It was a conveyance of the title to Butler, not to secure his demand, but to enable Butler to mortgage it to raise money to pay off the liens of the mechanics. And such a conveyance certainly passed the fee at the time. True, Butler would have held the legal title in trust for plaintiff, but upon what principle can it be said that afterwards, in October following, the execution of the instrument, which has been called a defeasance—an entirely distinct transaction—transmuted the original conveyance in fee into a mortgage? In *Trull v. Skinner*, 17 Pick. 216, it was held that where a deed was executed and at a subsequent time a defeasance was also executed, the deed and defeasance subsequently executed did not together constitute a mortgage, because the defeasance was not executed at the same time with the deed, and was not a part of one and the same transaction. From the execution of the instrument called a defeasance, and the facts found by the referee, it is evident that the parties, at the time of the execution of the defeasance, intended to make the two instruments serve the purpose of a mortgage, whatever the legal effect of the transactions might be, as they also intended to vest full title in Butler, by the subsequent surrender of the defeasance. The referee found the transaction to be a mortgage, contrary, perhaps, to these allegations of the complaint, and against the protest of the plaintiff. If not a mortgage, the legal title is certainly in the defendant, Butler.

But it is not necessary to determine, whether upon the facts alleged in the complaint, the two instruments in law constituted a mortgage or not; for in either view, taken in connection with the other findings, we think the plaintiff is not entitled to any relief, upon the case made by the record.

The judgment is therefore affirmed.

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ANDREW KOHLER v. WELLS, FARGO & Co.

DURESS OF GOODS.—The issue of an attachment and a levy of the same on goods, if there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized.

AFFIRMATIVE OF ISSUE IN ACTION FOR DAMAGES.—If the complaint avers that the defendant brought a false charge against the plaintiff, and threatened to publish the same and injure his credit unless he paid a false account, and that by reason of the false charge and threats he paid the same without other consideration, and prays judgment for the money thus paid, the payment of the money without consideration is the gist of the plaintiff's cause of action, and upon that issue he holds the affirmative. If he fails to offer any evidence of the facts tending to show a want of consideration, a nonsuit should be granted.

ORDER OF INTRODUCING TESTIMONY.—A plaintiff cannot keep back all his testimony on a material point until he draws out the testimony of the other party, and then introduce it; and if he does so reserve his testimony, the Court will not allow him to come in and make out his case after the defendant rests.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Porter & Holladay, for Appellant.

Alexander Campbell, for Respondents.

By the Court, SAWYER, J.

Plaintiff sues to recover four thousand dollars, alleged to have been paid under duress. The defendants constitute the well known express company, engaged in the business of carrying treasure and other valuables between California and the Eastern States and Europe.

The complaint alleges, substantially, that on the 2d day of April, 1860, the plaintiff, at the request of defendants, through their agents, called at the express office of said defendants in San Francisco, and was there by the direction of defendants' agent conducted into a private room, in which were assembled the agent and several of the employés of the defendants and their counsel, and there, by said agent, employés, etc., falsely and suddenly charged and accused of having made a certain

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bar of lead there shown, and of having, some time prior to said 2d of April, left said bar of lead at said express office, representing the same to be a bar of gold of the value of two thousand and seventy-five dollars, with intent to cheat and defraud said defendants; that, although he denied the charge, the said defendants, by their said agents, etc., informed plaintiff that they had witnesses who would swear to sufficient to convict the plaintiff of the offense charged, and threatened that unless he then and there settled the matter by paying the said sum of two thousand and seventy-five dollars and the additional sum of nine hundred and twenty-five dollars, for some purpose unknown to plaintiff, they would cause such witnesses to be brought against him, and that he would be ruined in his business and reputation; that he was greatly excited and overcome by such false and sudden charge, and greatly put in fear, and desired and requested time for reflection, and to consult his counsel, but the said parties refused to allow plaintiff to depart without first paying the said sum, on pain of ruin of his business and disgrace to himself and family; that he was a merchant, doing a large business, having creditors in various part of Europe, to whom he had been accustomed to forward money, and other treasure, through defendants' express, and drawing drafts against the same; that prior to the said 2d of April, he had forwarded some eight thousand dollars through defendants, by their express, to his creditors in Europe, which, he supposed, was on the way to its destination, but which, he was informed by said agent at the time when said false charge was made, had been detained in the hands of said defendants in the City of New York, and would not be forwarded unless said plaintiff complied with their said demand, and paid the sum of four thousand dollars; that intimidated by said threats, and fearing that his reputation as a merchant and a man would suffer, and with the hope of releasing said money so detained, he paid said sum; that said false charge was made for the purpose of intimidating him, and obtaining said sum without any equivalent; that he has never received any value for said sum so paid; that defend-

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ants retain the same, and on demand made refuse to pay it. Plaintiff demands judgment for the amount and interest.

The answer denies that the said charge of depositing a bar of lead, representing it to be gold of the value stated, with intent to defraud defendants was false, but on the contrary says the charge was true; denies that defendants' agents told plaintiff that they had witnesses, who would swear to enough to convict him of the offense charged, or of any offense, or that they threatened plaintiff that, if he did not pay said sum and expenses, they would cause said witnesses to be brought against him, and ruin his business and reputation; but admits that their said agents informed plaintiff that they had evidence sufficient to fully satisfy their minds, that plaintiff had passed off on them said spurious bar, and that they had no doubt they could establish the fact; and that they presented to said plaintiff an account of damages and expenses sustained by them, and demanded payment; denies that plaintiff was put to any fear other than such as naturally results from guilt, or that they refused to let him go except on pain of ruin; but avers on the contrary that defendants' agents, etc., distinctly informed plaintiff that they had no intention to detain him; that he was free to go or stay, and that it rested entirely with him to determine whether or not he would settle the claim made upon the terms offered by them; but that the offer would not remain open after that interview was closed. The answer further denies, that plaintiff was on that occasion informed that eight thousand dollars, or any other sum, was detained in their hands in New York, or that it would not be forwarded unless said four thousand dollars should be paid, and avers, on the contrary, that some three or four weeks before the said interview, the said agents of the defendants, having been informed to that effect by the office at New York, notified said plaintiff that a sum of eight thousand dollars, placed in their hands for transmission to Europe, had been attached in the City of New York to secure the said claim of said defendants against said plaintiff; and avers that said sum had been in fact so attached for said purpose, and denies that any money was detained by

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said defendants in any other manner than as above stated — denies that anything whatever was said at said interview, on the 2d of April, about the detention or attachment of said moneys, until the said plaintiff, upon reflection declared and agreed, that he would pay said defendants' claim; but that, after so agreeing, plaintiff asked if said defendants would release said attachment in New York. To which said agents replied that they would; that thereupon said plaintiff drew two checks, of two thousand dollars each, on Banks & Bull, bankers, dated on said day, and the said plaintiff and agents of defendants thereupon mutually executed and delivered to each other a memorandum, stating the demand and the settlement by said two checks, and stipulating that said attachment should be released by said defendants, and any claim for damages on account thereof, by said plaintiff; that said checks were delivered after banking hours, and plaintiff requested that one of said checks should not be presented for a few days, till plaintiff could provide for the same, and that one check was not presented for several days, and the other not till the day after it was drawn and payable; that, in the meantime, plaintiff consulted his counsel, and gave directions to his banker not to pay the check last presented, but after repeated consultations with his counsel and mature deliberation finally unconditionally withdrew his objection to the payment thereof, and the same was paid several days after its delivery, with the full knowledge, consent and approbation of plaintiff. The answer avers that said four thousand dollars was paid under no other circumstances than as stated in said answer; that they had paid the value of the said bar as gold, and costs and expenses in respect to it, and in tracing out the party who shipped the said bar of lead, amounting to about four thousand dollars in all.

The testimony in the record, as to the acts which transpired at the interview of the second of April in the office of defendants, clearly goes to show that the version given in the answer is the correct one, in those respects wherein there is a discrepancy between the averments of the complaint and those of

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the answer. There was testimony on the part of the defendants, also, showing that on the 19th of March, 1859, the defendants transmitted a package, purporting to be a gold bar of the value of two thousand and seventy-five dollars, to a house in Paris, France; that the agents of the defendants at the San Francisco office subsequently received advices to the effect, that the said package proved to be a lead bar, and informing them that considerable expenses had been incurred in some litigation about it; that a package containing a lead bar was returned to the San Francisco office; that plaintiff Kohler, before the 19th of March, 1859, had been in the habit of sending gold bars through the express of defendants to Europe, put up in a similar manner; that the cloth wrapper returned as aforesaid had upon it the address in the same handwriting, as the address of similar packages left by plaintiff Kohler before the said 19th day of March, 1859, and also had the number of the bar upon it in the handwriting of Mr. Kelly, the head clerk of defendants in that department of the San Francisco office, placed there by him on the day it was shipped, and that the said number on the wrapper so returned corresponded with the number of a bar on the stump of the receipt book, which purported to have been received from Mr. Kohler on that day, which number in the receipt book was in the handwriting of Mr. Bell, the clerk who received the bar; and the testimony of Mr. Bell tended to show that he received a bar of similar description and value. The testimony also showed that the lead bar exactly fitted the wrapper in which it was returned, which wrapper contained but one row of stitches, and did not appear to have been sewed but once.

Defendants had a verdict. The appeal is from the order denying a new trial.

Clearly, the order ought not to be reversed on the ground that the verdict is contrary to the evidence, even admitting that the evidence on the part of the plaintiff was sufficient to entitle him to go to the jury. But we think it was not, and that the Court ought to have granted a nonsuit when the mo-

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tion was made for that purpose, at the close of plaintiff's evidence.

Neither the facts stated in the complaint, nor the evidence, show any duress of the person in any legal sense of the term, and plaintiff cannot recover on that ground alone. He must recover, if at all in this action, on the ground of a payment of his money without consideration. There could have been no duress of goods, which can avail the plaintiff, if there was a cause of action in fact existing against him, and his goods were only taken in attachment in the pursuit of the ordinary remedy afforded by law to enforce and secure the claim.

The plaintiff alleges, that the defendants falsely charged him with imposing the lead bar upon them, representing it to be gold. If the charge was not false, that is to say, if the plaintiff did deposit the lead bar, of course there was a good cause of action against him, and he cannot complain that he was required to pay to the defendants its value, and the damages incurred by his wrongful act. He did in fact compromise and pay the claim, knowing at the time whether the charge made against him was false or not, and it is this compromise and payment, which he seeks to avoid. After stripping the complaint of all extraneous matter, it will be found that the cause of action, if any there be, arises out of the payment of the money without consideration; and of course the establishment of a want of consideration was, under the circumstances, an essential element in plaintiff's case, without which he could not recover. (1 Green. Ev. Sec. 78.) The affirmative of the issue to show a want of consideration for the compromise made by the plaintiff with defendants—and this was really the material issue in the case—was with the plaintiff. To prove this issue it was necessary to show that he did not deposit the lead instead of a gold bar, and thereby show a want of consideration. But it is often necessary for a party to prove a negative. (1 Green. Ev. Sec. 78.)

There are, undoubtedly, many cases where, from the nature of things, it may be difficult to do so, and the law, having regard to this difficulty, in such cases, does not require impos-

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sibilities, and does not, therefore, demand plenary proof. But it is necessary to offer some slight testimony, at least, tending to prove the issue, and which, in the absence of any counter testimony, would afford a ground for presuming the allegation to be true. In this case not a shadow of testimony is shown by the record to have been introduced or offered on the part of the plaintiff before he rested, which tended, in the remotest degree, to show that the lead bar was not deposited by him. The testimony of the plaintiff was entirely confined to what took place at the office of defendants, at the interview on the 2d of April, where the lead bar was shown and the subject discussed, and to the subsequent transactions with reference to the payment of the checks, etc. And this is the more remarkable from the fact that the plaintiff himself, who, of all men, best knew, and who alone, in all probability, had positive knowledge as to whether he did deposit the lead bar or not, was the leading witness on his own behalf and examined at length, and yet said nothing at all upon the point; nor, indeed, was he questioned upon that subject. Here he had in his power the means of introducing direct testimony upon the point as to whether he deposited the lead bar or not, and did not even offer it, but seemed carefully to avoid the subject. This certainly is a significant fact, when considered in connection with the legal proposition that some proof on the point was essential to his recovery. We think for this defect of proof, if for no other reason, the plaintiff should have been nonsuited at the close of his testimony.

He was not, however, and the defendants introduced their testimony. While the defendants introduced much testimony, without objection, tending strongly to show that the lead bar was deposited by plaintiff, not a particle was introduced which tended in any degree to supply the defect in the plaintiff's proofs, so that at the close of defendants' case, there was no testimony before the jury which tended to show that plaintiff did not ship the lead bar, and consequently no testimony tending to show that he paid his money without consideration.

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After the close of defendants' testimony, the plaintiff offered, as rebutting evidence, to prove by Q. A. Chase, who was book-keeper for plaintiff on the 19th of March, 1859, the time when said lead bar was charged to have been deposited, that on that day, plaintiff deposited with "Wells, Fargo & Co., to be forwarded by their express, a gold bar of the value and description named by Mr. Kelly (defendants' witness) as being of the value and description marked on the wrapper of the package which Mr. Kohler left there, and that this gold bar was purchased of Wells, Fargo & Co., the defendants, on the same day, and that they received the value thereof in cash."

The defendants objected, on the ground that this evidence should have been offered on the plaintiff's original case before he rested. The Court sustained the objection and plaintiff excepted. This ruling presents the most important question in the case. It must be borne in mind that the plaintiff had offered no proof at all on this point; yet it was a point upon which proof was essential to his recovery. He did not now, so far as appears by the record, show to the Court that he had, through any mistake in law, or from any inadvertence, omitted to introduce evidence on this point, and upon some reasonable cause shown, appeal to the discretion of the Court to open his case and permit him to supply the defect. But he simply relied upon his right to introduce the testimony by way of rebuttal. It was testimony that clearly belonged to the original case of the plaintiff, and should have been introduced before he rested; for if it tended to prove anything material, it was that Kohler did not deposit a lead bar. A plaintiff has no right to keep back all his testimony on any material point until he draws out the testimony of the other party, and then come in with his own. This would give him an undue advantage contrary to the rules of law, and if he does so reserve his testimony deliberately and wilfully, the Courts will not allow him to come in after the defendant rests and make out his case. But whether the plaintiff will be permitted to reopen his proofs or not, is a question which rests very much in

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the discretion of the Court below, upon consideration of the circumstances surrounding the particular case.

As testimony in rebuttal, it did not rebut any evidence that was material to the defense, as the case stood on plaintiff's testimony. Nor did it rebut any testimony upon any affirmative defense set up by defendants. We think there was no error in excluding the testimony. It is remarkable, that even here, the plaintiff did not offer his own testimony to show, that he did not in fact deposit a lead bar, but the testimony of his bookkeeper to show that he deposited a gold bar on that day.

No other points upon rulings as to the admissibility of evidence have sufficient plausibility to require notice.

The views already expressed render it unnecessary to consider the numerous instructions asked by the plaintiff and refused by the Court. Looking at the testimony of the plaintiff himself on the stand, in the light most favorable to him, there can be no pretense, that there was any duress of the person, in any sense known to the law, and we do not understand that it is claimed there was. Without any testimony tending to show a want of consideration for the sum paid by way of compromise, those instructions would, on this ground alone, be rendered inapplicable to the case before the jury, and would only have tended to embarrass and mislead, rather than assist them in their deliberations. The instructions refused were abstract, upon the case presented in the record, and all would require more or less modification, even supposing the plaintiff to have made out a *prima facie* case. Unless the charge made by defendants against the plaintiff was false, there was of course sufficient grounds for maintaining an action against him for the damages sustained by the defendants by the acts of plaintiff, and the matter in dispute was a fair subject for compromise; and certainly the pursuit in New York of the ordinary remedies furnished by the law to secure the demand, cannot be a duress of goods, nor would a payment, by way of compromise of such a claim, be without consideration within the principle of any of the authorities cited. There can be no pretense that the compromise was made under any mistake

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of facts. For in all probability, the plaintiff was the only person who had positive knowledge as to whether he was guilty of a fraud in depositing a bar of lead for one of gold, or not. Nor do we see in what respect he could have been mistaken upon any principle of law affecting the compromise. After suspending the payment of one check, and reflecting upon the subject for several days, with the benefit of the advice of his counsel, in the language of the admission made by his counsel on the trial, he "subsequently withdrew his objection and paid it." And the plaintiff himself testifies, in answer to a question put by a juror, "As to the checks, I did not pay them under protest." Conceding the original compromise to have been procured under improper influences, this was a ratification of the compromise after mature deliberation, and the compromise was of a suit pending in New York, upon reasonable cause. For this reason, as well as for the reasons stated in regard to the instructions refused, there was no error as against plaintiff in the charge complained of as erroneous, assuming it to have been given. But it nowhere appears in the record that it was in fact given by the Court.

We are of opinion that the order denying a new trial should be affirmed, and it is so ordered.

Mr. Justice SHAPTEL, having been of counsel, did not participate in the decision of this case.

SOLEDAD ORTEGA DE ARGUELLO, JOSE RAMON ARGUELLO, AND S. M. MEZES v. JOHN GREER, MARIA LOUISA GREER, MANUELA COPPINGER, JAMES MORRISON, JOSEPH B. CROCKETT, ALEXANDER P. CRITTENDEN, AND DENNIS MARTIN.

INCORPORATE OR IMPERFECT MEXICAN GRANT OF LAND.—If a grant of land made by Mexico in California, before its cession to the United States, required as one of its conditions that the land should be measured by the proper officer, and judicial possession should then be given to the grantee; until the

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measurement and delivery of possession, the legal title remained in the Mexican nation, and the grantee acquired only an imperfect or inchoate title.

RIGHT TO DETERMINE VALIDITY OF INCHOATE MEXICAN GRANT OF LAND.—So long as a grant of land made by Mexico in California was imperfect or inchoate, the right to determine the validity of the grant and give it precise location remained in the Mexican Government until California was transferred to the United States, and with that event this right passed to the United States, and when this right is exercised by the United States the grantee is bound by its decision and cannot demand more or other land than that allotted to him.

THIRD PERSONS NAMED IN ACT OF CONGRESS OF MARCH, 1851.—Persons having an inchoate or imperfect grant of land made by Mexico in California before its session to the United States, are not "third persons" within the meaning of the fifteenth section of the Act of Congress passed March, 1851, entitled "an Act to ascertain and settle private land claims in the State of California."

SAME.—"Third persons," mentioned in said Act, are those who have an interest in the land which would enable them to resist successfully any action of the Government respecting it.

NATURAL OBJECTS CONTROL BOUNDARIES.—If a decree made by a Court of the United States, confirming a Mexican grant of land, describes its boundaries by permanent natural objects, and also by courses and distances, with a mention of the quantity, the description by courses, distances, and quantity, must yield to the boundaries by natural objects, if they do not agree.

GRANTEES BOUND BY SURVEY OF GRANT BY THE U. S.—Where an inchoate grant was made by Mexico of a valley, (giving its name,) which valley was bounded by a range of hills, and the United States confirmed the grant, and in surveying the same fixed its boundary at the foot of the range of hills, leaving out their slope, and the grantees who were parties to the act of confirmation made no objection to this survey; *Held*, that the grantees and their privies were bound by this action of the Government, and it was conclusive.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. B. Crockett, for Appellants.

The defendants can impeach the plaintiffs' patent and survey. They are *third* persons within the true intent of the fifteenth section of the Act of Congress of 3d of March, 1851, establishing the Land Commission. Their title was derived from the Mexican Government anterior to the conquest, and the fifteenth section of the Act of 1851 was inserted for the express purpose of preventing persons holding title under the former Government from being precluded by an adverse patent and survey. Under the Acts organizing commissions to adju-

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dicating land claims upon the acquisition of Louisiana and Florida, enormous hardships had occurred for the want of such a provision. Under these Acts, the Courts held that the *first* confirmation and patent carried the title absolutely as against all adverse claimants, and the proceedings being *ex parte*, the result was that in many cases the true owner lost his land because some one else had obtained a prior confirmation and patent. To remedy this great grievance, Congress inserted the fifteenth section in the Act of March 3, 1851, which provides "that the final *decrees* rendered by the said Commissioners, or by the District or Supreme Court of the United States, or any *patent* to be issued under this Act, shall be conclusive between the United States and the claimants only, and shall not affect the rights of third persons." In other words, the patent is to operate only as a quitclaim on the part of the Government, and shall not affect the rights of third persons, which are to remain as valid as if no decree had been rendered or patent issued. The only difficulty under this section was to ascertain who are "third persons" within the meaning of the Act. Our Supreme Court in many cases have properly held that persons deriving title or claiming under the United States *since* the cession of California, are not such third persons. The decree and patent are obligatory on the United States, and are of course binding on their grantees; and in the case of *Leese v. Clark*, 20 Cal. 425, the Court holds that persons holding under grants made by American Alcaldes during the military occupation of the country, and prior to the cession, derive title from the United States and not from the Mexican Government, and therefore are not the "third persons" contemplated by the fifteenth section. They are bound by the patent, because their grantor, the United States, is bound by it. But in that case, and also in *Teschemaker v. Thompson*, 18 Cal. 27, the Court defines, with great precision, who are such "third persons" as are not bound by the decree and patent. The defendants in this case come strictly within this ruling.

The defendants are not estopped by their own survey and patent in respect to boundaries, as against an adverse claimant.

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It may be that the patent and survey, so long as they remain in force, are conclusive as between the claimant and the Government, who are parties to the proceeding. Neither could impeach them in a collateral proceeding, because as *between them*, the whole question has been finally adjudicated. But it was manifestly not the intention of Congress to render the action of its Board of Commissioners and its Surveyor-General obligatory upon either party in a contest between private claimants as to conflicting boundaries. The Government had no interest in such contests, and provided no machinery for settling such disputes. If the land in contest properly belongs to the Coppinger Ranch, we *have* an equity which bound the conscience of the Mexican Government. If that Government granted the land to Coppinger, it was bound in good faith to perfect the grant into a perfect title, and the United States, as the successor to Mexico, was bound in like manner; and when it wrongfully conveyed the legal title to the claimants of the Pulgas, they are affected with our equities in the same manner and to the same extent as the Government was.

Nor is there anything in the Act establishing the Land Commission to impair the force of this trust. The Commission was intended mainly to separate private lands from the public domain, and not in any degree to adjudicate conflicting claims between private individuals.

Sidney L. Johnson, for Respondent.

The appellants are estopped from demanding anything beyond their own survey and patent.

The Act of March 3d, 1851, was passed for the purpose of ascertaining and settling private land claims in the State of California. It provides for an investigation by Commissioners, and for a review of the decision of the Commissioners in the District and Supreme Courts of the United States. By the thirteenth section, all lands, the claims to which shall have been finally rejected by the Commissioners, or shall be finally decided to be invalid by the District or Supreme Court, or the

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claims to which shall not have been presented to the Commissioners within two years after the date of the Act, shall be deemed, held, and considered as part of the public domain of the United States; and for all confirmed claims a patent shall issue to the claimant, upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the land duly certified and approved by the Surveyor-General of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said Surveyor-General shall have the same power and authority as are conferred on the Register of the Land Office and Receiver of the Public Moneys of Louisiana, by the sixth section of the Act to create the office of Surveyor of the Public Lands for the State of Louisiana, approved March 3d, 1831. That section provides "that in relation to all such confirmed claims as may *conflict or in any manner interfere with each other*," the officers named "are hereby authorized to decide between the parties, and shall in their decision be governed by such conditional lines or boundaries as have been, or may be, agreed upon between the parties interested, either verbally or in writing; and in case no lines or boundaries be agreed upon between the parties interested, then the said Register and Receiver are hereby authorized to decide between the parties in such manner as may be consistent with the principles of justice; and it shall be the duty of the Surveyor-General of said State to have those claims surveyed and platted in accordance with the decisions of the Register and Receiver; *provided*, that the said decisions and surveys and the patents which may be issued in conformity thereto, shall not in anywise be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to any *such interfering claims*, but shall only operate as a relinquishment on the part of the United States of all title to the land in question." (4 Stat. at Large, p. 494.)

A similar power had been conferred upon these officers by

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the fourth section of the Act of May 8th, 1822, (3 Stat. page 708,) but without the proviso that such decision should not preclude a judicial investigation.

The counsel for appellants endeavors to find in this provision an escape from the estoppel, which we say results from the submission by the Coppingers of their claim to the tribunals constituted by the Act of 1851, and the final determination, survey, and patent of their claim under that Act.

We assume that the Act of 1851, in giving to the Surveyor-General of California the powers given to the Surveyor-General of Louisiana in the sixth section of the Act of 1831, gave them subject to the proviso in that section. If, then, the Pulgas and Coppinger claims had been such interfering claims as are spoken of in that section, the line established between them by the Surveyor-General would not have precluded a legal investigation and decision by the proper judicial tribunal, between the parties to such interfering claims.

Are they interfering claims? The Coppinger grant calls for the senior Pulgas grant as its western boundary. Where the one ends the other begins. How, then, can they interfere, overlap, or in any manner conflict? Two claims conflict or interfere when both include, in whole or in part, the same land. It is impossible to satisfy both of them. In such case, and in such case only, the line established by the surveyor may be the subject of investigation and decision by the proper judicial tribunal. In all other cases the survey and patent are conclusive.

By the Court, CURREY, J.

The plaintiffs being in possession of certain real property described in the complaint, brought an action as authorized by the two hundred and fifty-fourth section of the Practice Act, against the defendants as persons claiming some estate or interest therein adverse to the plaintiffs, for the purpose of determining such adverse claim, estate or interest.

The premises in controversy are situated in San Mateo

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County, and constitute as claimed by the plaintiffs a part of the "Rancho de las Pulgas, or the Pulgas Rancho," as the same has been surveyed and patented under the authority of the United States Government.

The answer of the defendants admits that at the time the action was commenced, and when the answer was filed, the plaintiffs were in possession of the premises, and interposes as an equitable defense and as ground for affirmative relief the following facts:

First—That the plaintiffs' title is founded on a Mexican grant, confirmed by a decree of the Supreme Court, and that the same has been surveyed and patented.

Second—That the decree of confirmation does not embrace the land in controversy, but that by mistake of the Surveyor-General and the Commissioner of the General Land Office an erroneous survey was made, which improperly includes the disputed premises, in violation of the decree of confirmation, and that the patent follows the erroneous survey, including the premises therein.

Third—That the defendants are the true owners of the same lands, under a grant from the Mexican Government to Juan Coppinger, which grant has been finally confirmed by metes and bounds embracing such lands. In conclusion the defendants pray that their titles may be adjudged to be superior to that of plaintiffs, and that the plaintiffs be decreed to release the legal title which they acquired under their erroneous survey and patent.

The plaintiffs by replication controvert the material allegations of the affirmative matter contained in the answer, besides pleading affirmatively matters in bar and estoppel to the facts on which the defendants rely for a judgment and decree in their favor.

When the cause came on for trial the parties stipulated as to certain facts, upon which and the pleadings the plaintiffs moved for judgment. The Court granted this motion, and rendered judgment for plaintiffs against the defendants in

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accordance with the prayer of their complaint, from which the defendants have appealed.

The defendants maintain that they are in equity the owners of the lands in controversy, and that at most the plaintiffs are but the trustees of the defendants, holding for their use the legal title of the premises, and they insist that the pleadings, stipulation and proofs in the case authorized and required a judgment and decree in their favor as prayed for in their answer, which was in the nature of a cross bill in equity.

In order to avoid prolixity we shall in the course of this opinion refer only to such facts appearing in the record as may be necessary to a clear understanding of the case as connected with the legal questions to be determined.

In 1835 there was granted by the Mexican Government to José Ramon Arguello, Luis Arguello, Maria Concepcion Arguello and Maria Josefa Arguello, children of Luis Arguello, then deceased, a tract of land called "Las Pulgas," situate within the present County of San Mateo, the boundaries of which were specified in the grant in the following words: "On the south the Creek of San Francisquito, on the north that of San Mateo, on the east the estuaries, and on the west the Cañada de Raimundo." In a subsequent part of the grant are the words: "The tract of which mention is made is of four leagues of latitude and one of longitude." The grant contains no reservation of any excess of four square leagues that might be within the locative calls of the description, to the nation for its uses, as was generally the case when it was intended to grant a particular quantity of land lying within limits of larger extent. In due time after the organization of the Board of Commissioners appointed under the Act of the Congress of the United States, passed in March, 1851, entitled "An Act to ascertain and settle the private land claims in the State of California," the claimants of the Las Pulgas presented their petition to the Board for the confirmation of their alleged title thereto. The Board confirmed the claim, describing the land substantially as in the grant, and adding the words, "said land being of the extent of four

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leagues in length and one in breadth, be the same more or less." From this decree the case was removed by appeal to the proper District Court, where the claim was again confirmed, and then an appeal was taken by the parties respectively from the decree of the District Court to the Supreme Court. That Court, upon the final hearing of the cause, after expressing the opinion that the judgment of the District Court was correct, pronounced judgment as follows: "It is adjudged that the said claim of the petitioners is valid as to that portion of the land described in the petition which is bounded as follows, to wit: On the south by the arroyo or Creek of San Francisco; on the north by the Creek of San Mateo; on the east by the esteros or waters of the Bay of San Francisco; and on the west by the eastern borders of the valley known as the 'Cañada de Raimundo,' said land being of the extent of four leagues in length and one in breadth, be the same more or less; and it is therefore hereby decreed that the said land be and the same is hereby confirmed to them;" and then follows a designation of the proportions of the premises which each confirnee should have and hold under the confirmation; and then it is further decreed that "as to the portion of the premises described in said petition which is not included within the boundaries above mentioned, the claim of the petitioners is adjudged not to be valid." (*Arguello et al. v. United States*, 18 How. 549.)

It should be observed here that the confirnees, in their petition, presented to the Board of Land Commissioners asking for the confirmation of Las Pulgas, claimed that the tract of land granted contained twelve square leagues, including the valley called the Cañada de Raimundo; and hence that part of the decree declaring that "as to the portion of the premises described in said petition which is not included within the boundaries above mentioned, the claim of the petitioners is adjudged not to be valid," is to be understood as applying to the portion of the tract of land described in the petition lying without the boundaries specified by the decree.

After the final confirmation the land was surveyed by the

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Government Surveyor. This survey was approved, and in October, 1857, a patent in the usual form was issued to the confirmees describing the land as surveyed, and as described in the final decree of confirmation on the north, east and south side; and on the west side the line is at the western base of the range of hills which bounds the Cañada de Raimundo or Valley of Raimundo on the east. The area comprehended by the description of the survey and patent is about thirty-five thousand acres.

The defendants claim the western portion of the lands embraced in the Las Pulgas patent, under a grant made in August, 1840, by the Mexican Government to Juan Coppinger, of the place known as the "Cañada de Raimundo," adjoining to and west of the Las Pulgas. The record shows that in July, 1839, Coppinger by petition addressed to the Prefect of the First District, sought to obtain a grant of a certain tract of land which he represented as "a small valley which lies in the Sierra in the same place where there now is a small timber cutting establishment, which place is about two and one half leagues in length and about three quarters of a league in breadth at the utmost; said valley borders on the Rancho of Donna Soledad Ortega and that of Maximo Martinez, and also on the Sierra, at the extremity, as it appears from the accompanying sketch." The grant which was afterwards made to Coppinger described the Cañada de Raimundo as "bordering on the west by the Sierra Morena; on the east by the Rancho de las Pulgas; on the south by that of Señor Maximo Martinez, and on the north with the lagoon." This grant had annexed to it certain conditions or specifications, one of which was, that "when the property shall have been confirmed to him he shall solicit the proper magistrate to give him judicial possession thereof." Another was, that "the land of which donation is made is that between the boundaries shown by the sketch he has presented. The judge who shall give possession of it shall have it measured according to ordinance, specifying the amount of sitios it contains." There is no provision in this grant reserving any surplus to the nation for its uses.

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Some time prior to the year 1850 Juan Coppinger died, leaving him surviving an infant child, Manuela Coppinger, and a widow, Maria Louisa, as his heirs at law. The widow afterward became and now is the wife of the defendant John Greer. Greer and his wife and the said Manuela presented their petition to the Board of Land Commissioners, praying that the title to the Cañada de Raimundo might be confirmed to the said Maria Louisa and Manuela, as the heirs at law of Juan Coppinger, deceased. This petition was granted by decree of the Board, in which the land was described as in the original grant. On appeal to the District Court the claim of the petitioners was again confirmed, describing the land as it was described in the decree of the Board. This decree became final, and the Cañada de Ramiundo was officially surveyed. The survey was approved, and in July, 1859, a patent was issued to the confirmees for the land as surveyed, comprehending within its limits about twelve thousand five hundred acres. The eastern line of the Cañada de Raimundo Ranch as described by this survey and patent coincided with the western line of the survey and patent of the Las Pulgas. But the defendants alleged that they refused to accept and receive the patent issued in July, 1859, and refuse to be concluded by it or by that of the Las Pulgas.

The land in controversy is bounded on the south by the San Francisquito Creek; on the west by the line forming the western boundary of the Las Pulgas as described in the patent; on the north by the San Mateo Creek, and on the east by a line running from the San Mateo Creek to the San Francisquito Creek, at a distance of one league westward from the estuaries of the Bay of San Francisco. The defendants maintain that the Las Pulgas patent, to the extent that it embraces the land here described, was not authorized by the original grant nor by the final confirmation of it by the Supreme Court, and also that the same land is embraced in the tract granted to Juan Coppinger and in the decree of confirmation to his heirs; and that the survey and patent including this land was the result of a mistake on the part of the Government Sur-

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veyor and the Commissioners of the General Land Office, and this mistake, it is contended, is established by reference to the original grants referred to and the final decrees of confirmation rendered by the tribunals of the United States.

The defendants claim that they come within the category of persons denominated third persons in the fifteenth section of the Act of Congress of 1851, and that the interest which they have under the original grant to Coppinger is of a quality that stands unaffected by the survey and patent of the Las Pulgas, and that they may impeach this patent by their answer and the proofs existing in the case, in so far as it embraces the land in dispute.

The section of the Act here referred to read as follows: "And be it further enacted, That the final decrees rendered by the said Commissioners or by the District or Supreme Court of the United States, or any patent to be issued under this Act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

The first case passed upon by the Suopreme Court of this State involving a construction of the section of the Act of Congress quoted and determining the character of persons and the interest that remained unaffected by a confirmation or patent, was the case of *Waterman v. Smith*, 13 Cal. 373.

In that case, which was an action of ejectment, Waterman claimed to recover upon a Mexican grant made to Francisco Solano, which had ripened into a perfect title by final confirmation and an approved survey and patent. Smith, the defendant, interposed as a defense the grant made by the Mexican Government to José Francisco Armijo, under which he derived his supposed right to the premises demanded, and which he relied on as the paramount title. The grants made to Solano and Armijo respectively embraced within their general boundaries more land than the quantity designated as granted, and overlapped each other, including in each the land in dispute; and both grants were regarded by the Court as inchoate and imperfect. The Court, in speaking of the effect of the patent

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which the plaintiff introduced in evidence in that case said: "The patent is conclusive evidence of the right of the patentee to the land described therein — not only between himself and the United States, but as between himself and a third person who has not a superior title from a source of paramount proprietorship" (p. 419); and of the third persons named in the Act the Court said: "The third persons against whose interests, by the fifteenth section of the Act of 1851, the final confirmation and patent are not conclusive, are those whose title is at the time such as to enable them to resist successfully any action of the Government in respect to it," (p. 420.) In *Biddle Boggs v. Merced Mining Company*, 14 Cal. 362, the Court reiterated this language employed in *Waterman v. Smith*, and in *Leese v. Clark*, 20 Cal. 425, in reference to the same subject, the Court say: "The term 'third persons' refers not to all persons other than the United States and the claimants, but to those who hold independent titles arising previous to the acquisition of the country. The latter class are not bound by the decree and patent, for they do not hold in subordination to the action of the Government nor by any title subsequent, but by title arising anterior to the conquest."

In *Minturn v. Brower*, 24 Cal. 644, this Court, after citing the fifteenth section of the Act of 1851, say: "If such only can be the effect of decrees and patents, and the interests of third persons are not to be affected thereby, then who are these third persons and what is the character of the interests that stand unaffected? Third persons must be regarded to be all persons who were not parties to the proceeding before the Land Commission, or standing in such relation with those who were parties thereto as to become affected and bound as privies; and the interests of third persons that remained unaffected by the final confirmation and patent are those subsisting in perfect titles derived from a source of paramount proprietorship, which could be used in resisting successfully any action of the Government respecting them."

These cases must be regarded as having settled the construction, so far as the Courts of this State are concerned, to be

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given to this section of the Act of Congress. If Coppinger's heirs and successors in interest have an interest in the land in controversy of a character that could be used in resisting successfully any action of the Government respecting it, then they have a *status* in this case which entitles them to the relief they have sought, otherwise they are not in a position to complain of the action of the Government on whose bounty and justice they have depended for the confirmation of their claim to the Cañada de Raimundo.

It does not appear that the land granted to Coppinger was ever measured by the proper officer, as required by one of the conditions of the grant, nor that judicial possession of it was given to the grantee; hence it did not become definitively complete and valid under the former Government. (*Greer v. Mezes*, 24 How. 274; *United States v. Reading*, 18 How. 7, 8; *Leese v. Clark*, 18 Cal. 574; *Rodriguez v. Comstock*, 24 Cal. 87, 88.)

The only interest which Coppinger had in the land mentioned in the grant at the time California was ceded to the United States was what is denominated an inchoate or imperfect title, as contradistinguished from a perfect title. Before then the legal title to the land was in the Mexican nation, and upon the cession of the country the same passed to the United States, charged with the equitable interest of Coppinger therein, which the Government of the United States was in good faith bound to protect on such just terms as the Congress of the nation might devise and prescribe. The protection promised by the treaty of Guadalupe Hidalgo, and which without an express stipulation, it would have been the duty of the Government to afford, it was the design of the Act of Congress to effectuate, by providing the mode and means for the confirmation of such inchoate titles to lands as were equitable and just, and for investing those entitled to the same with indefeasible titles thereto. But to secure the speedy settlement of such land claims, the Act required their presentation within a specified period to the tribunal established for the purpose, providing that if they were not so presented such

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lands should, from the lapse of the limitation, be deemed, held and considered as part of the public domain. While the claimants of mere inchoate titles to lands had the right to demand of the Government the fulfilment of its obligations, they could not dictate the mode nor the exact measure of its performance. Then, when in any given case the Government has acted in the discharge of its duty, and has granted to a claimant the land to which it was deemed, under all the circumstances considered, he was equitably entitled, he is in no position to demand more nor otherwise than is allotted to him by the granting power.

The Coppinger claim was one requiring confirmation and segregation to render it a perfect title. The right to determine its validity and give it a precise location belonged to the former Government until the country was transferred to the United States. With that event the right passed to the new Government, and has been exercised in discharge of its obligation to the heirs of, and successors in interest to, the original grantee. If we may, after having ascertained the nature and quality of the interest of Coppinger, look into the *expedientes* of the Las Pulgas and the Cañada de Raimundo, and the evidence properly connected therewith, in order to discover the intention of the granting authority as to the quantity of land to be granted in each case, then what land was granted or intended to be granted to the respective grantees?

In his petition to the Prefect, Coppinger represented the land which he desired to obtain, as a small valley lying in the sierra, where there was a timber cutting establishment, and that such valley was at the utmost in extent about two and a half leagues long and three quarters of a league broad, and that it bordered on the rancho of Donna Soledad Ortega and that of Maximo Martinez, and also on the sierra at the extremity, as appeared from a map or sketch which was submitted with his petition. The grant made to him described the property as "the place known as 'Cañada de Raimundo,' bordering on the west by the Sierra Morena; on the east by the Rancho de las Pulgas; on the south by that of Señor Maximo Marti-

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nez, and on the north with the lagoon." In the third specification or condition contained in this document it is declared that "the land of which donation is made is that between the boundaries shown by the sketch he has presented." This sketch or map represents the valley or Cañada de Raimundo in the midst of the hills by which it is bounded on the eastern and western sides; and at its northern extremity the lagoon is distinctly indicated. It is insisted on the part of the defendants that the boundaries of the valley exhibited on the map passed to the grantee by the terms of the grant as well as the valley itself, and this position is sought to be strengthened by the fact that there was no reservation in the grant of any surplus. We think the petition of Coppinger and the grant itself with the map referred to is a refutation of this position of the defendants. The petition describes the land solicited as a small valley not exceeding certain specified dimensions and names its surroundings. The grant calls it by the name by which it was known, and specifies by what it is bordered, and referring to the *diseño* or sketch presented with the petition, declares the land donated—that is, the "Cañada de Raimundo"—to be that between the boundaries shown by the sketch.

As to the absence in the grant of a reservation of any surplus, as was used in grants of a designated quantity to be selected and set apart by the Government authority to the grantee we are of opinion that this circumstance in no just view aids the defendants' construction of the effect of the grant. The petition had represented the valley of less area than two square leagues, and acting upon it and the report of the Prefect the Governor issued the grant to Coppinger for the place known as the "Cañada de Raimundo," providing that the Judge who should give him the possession of it should have it measured according to ordinance, and should specify the quantity of *sitios* or square leagues contained in it. It is to be presumed that no reservation of any surplus was made, because the Governor was aware, from "having previously taken the necessary steps and investigations on the subject,"

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as he says in the grant, that the valley did not exceed in extent the amount which the grantees might receive under the Mexican Colonization Law of 1824, and therefore no such reservation was necessary. The intention, as appears from these documents, was to grant the valley or Cañada de Raimundo and its appurtenances only.

It is maintained that the survey and patent on which the plaintiffs rely are not authorized by the confirmation in the Las Pulgas case; that the survey was made and approved under a misapprehension as to the effect of the decree of confirmation, and that the patent following the same is involved in the consequences of the mistake which was the result of such misapprehension.

In the original grant made to the Arguellos the western limit of the Las Pulgas (which is the disputed boundary in this case) was the Cañada de Raimundo. The four sides of the tract were defined with particularity by natural objects, and no surplus lands remained to be reserved. The manifest intent, as appears upon the face of the *titulo*, was to grant to the children of Luis Arguello, deceased, the land described. The confirmation of the grant by the Government of the United States described the land by the same natural objects as those contained in the original concession, but defined with more precision its western boundary as at the eastern borders of the valley known as the Cañada de Raimundo. The words in the final decree following the description by boundaries — “said land being of the extent of four leagues in length and one in breadth, be the same more or less,” — is not a limitation of the quantity confirmed. If it had been intended to limit the quantity to four square leagues of land — in length four leagues and in breadth one — lying adjoining the estuaries, it is to be presumed the Court would have so declared in express terms; but, as if doubtful as to its extent, and to guard against a constructive limitation as to quantity, the words “be the same more or less” seem to have been employed.

The rule is well settled that where land is described in a

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deed by permanent objects as its boundaries, and also by courses and distances with a mention of the quantity, the description by courses, distances and quantity must yield to the boundaries if they do not agree. (*Stanley v. Green*, 12 Cal. 164, and the cases there cited; 17 Mass. 207; 17 Pick. 357; 19 Pick. 445.) This rule rests upon solid reasons. While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land, or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments.

Admitting this construction of the language of the description contained in the original grant of the Las Pulgas and in the decree of confirmation to be correct, the defendants claim that the valley of the Cañada de Raimundo, by fair construction, comprehends the slope of the hills forming its eastern boundary, and that as the western limit of the Las Pulgas was declared to be the Cañada de Raimundo, the line between the two ranchos was at the top of these hills. Whatever force there might be in this position of the defendants, if the eastern line of the Cañada de Raimundo were not already established by Government authority, is overcome in the present state of things, by the fact that the Government, in a proceeding to which the defendants or those under whom they claim, were parties, has determined the eastern boundary of the Cañada de Raimundo to be at the base of the hills on the eastern border of the valley. It does not appear that any objection was made to the Government survey fixing this boundary so as to make it coincide with the western boundary line of the Las Pulgas, as surveyed and patented. If they did so object at the proper time and before the proper authority, their objections did not prevail. The survey of the Cañada de Raimundo was approved and confirmed on the part of the Government, as appears by the patent issued, and this must be regarded as conclusive upon the defendants who were parties or privies to the proceeding, and became bound by this action of the Government.

The views which we entertain and have herein expressed,

Statement of Facts.

render it unnecessary to consider other points made in the case, and which have been ably argued by the counsel of the respective parties. We are of the opinion the judgment should be affirmed.

Judgment affirmed.

HOMER A. CURTISS v. PEMBROKE MURRY, JOHN M. HEATH, WILLIAM STONE, MARION STONE, NORTON STONE, AND ELIAS STONE.

CORPORATION.—A corporation is recognized in law by its corporate name, and must sue and be sued by its corporate name.

LIABILITY FOR CORPORATE DEBTS.—If several persons associate themselves together and form a corporation, they cannot be sued as individuals for the debts of the corporation.

CERTIFICATE OF PRESIDENT OF CORPORATION.—If the president of a corporation signs, as president, a paper stating that the person named in it has a credit for a given sum for work done for the corporation, the instrument itself does not constitute a cause of action against the corporation or against the persons composing the corporation.

APPEAL from the District Court, Ninth Judicial District, Shasta County.

There were several instruments set out in the complaint, executed to different persons, as the cause of action against the defendants. Plaintiff sued as the assignee of these instruments. They were each in substance like the following:

“GEORGE LEACH, *Cr.*

“By work on the Soda Springs and Pitt River Road and bridges, from March 15th, 1861, to June 24th, 1861, \$296.

“JOHN M. HEATH,

“President of the Soda Springs and Pitt River Turnpike Road.

“SHASTA COUNTY, August 25th, 1861.”

The other facts are stated in the opinion of the Court.

M. G. Cobb, and E. Steele, for Appellants.

Opinion of the Court.

Robinson & McConnell, for Respondent.

By the Court, RHODES, J.

The plaintiff sued Pembroke Murry, John M. Heath, and others, and avers in his complaint that they being associated together, under the laws of the State, under the name and style of the Soda Springs and Pitt River Turnpike Road Company, having for its object the construction of a certain road, and having their principal places of business at Yreka; and the company having at a time stated filed its certificate of incorporation, and thereafter acting as a duly incorporated company, with certain persons as its officers, who were at a time mentioned duly elected by the stockholders; and that "as such incorporated company, to wit, the Soda Springs and Pitt River Turnpike Road Company aforesaid, and defendants herein, they became indebted to the following named persons," etc. Judgment was entered for the plaintiff against the persons named in the complaint "and others associated together under the corporation laws of this State, under the name and style of the Soda Springs and Pitt River Turnpike Road Company, and each of them, and each member of said incorporation."

The corporation is not a party to the suit and judgment has not been rendered against it. The allegations respecting the formation of the company, its officers, etc., amount merely to a description of the persons, of those named as defendants, and serves no other purpose in the case, than does the statement of the county of their residence. It is a rule as old, perhaps, as the earliest laws forming or authorizing the formation of corporations, that a corporation must sue and be sued by its corporate name. Indeed, one of the powers and capacities, "necessarily and inseparably incident to every corporation," is that of suing and being sued by its corporate name. A corporation, like a person, is recognized in law only by its name, and in its corporate capacity, rights and liabilities, it is as distinct from the persons composing it, as an incorporated

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city is from an inhabitant of the city. The plaintiff has not sued the corporation, and no judgment could be rendered against it, and in fact the judgment does not run against it. (See *Collins v. Montgomery*, 16 Cal. 398.)

The judgment cannot be maintained against any of the defendants, except Murry, because they have not been served with process and have not entered their appearance to the action. It cannot be upheld against Murry or any of the defendants personally, for the reason that the complaint does not state facts sufficient to constitute a cause of action against them. They do not appear, individually, to have had any connection with, and are not charged to be liable for the amounts of money specified in the several instruments signed by J. M. Heath, President, etc.

Those instruments set out in the complaint are mere matters of evidence, and do not of themselves constitute a cause of action against the defendants, or indeed the corporation.

Judgment reversed and cause remanded for further proceedings, with leave to the plaintiff to amend his complaint.

THE PEOPLE v. THOMAS MAGUIRE.

COMPLAINT FOR MISDEMEANOR.—In a complaint for a misdemeanor created by statute, it is only necessary under our system of pleading in stating the offense to follow, as near as may be, the language of the statute.

COMPLAINT FOR GETTING UP A THEATRE.—A complaint which charges that the defendant "did wilfully and unlawfully on the first day of the week, commonly called Sunday, to wit: on the Sabbath day, get up, and in getting up and opening of a theatre," contains a sufficient statement of the facts constituting the offense of getting up a theatre on the Sabbath day.

APPEAL TO COUNTY COURT IN CRIMINAL CASES.—On an appeal from a magistrate's Court or the Police Court of the City and County of San Francisco to the County Court, in criminal cases, a statement is unnecessary if the pleadings and docket of the magistrate show the error relied on.

APPEAL FROM POLICE COURT OF SAN FRANCISCO.—An appeal from a judgment of the Police Judge's Court of the City of San Francisco to the County Court can only be heard by a trial *de novo* in the County Court.

APPEAL from the County Court of San Francisco.

Statement of Facts.

The following are the records of the Police Judge's Court:

"Tuesday, June 21, 1864.

*"STATE OF CALIFORNIA,
City and County of San Francisco. }*

"POLICE JUDGE'S COURT.

"Present, presiding, his Honor P. W. Shephard.

*"The People
v.
Thomas Maguire. }*

"The defendant arrested charged with misdemeanor by violation of the Sunday Law, and on motion of defense, the Court orders that the case be continued until Wednesday, June 22, 1864.

"Wednesday, June 22, 1864.

"Case being called, defendant demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and the Court sustains the demurrer, and orders that the case be dismissed, and defendant discharged.

"I hereby certify that the above is a true copy of the records of the Police Judge's Court in the above entitled cause.

"JOHN H. TITCOMB, Clerk."

No statement was made by the appellant on appeal, but the same was taken by serving the following notice:

*"CITY AND COUNTY OF SAN FRANCISCO,
State of California. }*

*"The People of the State of California
against
Thomas Maguire. }*

"To J. H. Titcomb, Esq., Clerk of the Police Judge's Court of said City and County:

"SIR:—You will please take notice that the People of the

Argument for Petitioner.

State of California, the plaintiff in the above entitled action, hereby appeals from the judgment therein made in said Court, on the twenty-second day of June, A. D. 1864, in favor of said defendant, Thomas Maguire, and against said plaintiff, and from the whole thereof, and from all orders, and the judgment made therein, on said day before mentioned; and also from the order and judgment therein made on said day, sustaining the plea and demurrer therein, and dismissing the above entitled action, and discharging the defendant, Maguire. This appeal is taken on questions of law alone, in the above entitled action. A. J. Hoyt is the complaining witness, who swore to the complaint in said action, and the crime or offense charged and alleged to have been committed at Pine street, in said city and county, etc.

"Dated, San Francisco, June 24th, 1864.

"DAVIS LOUDERBACK,

"Assistant District Attorney."

The other facts are stated in the opinion of the Court.

Carpentier, and Byrne & Freelon, for Petitioner.

The offense not being *malum in se*, everything necessary to bring the defendant not only within the letter but also within the spirit of the statute must be averred and proven. (8 McCord, 533; Wharton on Cr. Law, 168-70 — note of Judge Kane on page 168.)

A complaint upon a statute must state all the facts and circumstances which constitute the statute offense, so as to bring the accused perfectly within the provisions and objects of the statute. (*Commonwealth v. Collins*, 2 Cush. 556; *Commonwealth v. Slack*, 19 Pick. 304; *Commonwealth v. Thurlow*, 24 Pick. 374; *People v. Taylor*, 3 Denio, 91; *People v. Allen*, 5 Denio, 76; *People v. Wilbur*, 4 Parker Ch. R. 19; *People v. Miller*, 5 Barbour, 203; *Divine v. The State*, 4 Porter, 240.)

J. G. McCullough, Attorney-General, for the People.

Opinion of the Court.

The complaint is not to be construed as rigidly as an indictment. (1 Wharton's Crim. Law, § 1,036.)

This statute (Laws of 1855, p. 50) does not simply define or alter the punishment of a common law offense. It creates a new statutory offense, and it is sufficient, even in an indictment in such cases, to describe the crime in the words of the statute. (*People v. Parsons*, 6 Cal. 487; *People v. Saviers*, 14 Cal. 29; *People v. Beatty*, 14 Cal. 572; *People v. Garcia*, 25 Cal. 531; *State v. Raines*, 3 McCord, S. C. *542; *People v. Taylor*, 3 Denio, 93; 1 Wharton's Am. Crim. Law, § 364.)

In most of the cases referred to by petitioner there were exceptions to the general words of the statute, and the Court held the purpose must be alleged. Here the "getting up" is alleged to have been "unlawful and wilful," which negatives any such thing as an innocent opening of the theatre.

By the Court, SANDERSON, C. J.

This case has been brought up for review by certiorari from the County Court of the City and County of San Francisco. It appears from the return that the defendant was arrested under a warrant issued by the Police Judge of the City and County of San Francisco, upon a complaint charging him with a violation of the Act entitled "An Act to prohibit barbarous and noisy amusements on the Christian Sabbath." (Statutes of 1855, p. 50.) On his arraignment in the Police Judge's Court, he demurred to the complaint on the ground that it did not state facts sufficient to constitute a criminal offense. The demurrer was sustained and a judgment dismissing the case was entered. Thereafter the District Attorney appealed to the County Court. Upon the hearing, the County Court reversed the judgment and directed the case to be tried in that Court. Thereupon the defendant again demurred to the complaint upon the ground already stated, and upon the further grounds that two distinct offenses were improperly united, and that the County Court had no jurisdiction to try the case, but must remand it for trial to the Police Judge's

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Court. The demurrer was overruled and the defendant was subsequently tried and convicted.

The second section of the Act under which this prosecution was instituted provides that "Any person who shall get up, or aid in getting up, or opening of any bull, bear, cock or prize fight, horse race, circus, theatre, bowling alley, gambling house, room or saloon, or any place of barbarous or noisy amusements on the Sabbath, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not less than fifty nor more than five hundred dollars."

The complaint reads as follows:

"State of California, City and County of San Francisco; Police Judge's Court:

"Personally appeared before me this 20th day of June, 1864, A. J. Hoyt, who deposes and says, that on the 19th day of June, 1864, at Pine street, in said city and county, the crime of misdemeanor was committed, to wit: by Thomas Maguire, who then and there did wilfully and unlawfully, on the first day of the week, commonly called Sunday, to wit: on the Sabbath day, get up, and in getting up and opening of a theatre there, all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California; and said deponent accuses Thomas Maguire of having committed said crime, and prays that a warrant may be issued for the arrest of said Thomas Maguire, and that he may be brought before a magistrate and dealt with according to law."

That the foregoing complaint is inartificial and ungrammatical cannot be denied; but in our judgment it contains, in substance, a sufficient statement of the facts constituting the offense intended to be charged. It substantially charges the defendant with getting up a theatre on the Sabbath day, at the time and place stated, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California. This is one

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of the offenses created by the Act in question, and the foregoing is a sufficient statement of the facts constituting it. The statute enumerates several things which, being done upon the Sabbath day, shall be deemed a misdemeanor, to wit: bull fight, bear fight, cock fight, prize fight, horse race, circus, theatre, bowling alley, gambling house, gambling room, gambling saloon, and in addition thereto, any place of amusements which in their character are either noisy or barbarous. Every person who gets up either of these amusements on the Sabbath day, or aids in so doing, is declared guilty of a misdemeanor. In stating the facts constituting either of these offenses, it is only necessary, under our system of criminal pleading, to follow as near as may be the language of the statute. (Wood's Digest, p. 318, Sec. 608.) For example: "State of California, County of ——. Now comes A. B., who being duly sworn, deposes and says, that heretofore, to wit, on the — day of —, 186—, the same being Sabbath day, at the county aforesaid, one C. D. did get up (or did aid in getting up, as the case may be), a horse race (or circus, or theatre, as the case may be), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of California." All beyond the foregoing is matter of evidence, and need not be averred in the complaint.

There is nothing in the point that the County Court could not entertain the appeal except upon a statement prepared as provided in section 3, page 218, of the statutes of 1858. Assuming that sections two, three, four and five of that Act are applicable to appeals from the Police Judge's Court of the City of San Francisco, there is no necessity for a statement where the record discloses the error relied on by the appellant. The section in question does not apply to cases where the rulings of the Court, alleged to be erroneous, appear upon the face of the judgment roll. Where the errors do not appear upon the face of the judgment roll a statement is made necessary because the errors can in no other way, except by a trial *de novo*, be brought to the notice of the appellate

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Court. But it seems by the provision contained in the sixth section that sections two, three, four and five are not applicable to appeals from the Police Judge's Court of San Francisco. Why this distinction was made is not readily perceived, but such is the express language of section six, and it follows therefrom that appeals from that Court to the County Court are left to be regulated by the law as it stood prior to the passage of that Act. By section twenty of the Consolidation Act of the City and County of San Francisco it is provided that "proceedings in the Police Judge's Court shall be conducted in conformity with the laws regulating proceedings in Recorders' Courts." Those laws are found in Wood's Digest at page three hundred and eighteen, commencing with section six hundred and eight and ending with section six hundred and forty-one. We there find no provision for a bill of exceptions or statement of the case for the purposes of a trial in the appellate Court. An appeal to the County Court being given by section four hundred and eighty-one, as amended in 1858, and no special method being prescribed for getting up and trying the appeal, it necessarily follows that the appeal can only be heard by and through a trial *de novo* in the appellate Court.

There has been no excess of jurisdiction on the part of the County Court, and the writ must be dismissed, and it is so ordered.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE *ex rel.* THE COUNTY OF CONTRA
COSTA v. THE BOARD OF SUPERVISORS OF
THE COUNTY OF ALAMEDA.

A COUNTY CAN BE RELATOR.—In an application for a writ of mandate to compel a Board of Supervisors to levy a tax, the county into whose Treasury the money intended to be raised by the tax will go can be the relator.
POWER OF LEGISLATURE OVER COUNTIES.—If an equitable claim exists in favor of one county against another arising out of the erection of a new county

Argument for Appellant.

out of territory taken in part from one already organized, the Legislature has the power to create by law a Board of Commissioners, to ascertain, settle, and report the amount due, and the further power, by the same law, to compel the Board of Supervisors of the county indebted to levy a special tax to pay the amount which the Commissioners report due.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The petition for the writ of mandate was verified by the District Attorney of Contra Costa County.

The other facts are stated in the opinion of the Court.

J. McM. Shafter, and *W. W. Crane*, for Appellant.

The County of Contra Costa has no power to act as relator, for the county is not "a party beneficially interested." (Prac. Act, Sec. 468; 18 Bar. 635; 1 Kern, 392, 146.)

The Legislature has trespassed upon the judicial power.

Article III, Constitution, Sec. 1: "The powers of the Government of the State of California shall be divided into three separate departments: the Legislative, the Executive, and Judicial; and no person *charged* with the exercise of powers *properly* belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

The exceptions are as follows: 1 — "Each House shall *judge* of the qualifications, elections, and returns of its own members," (p. 30, Sec. 8. 2 — "May compel the attendance of absent members under penalties," (p. 30, Sec. 9.) 3 — "Assembly may impeach, and all impeachments shall be tried by the Senate," (p. 30, Sec. 18.)

Subject to the foregoing exceptions, neither the Legislature as a body, nor either of the two branches, nor any member of either branch, can do any act properly *belonging* to the judiciary, nor exercise any function appertaining thereto. (*Thompson v. Williams*, 6 Cal. 88.)

The general result is that the Legislature can deal with no description of judicial question, except as it may, within cer-

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tain narrow limits, create municipal Courts for the purpose of trying them as a class.

The Legislature, in the Act of 1862, (p. 405,) has trespassed upon the judicial power in two particulars: 1 — In taking from the judiciary the right to *try and determine a controversy which the Act creates or recognizes*.

This Act may be thus analyzed: 1. Law feature — creating the *right* of contribution; 2. Judicial feature — provision for trying and determining the amount equitably due; 3. Executive feature — levying the tax.

A judicial question is a question of disputed right between two parties who are competent to sue and be sued in the established tribunals with respect to it. It matters not who the parties are, nor what was the *origin* of the right: *i. e.*, whether of common law or statute origin, as here.

The question raised was a judicial one in its essential nature. We have all the elements of a judicial controversy: *rights, duties, subject matter, parties, the relation of creditor and debtor.*

Could not the Courts have tried and determined the controversy, or the amount of the indebtedness, after the statute had impressed that character upon it? Counties may sue counties under Act of 1854, (p. 45.) But if the Courts *could* have tried, the Legislature *could not*. (*Smith v. Judge Twelfth District*, 17 Cal. 559; *Gilmer v. Lime Point*, 17 Cal. 260.)

This will be made more apparent by ascertaining whether the ordinary ancillary judicial powers and processes could be used or resorted to by the Commissioner created by this Act.

Mandamus.— Could the Commissioners have issued *that* under legislative authority, if the *statute* had authorized it? Why not? To try and determine a controversy is as clearly a judicial act as to issue a mandamus.

People on the relation of O'Donnel v. Board of Supervisors of San Francisco, 11 Cal. 211 — constitutionality vindicated on the ground that O'Donnel's debt had passed into judgment.

The statute is unconstitutional, for the reason that there was a general law under which the statute right of Contra Costa *might* have been tried in the Courts; but by this excep-

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tional statute that law has not been allowed its constitutional dues; that is, a uniform operation.

Again: Either party by the general law would have had the right of appeal. By this statute, this right is defeated of a uniform operation.

The Act of 1862 is an unconstitutional and oppressive edict, undertaking, as it does, to take the property of one class of citizens and give it to another. In this view, the counties, as such, do not figure, but the tax payers, in whom the real interest in the question all centers, reveal themselves. (18 Barb. 615.)

Mark Shepard, and H. Mills, for Respondents.

There are but two points made by the appellants:

First — "Are the People *ex rel.* the County of Contra Costa, beneficially interested in this case?"

We answer: This question cannot for the first time be raised in this Court, no issue thereon having been made by the pleadings. If it had been pleaded, it would have been equivalent to the plea of "*non fuit electus*" on a return to a mandamus to swear in a churchwarden, because the writ is directed only to ministerial officers to levy the tax; they are to do their duty, and no inconvenience can follow, for if the county be entitled to have the tax applied, it ought to be levied — if it ought not to be applied, the levy will do the County of Contra Costa no good. (See 3 Blk. Com. p. 266, marginal note 11, last part, to this effect: "Wherever the officer is but ministerial, he is to execute his part, let the consequence be what it may." Also Stra. 895.)

Second — The second proposition of the appellants, "That the Legislature hath trespassed upon the judicial power," is fully and entirely answered by Judge Denio, in the case of *The Town of Guilford v. The Supervisors of Chenango County*, 3d Kernan, (N. Y.) p. 148.

The point sought to be the most strongly and ingeniously urged by the appellants' counsel is in substance and to the

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effect that the Legislature have created "a judicial problem;" and, in analyzing the Act, they resolve the same into what they are pleased to call its several "features," as follows: 1st, "Law Feature;" 2d, "Judicial Feature;" 3d, "Executive Feature;" then proceed to define a judicial question — and then say, "the question raised was a judicial one in its essential nature." What question is a judicial one?

The fallacy of the argument on this point rests in the fact of assuming that the claim of Contra Costa County was a legal subsisting right in law or debt which was or not binding on Alameda County, the same as a claim or debt by one individual against another; and that the Legislature undertook to legislate upon such supposed debt existing with such supposed rights; whereas, in fact, the Legislature only undertook to say, by the Act, that since Contra Costa County has been compelled by us (see Laws 1860, pp. 94, 95,) to levy a tax to pay Gilman for a bridge that you, Alameda, got by our Act of 1853, we will compel Alameda County to levy a tax for the benefit of roads in Contra Costa County. In other words, Contra Costa built your bridge, and you shall repay by building roads in that county. And to ascertain the amount of tax to be levied, we direct that the sum shall be the proportionate of the cost of building the bridge that that portion of Alameda County taken from Contra Costa would have been compelled to pay to Gilman if it had remained a part of Contra Costa County.

This could easily be determined by a mathematical calculation, and was referred by the Act to Commissioners named therein; and when this simple calculation had been made, the Board of Supervisors of Alameda was to levy the tax. We cannot see that in this the judicial field was greatly invaded, unless the solution of mathematical problems — and only simple ones, at that — is such invasion by the Legislature as to work it.

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By the Court, SAWYER, J.

In 1852, one Gilman built a bridge for the County of Contra Costa, upon a contract for about eight thousand dollars, to bear interest at the rate of five per cent per month till paid. The bridge was not completed till some time in 1853. On the 23d of March, 1853, the County of Alameda was created by the Legislature out of territory taken from the Counties of Contra Costa and Santa Clara, and the said bridge fell within the new County of Alameda. The contract for building the bridge being with the County of Contra Costa, and the money being unpaid, Gilman sued that county for the amount due, and in 1856 recovered a judgment for upwards of twenty thousand dollars, with accruing interest and costs. In 1858, the Legislature passed an Act appointing Commissioners to adjust the amount to be paid by Alameda County to Contra Costa County, as her share of the debt that had accrued while a portion of Alameda County formed a part of the County of Contra Costa, but the Commissioners in their award were limited by the Act to the indebtedness which had accrued prior to the 23d of March, 1853, the date of the creation of the new county. At that date, no interest on the bridge contract had accrued. The Commissioners awarded against Alameda County the sum of three thousand nine hundred and forty-four dollars and sixty-six cents, but for reasons before stated, the award did not include any interest on the bridge contract. This award was afterwards in 1860 and 1861, paid to the County of Contra Costa. On the 14th of March, 1860, the Legislature passed an Act empowering and requiring the Board of Supervisors of Contra Costa County to levy a special tax for the payment of the judgment, interests and costs recovered by Gilman in 1856 on the bridge contract, which was accordingly done and the judgment paid by the County of Contra Costa.

In 1862, another Act was passed reciting in its preamble the payment by Contra Costa County, in pursuance of said Act of 1860, of the said Gilman judgment of "thirty-one

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thousand dollars, some twenty-four thousand dollars of the amount being for interest * * * on an obligation contracted before the organization of Alameda County," etc., and in the body of the Act appointing Commissioners "to ascertain and award the amount of indebtedness, if any be found equitably due from the County of Alameda to the County of Contra Costa on account of obligations existing at the time of the organization of the said County of Alameda." The Commissioners are required, if any award be found against the County of Alameda, to certify the same to the Boards of Supervisors of the respective counties, and thereupon the Board of Supervisors of Alameda County are required, within a specified time, to levy a tax for the purpose, and pay the amount so awarded to the County of Contra Costa. Under this Act the Commissioners awarded in favor of Contra Costa County against the County of Alameda, the sum of eleven thousand five hundred and seventy-four dollars and twelve cents, this sum being for a portion of the said interest paid by the County of Contra Costa on the said bridge contract, and the judgment thereon, and for nothing else. The award having been certified to the Board of Supervisors of Alameda County, and a demand that the tax for its payment be levied in pursuance of the Act having been made, and the said Board having refused to levy the same, an alternative mandamus was issued by the District Court of the Fourth Judicial District against said Board in this case, which was afterwards, by the judgment of the Court made peremptory. From the judgment this appeal is taken.

The appellants made two points — Firstly, the County of Contra Costa has no power to act as relator, for the county is not a party beneficially interested. Secondly, the Legislature has trespassed upon the judicial power.

There is nothing in the first point. The judgment paid was against the County of Contra Costa, and the money awarded is to go into the Treasury of the county. It makes no difference that the law provides that "it shall be apportioned in the Treasury of the County of Contra Costa," for certain speci-

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fied purposes, viz: for the construction of certain roads, and to the "County School Fund." The county has charge of the funds, and is the trustee appointed by the law to apply it to the public uses specified, all of which are appropriate county charges. The county is, we think, "a party beneficially interested," within the meaning of the Practice Act.

It is objected that in appointing Commissioners to ascertain and award the amount to be paid by Alameda County to Contra Costa County, the Legislature conferred upon them judicial functions, and thereby usurped powers that, under the Constitution, belong exclusively to the judicial department of the Government. It will be observed that the money claimed was not a legal demand by one county against another, growing out of contracts or transactions between themselves, which could be litigated between them and enforced by suit in a Court of justice. The claim as between the counties arose solely out of legislative action in creating the new County of Alameda in part out of the County of Contra Costa, and wholly independent of the action of either county as between themselves. The Legislature is charged by the Constitution with the power and duty of establishing a system of county and town governments. (Article IX, Section 4.) It may divide counties and create new ones, or change the boundaries, as in its wisdom it may deem the public interest to require. And in creating new counties out of territory taken from counties already organized, it is but just that it should apportion the debts already accrued between the new and old counties in the ratio of the territory, population, taxable property and benefits conferred on the respective counties, or portions of counties affected by the change. It possesses the taxing power, and the power to determine for what objects of public interest, and to what extent the taxing power shall be exercised. As incident to these powers, it is authorized to apportion the taxes either upon the whole State, or upon particular districts according as the object is one of general or local interest or benefit. It may say what amount shall be paid by one district, and what amount by another.

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In the case of *The Town of Guilford v. Supervisors of Chenango County*, 3 Ker. 149, the Court of Appeals of New York say: "The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires, or will be promoted by it; and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax paying citizens of the State, or among those of a particular section or political division."

This was in a case where certain parties had sued the Town of Guilford for expenses incurred and paid by them in conducting, by direction of the town, certain litigation on the part of the town, but in said suit failed to recover against the town the amount so expended, because the town was not legally liable. Subsequently the Legislature authorized the town, upon the vote of the majority of the inhabitants, to raise the sum expended and equitably due from the town, by tax, and to pay the demand; but directing that the decision of the people should be final. The inhabitants voted the proposition down. The Legislature then passed a law authorizing Commissioners to determine and award the amount expended by the parties in the litigation, and directing the Supervisors of the county to levy a tax upon the Town of Guilford and pay the amount so awarded. The town resisted the tax on the ground that it was unconstitutional, and among other points it was insisted that the Legislature had usurped judicial functions. But the law was upheld. The Court further say in the case, (p. 148): "The statute book is full, perhaps too full, of laws awarding damages and compensation of various kinds to be paid by the public to individuals who had failed to obtain what they considered equitably due to them by the decision of administrative officers acting under the provisions of

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former laws. The Courts have no power to supervise or review the doings of the Legislature in such cases." (See also *Blanding v. Burr*, 13 Cal. 347.)

The Legislature, then, may, in its discretion, determine the objects for which, and the extent to which, the taxing power shall be exercised, and may apportion the taxes to be levied. In ascertaining the amount that ought equitably to be charged upon the different districts, as a guide to the exercise of this discretion, it may pursue its own methods, and employ its own instruments.

In this case the County of Contra Costa, in making a necessary public improvement—a bridge—incurred an obligation, which was chargeable upon the entire county. After the obligation was incurred, but before the entire amount subsequently paid had become due, the county was divided and a large portion of the territory, population and taxable property liable for the demand was, by the Legislature, cut off from the County of Contra Costa, and erected into the new County of Alameda—the new county including the bridge, for the erection of which the obligation was incurred. Equity, at least, required that the Legislature, in making the division of the territory, should then, or at some subsequent time, ascertain in some manner, the portion of the debt then accrued or to accrue on existing obligations, that should be equitably apportioned to each of the counties. The Legislature chose to make the apportionment through Commissioners appointed by itself. The amount chargeable upon the whole territory originally liable had, at the time of the passage of the law, been fixed by the judgment of a competent Court, and it was only necessary to make the apportionment. There are two apportionments necessary, firstly, between the two counties, and secondly, each county is to apportion its share among the taxable inhabitants of the county. The latter apportionment as much involves the exercise of judicial functions as the former. Both require an examination of facts, and the exercise of judgment. Both depend upon the same principles, and stand upon the same footing. But neither is in the nature of a suit liti-

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gated between contending parties. The entire amount to be paid is fixed by judgment. The Legislature provides the mode and designates the officers who shall make both apportionments; and we think the power is peculiarly within the province of the legislative department of the Government. It makes no difference whether each county is directed to levy its proportion of the debt and pay it directly to Gilman, or whether the whole is first raised by the County of Contra Costa and paid to Gilman, and then the County of Alameda raises its portion and pays it to the County of Contra Costa. We think, therefore, the apportionment of the amount to be paid by the respective counties was not an encroachment upon the powers with which the judicial department is charged within the meaning of the Constitution. It is a power that has usually been exercised in other States, as well as heretofore in this State, by the political, and seldom, if ever, by the judicial department of the Government.

The judgment is affirmed.

Mr. Justice SHAFTER, having been of counsel in the case, did not participate in the decision.

THE PEOPLE *ex rel.* EMERY TOWNSEND v. J. B. HALLOWAY, JUDGE OF THE COUNTY COURT OF LAKE COUNTY, AND W. R. MATHEWS, CLERK OF THE SAME COURT.

APPEAL FROM AN ORDER OF A JUSTICE OF THE PEACE.—An appeal does not lie to the County Court from an order made by a Justice of the Peace, directing property alleged to have been stolen, and discovered and brought before the Justice by a peace officer, by virtue of a search warrant issued by the Justice, to be delivered to the owner.

MANDAMUS BY A COUNTY COURT.—If notice of appeal is given from an order of a Justice of the Peace directing stolen property to be delivered to the alleged owner, the County Court has no jurisdiction to compel, by writ of mandate, the Justice of the Peace to send up the appeal papers.

SAME.—In such cases the County Court can only inquire by the intervention of a Grand Jury whether a public offense has been committed in the county.

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CERTIORARI to the Judge of the County Court of Lake County, and to the Clerk of the same Court.

The facts are stated in the opinion of the Court.

Emery Townsend, for Relator.

By the Court, CURREY, J.

The relator, Emery Townsend, as a Justice of the Peace of Lake County, and a magistrate having power to issue a warrant for the arrest of any person charged with a public offense, and also having authority to issue a search warrant directed to a peace officer, commanding him to search for personal property stolen or embezzled, and bring it before him (Laws 1861, p. 223, Secs. 102, 103, and p. 284, Secs. 642-645), did, in the month of January, 1864, upon proper complaint made before him, issue a search warrant in due form, having for its object the discovery of an article of personal property alleged to have been stolen. The warrant was duly executed and the property discovered and delivered to the magistrate. The grounds upon which the warrant was issued were controverted by one John J. Dean, from whose custody the property was taken, and thereupon the magistrate proceeded to take and reduce to writing the testimony of divers witnesses in relation to the subject of controversy; and such proceedings were had in the case that the magistrate ordered the property to be restored and delivered to the complainant upon the payment of the necessary expenses. Three days afterward the magistrate annexed together the depositions of the witnesses, duly certified by him, and the search warrant with the affidavit on which it was issued, and the return of the officer thereon, and the inventory taken of the property, and caused the same to be filed in the office of the Clerk of the County Court of said county, that they might be laid before that Court at its then next term.

Immediately after the decision of the magistrate was made for restoring and delivering the property to the complainant,

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Dean by his counsel filed with the magistrate a notice of appeal from this decision to the County Court, and tendered a bond on such appeal, which the magistrate refused to allow or approve, and he also refused to make any return on such appeal to the County Court. On the 7th of March following, Dean applied to the County Court for an alternative writ of mandamus, which was allowed and issued, commanding the magistrate, on a day named, to file with the Clerk of the County Court of said county "all the papers necessary on the appeal of said cause," together with the property in controversy, or to show cause to the contrary before the County Judge on the day appointed. This writ of mandamus was issued in aid of the supposed jurisdiction of the County Court in the premises. The magistrate, in obedience to this writ, made a return to the appeal alleged to have been taken, and filed an answer to the writ of mandamus, and also deposited with the Clerk of the Court the property taken on the search warrant. On the day following, the County Court, on the motion of counsel for Dean, rendered a judgment dismissing the proceedings which it was assumed were before the Court on the appeal, and for the return of the property in controversy to Dean, and also rendered a judgment in favor of Dean against the magistrate, Emery Townsend, in the mandamus proceeding, for ten dollars damages, and ten dollars and five cents costs; and afterwards, in the month of April, an execution was issued on this judgment for damages and costs, and placed in the hands of the Sheriff.

The relator, by his petition, applied to this Court for a writ of certiorari, on the ground that the County Court, in rendering the judgment dismissing the proceedings instituted and had before the relator, as magistrate, and in ordering the property in controversy to be delivered to the said Dean, and in rendering judgment in favor of Dean, against him in the proceeding by mandamus, had exceeded its jurisdiction, and that the relator and the people of the State whom he represents are without other remedy in the premises. The writ was granted and issued, and returned with the transcript required

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on a day certain in the last July term of this Court, and was continued from that day to the October term, when it was argued and submitted.

The proceedings which were had and taken before the magistrate seem to have been conducted by him with a scrupulous observance of the requirements of the law in such cases, and when he had passed upon the case he made his return of the affidavit, the complaint, and the search warrant, with the return of the officer and the inventory of the property, together with the depositions of the several witnesses taken before him, duly certified, in conformity to the statute in such case made and provided, and caused the same to be filed with the Clerk of the proper Court. (Laws 1851, pp. 284-286.) These things being done, the duty of the magistrate was at an end, though that of the County Court, which, under the amended Constitution and the statute, had at the time succeeded to the duties of the Court of Sessions, then had their inception, not as a Court of appeal having authority to review the judgment and proceedings of the magistrate, but as a Court of original jurisdiction, whose duty it was to inquire by the intervention of a Grand Jury of all public offenses committed and triable in Lake County. (Laws 1863, p. 337, Sec. 32.)

The granting of the writ of mandamus by the County Judge of Lake County and the judgment of the County Court of the same county, dismissing the proceedings instituted before the magistrate, and in ordering the property described in the complaint and search warrant to be delivered to said Dean, and in the giving of judgment in favor of said Dean against the relator Emery Townsend, for damages and costs, were *coram non judice*, and each of such acts were utterly void.

It is therefore ordered and adjudged that the action and proceedings of the County Court, of Lake County, granting the writ of mandamus, and in dismissing the proceedings instituted before Emery Townsend, as a magistrate of said county, which are hereinbefore mentioned and referred to,

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and the order made restoring the property obtained on the search warrant and delivered to said magistrate, and the judgment rendered by said County Court in favor of said Dean against said Townsend for ten dollars damages, and ten dollars and five cents costs, be annulled and held for naught; and it is further ordered that the said Emery Townsend have and recover against the respondent, J. B. Halloway, judgment for his costs and disbursements in this behalf expended, to be taxed by the Clerk of this Court, and that he have execution therefor.

THE PEOPLE *ex rel.* THOS. W. MULFORD v. JOSEPH
A. MAYHEW.

PURCHASER OF LAND AT SHERIFF'S SALE.—The purchaser of land at Sheriff's sale does not by his purchase acquire the title to the land. The title passes by the execution and delivery of the Sheriff's deed. The purchaser prior to the execution of the Sheriff's deed holds merely a lien upon the land.

REDEMPTION FROM SHERIFF'S SALE IS PAYMENT OF A DEBT.—The obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a Sheriff, is a debt within the meaning of the Act of Congress making treasury notes lawful money and a legal tender in payment of debts.

REDEMPTION IN TREASURY NOTES.—Land sold at Sheriff's sale under a judgment payable generally in money, without specifying a particular kind of money, may be redeemed with treasury notes made a legal tender by Act of Congress.

TREASURY NOTES A LEGAL TENDER.—Treasury notes issued under the Act of Congress of February 25th, 1862, are lawful money, and a legal tender in payment of all debts, public and private, except certain public debts mentioned in the Act.

WHAT MONEY SHERIFF MAY RECEIVE IN REDEMPTION.—The Sheriff is the special agent of the purchaser of land authorized to receive the redemption money for him, and as such, may receive in redemption what is regarded as current money at the time and place, though not strictly a legal tender, unless the judgment under which the sale was made was rendered payable in a particular kind of money.

APPEAL from the District Court, Third Judicial District, Alameda County.

The facts are stated in the opinion of the Court.

Sloan & Provines, for Appellants.

Argument for Appellants.

The power of Congress to authorize the issuance of notes, bonds, or other obligations of the United States, is one thing, but its power to declare that the same shall be current money—a lawful tender—a standard of value—is quite another thing. We do not, in this case, however, question the power of Congress. It is sufficient to observe, touching the treasury notes so to be issued, that it did not undertake to clothe them with all the attributes of money. They are made payable and receivable as such only for certain specified purposes.

They are made receivable in payment of all demands due to the United States, except duties on imports; and of all demands against the United States, except for interest on bonds and notes.

The Act declares “they shall be lawful money, and a legal tender in payment of all *debts*, public and private, within the United States; except duties on imports, and interest as aforesaid.”

The statutory right of the debtor to redeem from the purchaser the land sold under judgment, is very different from an obligation.

The privilege of redeeming is not confined to the judgment debtor; nor is it limited to the case of a purchase by the judgment creditor. A purchase by any one, creditor or stranger, discharges the judgment to the extent of the sum bid, less the costs of sale, whatever that may be. Of course, if the sum bid be sufficient, the whole judgment is satisfied, and the debtor discharged from his obligation. In either case, he is discharged to the extent of the net amount of the purchase money produced; and, consequently, if the plaintiff should become the purchaser, he ceases to be a creditor to that extent.

The sale, therefore, results in the extinguishment, not in the creation of a debt. Debt implies an obligation, on the one hand, and the right to demand and enforce payment, on the other. But the purchaser can take no legal measures to compel redemption.

The act of redeeming under the statute is clearly, then, not one

Argument for Respondent.

of the cases mentioned in the Act of Congress in which treasury notes are lawful money or a legal tender.

The case stands just the same as if the Act had provided for the issuance and sale of such notes, without declaring that they should be payable or receivable as a circulating medium, or be lawful money for any purpose. Those notes are promises to pay; and, being issued by authority of an Act of Congress, may be regarded as pledges of the faith of the United States. The question before the Court is, therefore, to be considered as if the Act had authorized the issuance of those notes, and stopped there.

W. W. Crane, Jr., for Respondent.

When Ward and wife paid to the Sheriff the sum of fifteen thousand six hundred and eighty dollars in United States treasury notes, they thereby paid and discharged the debt owing by them, and the judgment and sale became as though they never had existed. It was the payment of a debt within the meaning of the Act of Congress of February 25, 1862. (*McCarthy v. Christie*, 13 Cal. 79.)

Those who can redeem property are divided into two classes: 1st—the judgment debtor; 2d—a creditor having a lien by judgment, etc. (Practice Act, Sec. 230.)

When the judgment debtor redeems, he pays his debt, together with a penalty. When the creditor redeems, he is only subrogated to the rights of the purchaser. The very idea of redemption as between the judgment creditor and debtor involves the payment in whole or part of the debt.

It is true it is a statutory right, but it is a statutory contract. The purchaser takes the place of the execution creditor, with a lien upon the property, which, as against the debtor, he can enforce at the end of six months by calling for a deed. The debtor avoids this by in fact paying his debt in whole, or in part, to another person.

Mr. Justice Baldwin, speaking of redemption in an opinion denying a petition for a rehearing in *Tuolumne Redemption*

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Company v. Sedgwick, 15 Cal. 529, says: "But the whole aim of our opinion was to show that the matter of redemption was a new contract, not connected with the original contract, but created or authorized by statute, as part of the remedy."

To the point, that upon a redemption by a judgment debtor, the sale becomes as though it never had been, but otherwise when by a creditor, see *Phyfe v. Kiley*, 15 Wend. 252; *Bodine v. Moore*, 18 N. Y. 251.

The statute only requires the debtor to pay to the purchaser *the amount* of his purchase, with twelve per cent thereon in addition. (Practice Act, Sec. 231.)

Now, the *amount* of the purchase in this case was fourteen thousand dollars in treasury notes, and the purchasers were paid that amount. If they put it upon the ground that they paid a debt, it certainly was the payment of our debt, and we have now paid them that debt in the same currency that they used.

By the Court, RHODES, J.

A judgment of foreclosure was rendered in favor of Wm. N. Spear against John B. Ward and others, on the 6th of August, 1861; and in 1862 an order of sale was issued upon the judgment, and the defendant as the Sheriff of Alameda County, sold the mortgaged premises to the relator, Wicks and Smith jointly, as appears by his return, though the relator contends that he was the sole purchaser. The sale was made on the 22d day of December, 1862, for fourteen thousand dollars, which sum was paid by the relator in United States treasury notes. On the 28th day of April, 1863, John B. Ward paid to the defendant, as Sheriff, for the purchasers, the sum of fifteen thousand six hundred and eighty dollars in United States treasury notes, for the purpose of redeeming the land from the Sheriff's sale, and on the 6th day of May, 1863, the defendant paid the treasury notes to said Smith, who receipted to him therefor in the name of Mulford & Co. (the said Mulford, Wicks and Smith composing said firm of Mul-

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ford & Co.); and on the 11th of June, 1863, Smith returned the same treasury notes to the defendant, and told the Sheriff that he had informed Mulford (who returned about that time after an absence from the State from the month of January) of what he had done, and that Mulford refused to receive the treasury notes. The relator demanded a deed of the defendant for the land purchased, and it being refused, he commenced proceedings by mandamus, to compel the execution of the deed. The Court below refused the peremptory writ, and the relator appeals.

A preliminary point is raised by the respondent, that as the return of sale and the certificate of sale shows that the sale was made to Mulford, Wicks and Smith jointly, they should have united in these proceedings; but it is unnecessary to discuss the point.

The burden of the appellant's argument is directed to the proof of the proposition that, by the purchase at the Sheriff's sale, no debt was created between the purchaser and any of the parties to the proceedings, and that the person, whether a judgment debtor or redemptioner, who exercises the statutory right of redemption, does not pay or satisfy any *debt*, and that therefore the payment by the judgment debtor to the purchaser of treasury notes, which, by the Act of Congress, are declared a legal tender in payment of debts (except certain public debts mentioned in the Act) is insufficient to constitute a redemption of the land from the sale.

We understand it to be conceded by the parties that the payment by Ward to the Sheriff was proper, as regards the person paying and receiving, and that the nominal amount paid was the correct sum required for the redemption.

When a judgment debtor pays to the purchaser, at a sale under an execution or an order of sale, a sum of money for the purpose of effecting a redemption of the land, what can that which he pays be properly denominated? Suppose, first, that the judgment creditor is the purchaser, that the sum bid equals the amount of his judgment, and that thereupon the execution is credited by the Sheriff with the amount bid.

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The purchaser does not thereby acquire the defendant's title to the land, for that passes to him by the execution and delivery of the Sheriff's deed. This is manifest by the provisions of section two hundred and thirty-two of the Practice Act, which declares in effect that upon a redemption being made by the debtor, the sale becomes null and void — which could not be the case if the title had passed — and by the fact that the purchaser can neither take nor recover the possession of the land previous to the Sheriff's deed. His judgment is not satisfied by the sale, for if the sale should for any reason be set aside, the judgment remains in full force, and such could not be the case if it had been satisfied. The purchaser, prior to the execution of the Sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this, that it is more specific and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment — the single act of the execution and delivery of the Sheriff's deed being required.

If the land is redeemed by a judgment creditor, the lien that was acquired by means of the purchase, vests in the redemptioner, and in consequence of the redemption, the judgment under which it was made also becomes a lien, that is enforced in the same manner as the purchaser's lien — that is, by a conveyance of the property. A second redemptioner acquires the two previous liens, but he acquires no part of either of the prior judgments, for his payment in redemption satisfied the purchaser's judgment and that of the first redemptioner. If a third person purchases at the Sheriff's sale, he occupies no other relation to the property than the judgment creditor would do if he had purchased, so far as the point under consideration is concerned. He acquires his lien in consequence of having paid the purchase money, and that is enforced also by the Sheriff's deed.

The lien, in either of the cases supposed, is discharged by the payment by the debtor of the amount of the purchase money and the percentage, etc., allowed by law, and the redemptioner's lien, if it has been redeemed by a redemptioner

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—that is, the land is thus discharged of the lien resting upon it. If the right or interest that the purchaser or redemptioner holds prior to the execution of the Sheriff's deed, is not a mere lien, and with the qualities only of a lien, we are unable to give it a legal designation. (See *Vaughn v. Ely*, 4 Barb. 159, and cases cited.)

We cannot comprehend the idea that a lien, that may be discharged by the voluntary payment of a sum of money, is not a security for the payment of a debt. The error in the argument of the learned counsel for the appellant consists in assuming—tacitly, perhaps—that in order to be a debt, there must be a personal liability for the payment of the sum in question. A charge upon a specific parcel of a person's property for the payment of a sum of money constitutes a debt as fully as a demand which is or may be made a charge upon all his property, both present and future, and it makes no difference, in this respect, whether the lien is acquired by express agreement or by operation of law. This becomes more apparent when it is remembered that the payment of a debt, for which we say there is a personal liability, is enforced by the seizure and sale of the debtor's property, and in the absence of the power to imprison for debt, that is the only means of enforcing payment. If a person owning real estate, mortgages it to secure the payment of money, and then conveys it, we frequently say that the debt, so secured, is not the vendee's debt, and it is not his debt in the sense of a personal contract or liability, but it is his debt to the extent that his property is liable for its payment.

The same is true of a large class of cases, in which the person, who owned the property at the time of the collection of the claim, did not personally contract the debt; and in still other classes—as cases in the Admiralty Courts for salvage—in which no one contracted the debt, but the liability was cast on the property by operation of law.

We think the term "debt" employed in the Act of Congress is not limited to a demand, for which a personal liability exists against the party offering or making the payment, but

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that it comprehends, also, all liens, claims and charges upon property for the payment of money; and we do not think Congress could have intended the inconsistency if not the hardships that would be manifest if a mortgagor is permitted, under the provisions of the Act, to pay the mortgage debt in any kind of money, but the purchaser of the property charged with the mortgage is restricted to gold coin alone.

If, however, we misconstrue the Act of Congress, then it becomes necessary to ascertain whether treasury notes are money, and to determine the powers of the Sheriff in case of redemption.

The Act declares that "they shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest, as aforesaid." The portion of the Act cited seems to include two objects: First, to declare the treasury notes lawful money; and, second, to prescribe in what cases they shall be a legal tender.

Silver coin of the United States is lawful money, but is not a legal tender in payment of sums exceeding five dollars; and the fact that it is not a legal tender for the payment of a sum exceeding five dollars does not prevent its being lawful money. So with the treasury notes, though they are not a legal tender for the payment of certain demands, yet they are lawful money. This question was carefully considered in the case of *Lick v. Faulkner*, 25 Cal. 404, in which we held them to be lawful money, and we are satisfied with our views there expressed.

If they are not money, either declared as such by the Act of Congress, or recognized as such by commercial usage in this State, as bank bills are recognized as money in most of the States of the Union, then the appellant has no standing in this case, because he has not purchased the land, for the proceedings at the sale do not amount to a purchase by a third person until he has paid the amount of his bid in money.

The Sheriff, under the provision of section two hundred and thirty-two of the Practice Act, is authorized to receive the

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redemption money for the purchaser. For that purpose, the law constitutes him a special agent for the purchaser.

In *Dickenson v. Galliland*, 1 Cow. 481, it is held that the Sheriff, in respect to the redemption, is a special agent; and in *ex parte Board* (4 Cow. 420,) it is said that he is a *quasi* agent. In the last case, the Court held that he was not a mere naked agent, subject to the absolute control of the creditor, and he having received bank bills in redemption, contrary to the express direction of the creditor, the Court upheld his acts, and asserted for him the same discretion that he would have on a sale upon execution.

It is unnecessary to go the extent of holding that the Sheriff may violate the directions of the creditor in any case where, if the money was tendered to him, he might properly refuse to accept it, unless it was tendered in a particular kind of money; but those and a vast number of cases proceed on the ground, expressly or by necessary implication, that the Sheriff, as such special agent, may receive in redemption what is regarded as current money at that time and place, though not strictly a legal tender. Hence, a payment to the Sheriff, without objection by him, in bank bills or foreign coin, by tale, has been held good. (*Wright v. Reed*, 3 T. R. 554; *Ex parte Becker*, 4 Hill, 613; *Hall v. Fisher*, 9 Barb. S. C. 17; see also *United States Bank v. Bank of Georgia*, 10 Wheat. 347.)

We therefore hold, both upon principle and authority, that the payment in United States treasury notes by the judgment debtor to the Sheriff, for the purchaser, of the amount of his purchase, was a legal payment, and was sufficient to effect a redemption of the property sold.

Judgment affirmed.

By the Court, RHODES, J., on petition for rehearing.

The appellant in his petition for rehearing again insists that the payment by the judgment debtor of the amount necessary to effect a redemption of his land, sold by the Sheriff under a

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judgment of foreclosure, is not the payment of a debt within the meaning of the term debt as employed in the Act of Congress providing for the issue of treasury notes. This point was passed upon by us, in the opinion already rendered in the case, after very careful consideration, and the result arrived at was adverse to the very forcible views of the learned counsel, but we think the decision of the point is unnecessary and that the case can be properly determined without regard to the solution of that question.

Only two questions are necessarily involved in the case, and they relate to the capacity in which the Sheriff acts in receiving the redemption money and the character of treasury notes as lawful money.

We are satisfied that the Sheriff is by law constituted the agent of the purchaser in receiving the redemption money, and that as such agent, in cases where neither the law nor the judgment of the Court directs him to receive a particular kind of money only, he may properly receive for the purposes of redemption any lawful money, in the absence of instructions from the purchasers, when he has the right to give such instructions, restricting him to a certain kind of money.

The remaining question is whether treasury notes are "lawful money," notwithstanding they are declared by the Act of Congress a legal tender for certain purposes, but not for all purposes for which money may be employed. On this question we see no sufficient reason for changing the opinion already announced by us, that treasury notes are lawful money.

As we have already remarked, silver money is not a legal tender in payment of sums exceeding five dollars, but can it be questioned that it is lawful money? If a debtor, to satisfy his obligation for the payment of a sum of money exceeding five dollars—the kind not being specified in the contract—should pay the creditor the amount in silver coins, and nothing should be said by the debtor or creditor at the time of its payment as to its being paid or received as or in lieu of money that would be a legal tender in the payment of the

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debt; and if thereafter an action should be brought on the contract, could not the debtor rely upon payment for his defense, or would he be obliged to answer an accord and satisfaction, or a set-off? If the silver coins are not lawful money, they could not be employed in the payment of a debt calling for money, unless the creditor agreed to receive and did receive them as lawful money. Treasury notes, like silver coins, are not a legal tender for all purposes, but, like them, constitute lawful money.

It is proper to remark, though not in response to the arguments of the learned counsel for the appellant, that the purchase at the Sheriff's sale, in this case, was made with treasury notes, and that the provisions of the "Specific Contract Act" are not in any manner involved in this case, nor the case out of which the present action arose.

We do not desire a reargument of the questions necessarily involved in this case, and on which the decision hinges, and must therefore deny the petition.

Rehearing denied.

Mr. Justice SAWYER expressed no opinion.

THE PEOPLE v. TERRENCE SMITH.

EVIDENCE OF FORMER QUARREL ON TRIAL FOR MURDER.—If two persons have a quarrel and a fight, and after an interval of six hours one of them seeks the other, forces a contest, and takes his life, and is afterwards indicted for murder, he cannot, in defense, introduce evidence of the first quarrel as part of the *res geste*.

FORMER QUARREL AS PROVOCATION FOR KILLING.—If two persons quarrel, and after a sufficient time has elapsed for reason to resume its sway, one of them kills the other, and is indicted for murder, proof on the trial of the first quarrel as a provocation for the killing makes the killing attributable to deliberate revenge, and punishable as murder.

APPEAL from the District Court, Fourteenth Judicial District, Nevada County.

The facts are stated in the opinion of the Court.

David D. Belden, for Appellant.

It will be observed that the offer was to prove that both transactions were part of the same fight; the one—its commencement—the stabbing of Smith by Daley, and the result, the killing of Daley by Smith. If this fact, proven as offered, would have been relevant or material, then the exclusion of the evidence offered to establish it, was error. We admit, for the purposes of this argument, that there is nothing in the evidence presented that shows this to have been the fact; and we may further concede, that had we presented what we proffered, it would have been overwhelmingly contradicted; still, if it was material or relevant, its weight or credibility does not affect its admissibility. Upon this point we cite: *People v. Arnold*, 15 Cal. 481; *People v. Costillo*, 15 Cal. 334; *People v. Williams*, 18 Cal. 191; *People v. Roach*, 17 Cal. 297.

Says Greenleaf: "The surrounding circumstances constituting part of the *res gestæ*, may always be shown to the jury along with the principal fact." (1 Greenleaf's Ev., Sec. 108.)

While the surrounding circumstances may be thus proven, the commencement or conclusion of the transaction itself cannot be excluded.

It was further admissible as showing the mental condition of the defendant. Under the indictment in this case, the defendant could have been convicted of manslaughter; the provocation he had received determining whether this offense was committed, the offer to prove that deceased stabbed him twice before he was slain would be material as to the question of provocation. (*People v. Costillo*, 15 Cal. 334; *People v. Roach*, 17 Cal. 297.)

J. G. McCullough, Attorney-General, for the People.

It will be noticed that the question of self-defense is not raised, nor is such even suggested by brief of counsel; and if it has, there can be no doubt that Smith commenced the fight, nor is anything different even *claimed*; therefore, this evidence is not necessary to illustrate the transaction, or to show Daley's

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purpose, as it might be if there were any dispute as to who commenced the affray, and the defendant claimed he killed in self-defense.

The offer, therefore, was no part of the *res gestæ*; and the case of *People v. Arnold*, 15 Cal. 476, is no authority for defendant, nor would such evidence be proper to be considered by the jury in such a case as this.

In the cases of *People v. Costillo*, 15 Cal. 350, and *People v. Roach*, 17 Cal. 297, the offered testimony were parts of the immediate transaction wherein the killing occurred, and formed part of the *res gestæ*.

The idea of *res gestæ* presupposes a main fact; and the *res gestæ* are merely the surrounding circumstances which serve to illustrate it. (1 Phillips' Ev. 201.)

By the Court, SANDERSON, C. J.

The defendant was indicted for the crime of murder, and upon the trial was convicted of murder in the second degree. The only error assigned relates to the exclusion of certain testimony offered on the part of the defendant. It appears that the homicide was committed between nine and ten o'clock in the forenoon, and the defense offered to prove that there had been a quarrel and fight between the deceased and the defendant between three and four o'clock in the morning of the same day, in which the deceased had stabbed the defendant twice, and that the last fight was the result and a part of the first. This evidence was excluded by the Court upon the ground that it was irrelevant.

It is claimed that the evidence was admissible because the facts offered to be shown thereby constituted a part of the *res gestæ*. This would be so if the first difficulty was a part of the last, as stated, but it is not easy to perceive how or by what kind of testimony two fights with an interval of six hours between them, during which time the parties had not met, can be proven to have been but one transaction. It seems to us that when counsel offered to prove that these two

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fights were in fact but one, they promised more, in view of the lapse of time and the separation of the parties, than their witness could have performed. We think it is clear that the evidence was not admissible, upon the ground that the first fight was a part of the *res gestæ*. If admissible at all on the part of the defense, it could be so only upon the ground that the first fight was the provocation for the second. But if the first fight is regarded as a provocation for the second, the interval between them was sufficient for the voice of reason and humanity to be heard, and the killing therefore attributable to deliberate revenge, and punishable as murder. The second fight was sought by the defendant, armed with a knife and pistol. The deceased told him that he was unarmed and unable to fight him; yet the defendant forced the quarrel, and ended it by stabbing and killing his adversary. Under all the circumstances, we think it is a little surprising that the District Attorney did not prove the first fight for the purpose of showing a grudge and deliberate revenge on the part of the defendant; and had he done so it is more than probable that the verdict would have been for murder in the first degree instead of the second. The defendant has more cause to rejoice than to complain of the ruling of the Court. (Wharton on Homicide, 179, *et sequens*.)

Judgment affirmed.

PEOPLE v. HASTINGS *et al.*

JUDGMENT FOR TAXES.—Although the statute does not require the assessed value of property to be alleged in the complaint in an action to recover taxes, yet, if it is alleged, and the record shows that a judgment was rendered for a greater sum than the total amount of county and State taxes authorized to be levied by law, the judgment will be reversed.

APPEAL from the District Court, Seventh Judicial District, Mendocino County.

The facts are stated in the opinion of the Court.

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B. McGarvey, for Appellants.

Veeder & Latimer, for the People.

By the Court, SAWYER, J.

This is a suit to recover taxes levied on certain lands in Mendocino County for the fiscal year ending March 1, 1863. The complaint generally follows the statutory form, but includes some allegations not specified in the statute. It avers the ownership of the lands described to be in the defendants Hastings & Currey, and "that there was duly assessed to them the above described real estate, valued at fourteen thousand eight hundred dollars, and that upon such property there has been duly levied, for the fiscal year ending March 1, 1863, a State tax of eight hundred and seventy-two dollars, and a county tax of one thousand six hundred and eighty-nine dollars and sixty cents, and a national tax of two hundred and eleven dollars, and upon which costs and percentage have since accrued of one hundred and thirty-eight dollars and sixty-eight cents, amounting in the whole to two thousand nine hundred and twelve dollars and ninety-four cents, all of which is due and unpaid," etc. Defendants demurred. The demurrer having been overruled, defendants answered; after which the Court, upon plaintiff's motion, entered judgment on the pleadings for the full amount claimed, on the ground that the answer presented no material issue. Defendants appeal from the judgment.

The complaint alleges the valuation of the land described in the complaint to be fourteen thousand eight hundred dollars. The limit of taxation for State purposes was sixty-two cents on each one hundred dollars, which, upon the valuation stated, would only be ninety-one dollars and seventy-six cents; but the amount levied, and recovered by the judgment for State purposes, is eight hundred and seventy-two dollars. The highest amount authorized by law to be levied for county purposes is sixty cents on each one hundred dollars, which, on

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fourteen thousand eight hundred dollars would be eighty-eight dollars and eighty cents; whereas the amount levied and recovered for county purposes is one thousand six hundred and eighty-nine dollars and sixty-cents; and the whole amount sued for and recovered, including national tax, percentage and costs, is two thousand nine hundred and twelve dollars and forty-four cents — about one fifth of the entire assessed value of the property. It is claimed that for this reason, it appears upon the face of the record that the judgment is erroneous. The respondents, however, insist that as the statute does not require the valuation to be stated in the complaint, it was unnecessary to state it, and it may be regarded as surplusage. It may be that the complaint would have been sufficient without this averment, but the valuation is an essential step in the levy of a tax, and is the only basis upon which the amount of the tax can be ascertained. It is a fact, material to the validity of a tax, if not necessary to be stated in the complaint, and when stated must be considered. The valuation is alleged, and it must be deemed to have been stated correctly. From the valuation as alleged, it appears affirmatively on the face of the complaint, that the amount of the taxes levied, and claimed and recovered in this suit, is wholly unauthorized by law. The judgment, therefore, is manifestly erroneous, and must be reversed on this ground.

There is evidently some mistake in the averments, but the complaint does not afford the means of correcting it, or of determining what amount of taxes, if any, has been legally assessed.

The judgment is reversed without costs, and the cause remanded for further proceedings, with leave to both parties to amend their pleadings.

Mr. Justice CURREY, being disqualified, did not sit on the hearing of this case.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

AMN

VOLUME XXVI.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

28 Cal. 11-23. O'CONNOR v. DINGLEY.

Common Count is improper for work and labor done under special contract, p. 19.

Distinguished in Castagnino v. Balletta, 82 Cal. 257, holding common count allowable under facts and discussing subject generally.

Complaint of modified contract should allege original contract and modifications, p. 21.

Cited in Roche v. Baldwin, 135 Cal. 525, holding action not maintainable on alleged implied contract, where special conditional contract is proved; People's etc. Co. v. Gillard, 136 Cal. 62, holding action not maintainable because of variance; White v. Soto, 82 Cal. 657, 658, admitting in evidence original and modifications although only contract as modified alleged; Daley v. Russ, 86 Cal. 117, on point that excuse for nonperformance cannot be shown under complaint alleging performance. Cited, also, in note to Green v. Palmer, 76 Am. Dec. 498, as to averments of complaint under code.

Agreement to Execute note for labor done may be sued upon at once on failure to execute the note, p. 22.

Approved in Flick v. Hahn's Peak etc. Min. Co., 16 Colo. App. 492, where contract provided that for certain work done after making certain payments defendant was to execute to plaintiff conditional note for balance, secured by shares of stock, with condition that if note not paid at maturity, stock should be received in full payment of note, plaintiff could recover amount in money, where defendant failed to execute and deliver note and stock at time specified; note to Hanna v. Mills, 34 Am. Dec. 218, as to vendor's right to sue immediately. Cited, also, in Ballew v. Casey, 60 Tex. 575, on point that no demand necessary when obligation to pay is complete; and in Globe etc. Co. v. Doud, 47 Mo. App. 450, construing contract to be a promise of credit.

26 Cal. 23-46. DAVIS v. DAVIS. 85 Am. Dec. 157.

Competency of Witnesses.—Actions against "representative of deceased" include his executor or administrator, and also his successor in interest, p. 34.

Cited in Poulson v. Stanley, 122 Cal. 657, 68 Am. St. Rep. 75, as stating changes in rule prior to 1864, and construing Code of Civil Procedure, section 1880; Kialing v. Shaw, 33 Cal. 446, 91 Am. Dec. 650, rejecting testimony of wife of decedent in action against his grantee; Satterlee v. Bliss, 36 Cal. 512, where action against administrator; Marquert v. Bradford, 43 Cal. 530, holding party, however, not shown to be decedent's grantee; King v. Haney, 46 Cal. 562, 13 Am. Rep. 219, where action against grantee, holding error in admission waived, however, because motion to strike out made too late; Wamsley v. Crook, 3 Neb. 350, where action by widow and children of decedent; Mageman v. Bell, 13 Neb. 249, where action against executor, and holding further plaintiff's disability for interest not removed by transfer of interest to coplaintiff during pendency of suit; and in Crane v. Gloster, 13 Nev. 283, 284, holding rule, however, not to embrace surviving partners of deceased. Distinguished in Ewing v. Jones, 130 Ind. 251, confining term "legal representatives" in deed, to heirs and descendants. Cited, also, in note on general subject to Bank v. Payne, 33 Am. St. Rep. 526.

Estoppel in Pais.—Doctrine of rule stated and discussed, p. 38.

Cited in Bowman v. Cudworth, 31 Cal. 153, holding no estoppel because no reliance or injury shown; and ruling similarly in Wilson v. Castro, 31 Cal. 439, 440, for want of injury; Love v. Shartzer, 31 Cal. 494, as to statements concerning title; Maine etc. Co. v. Boston etc. Co., 37 Cal. 50, holding instruction upon estoppel erroneous; Martin v. Zellerbach, 38 Cal. 316, 99 Am. Dec. 379, and Shoufe v. Griffiths, 4 Wash. St. 166, 31 Am. St. Rep. 914, where no declarations made with intent to deceive and no reliance thereon shown; Smith v. Penny, 44 Cal. 166 (cited in Dean v. Parker, 88 Cal. 288), where party not shown to have been ignorant of true facts; Flege v. Garvey, 47 Cal. 377, upon similar ground and also because no reliance shown; dissenting opinions in Reis v. Lawrence, 63 Cal. 142, 143, main opinion holding married woman estopped by deed executed as if unmarried; and in dissenting opinion in Hand v. Hand, 68 Cal. 141, 58 Am. Rep. 8, main opinion following last case on similar facts; Montgomery v. Keppel, 75 Cal. 134, 7 Am. St. Rep. 128, 129, and Wilkins v. McGerke, 86 Ga. 770, where no intent to deceive and other party had other means of discovering truth; Griffith v. Brown, 76 Cal. 262, holding instruction erroneous because omitting question of intent to deceive; Watson v. Sutro, 86 Cal. 526, where no deception nor intent to deceive; Gjerstandengen v. Hartzell, 9 N. Dak. 275, 276; Bloch v. Sammons, 37 Or. 604, and First National Bank v. Hsley Bank, 83 Fed. 734, 54 U. S. App. 527, noted under Boggs v. Merced Milling Co., 14 Cal. 279; Murray v. Brigg, 29 Wash. 259, fact that judg-

ment debtor was present at void sale on execution of his land, which was bid in by creditor on express wish of debtor, and debtor afterward collected rents as creditor's agent, does not estop debtor or his successors in interest from questioning purchaser's title where execution sale was void; *Sweezy v. Collins*, 40 Iowa, 543, on point that ignorance of truth is no ground of estoppel, where result of gross negligence; *Dohms v. Mann*, 76 Iowa, 728, where equal knowledge shown and no reliance upon statements; *Chellis v. Coble*, 37 Kan. 566; *Henshaw v. Bissell*, 18 Wall. 272 (S. C. sub nom. *Bissell v. Henshaw*, 1 Sawy. 563, 3 Fed. Cas. 470); *Brant v. Virginia etc. Co.*, 93 U. S. 335; and in *Farmers' etc. Bank v. Faulk*, 58 Fed. Rep. 639; where no intent to deceive; *Fabian v. Collins*, 3 Mont. 228, where no injury or reliance alleged in complaint; and in *Wythe v. Smith*, 4 Sawy. 26, 30 Fed. Cas. 775, where no deception nor intent to deceive, and holding further such defense not pleadable in ejectment in Oregon. Distinguished in *Ions v. Harbison*, 112 Cal. 271, holding estoppel shown by facts. Cited, also, in *Hayes v. Livingston*, 34 Mich. 393, 22 Am. Rep. 540, holding doctrine inapplicable when applied to legal title to realty. Cited, also, in notes on general subject, to *Hamilton v. Elliott*, 17 Am. Dec. 410, as to estoppel by execution sale; *Commonwealth v. Moltz*, 51 Am. Dec. 505; *Chouteau v. Goddin*, 90 Am. Dec. 466; *Diller v. Brubaker*, 91 Am. Dec. 183; *Goddin v. Cincinnati etc. Co.*, 98 Am. Dec. 102; *Davidson v. Follett*, 99 Am. Dec. 651, upon estoppel as to title to or lien on land; and, on same point, to *Bynum v. Preston*, 5 Am. St. Rep. 53; *Bates v. Cobb*, 13 Am. St. Rep. 749; *Holman v. Boyce*, 36 Am. St. Rep. 863, as to estoppel by admission; and to *Union Bank v. Mechanics' Bank*, 45 Am. St. Rep. 361.

Estoppel in Pals must be pleaded with enough particularity to advise adverse party of nature of defense, p. 39.

Cited in *Bashore v. Parker*, 146 Cal. 528, determining sufficiency of pleading of estoppel in pals in action for claim and delivery by husband for community property; *Newhall v. Hatch*, 134 Cal. 273, on point that facts constituting estoppel in pals must be pleaded as being new matter; *Dyer v. Scalomini*, 69 Cal. 642, holding evidence as to estoppel admissible under pleadings although not specially pleaded; *Swasey v. Adair*, 88 Cal. 182, and *Ming v. Foote*, 9 Mont. 223, applying rule to pleading of equitable defenses generally; *McKeen v. Naughton*, 88 Cal. 467, holding further, doctrine of estoppel not to extend to questions of law; in *Carpy v. Dowdell*, 115 Cal. 687, 688, holding answer sufficient in this respect. Cited, also, in note on general subject to *Weinstein v. Bank*, 5 Am. St. Rep. 28; to *Tyler v. Hall*, 27 Am. St. Rep. 344, 345, 347, as to manner of pleading.

Pleading of Estoppel may be waived by failure to object to evidence, p. 39.

Cited in *Willey v. Bank*, 141 Cal. 511, holding objection so waived. *Hughes v. Wheeler*, 76 Cal. 232, holding objection waived by treating
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amendment filed at trial as sufficient; *Parlman v. Young*, 2 Dak. Ter. 184, holding further as to necessity of pleading estoppel; *Fabian v. Collins*, 3 Mont. 229, where in addition pleading was not objected to; and in *Alderson v. Marshall* 7 Mont. 297, where appellant himself introduced evidence upon question of estoppel. Distinguished in *Patent Brick Co. v. Moore*, 75 Cal. 208, holding findings improper when not responsive to issues although evidence as to estoppel not objected to.

Limitation as to Spanish Grant.—“Final confirmation” in statute of 1855 means issuance of patent, p. 46.

Cited to same effect in *Hills v. Sherwood*, 33 Cal. 479, on point that “final adjudication” is not made until expiration of time for appeal; *Sabichi v. Aguilar*, 43 Cal. 291, 294, holding further same term in act of 1863 to include final determination of survey also; *Younger v. Pagles*, 60 Cal. 521, holding plaintiff not barred under act of 1863; *O'Connor v. Fogle*, 63 Cal. 11, applying rule to patent issued to pre-emption claimant, and holding further no adverse possession shown under facts; and in *Bissell v. Henshaw*, 1 Sawy. 559, 560, 3 Fed. Cas. 468, 469, construing acts of 1855 and 1863; note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 483, on adverse possession of public lands.

General Citation.—*Cornell University v. Parkinson*, 59 Kan. 373.

28 Cal. 46-50. GALLAND v. LEWIS.

“Specific Contract Act” is retrospective and applies to contracts made before its passage, p. 48.

Cited to same effect in *Otis v. Haseltine*, 27 Cal. 82, as to note and indorsement; *People v. Senter*, 28 Cal. 506, holding Probate Act applicable to estates of persons dying before its enactment; *City v. Railroad Co.*, 35 La. Ann. 682, holding not retroactive an act authorizing assessment of property omitted from rolls for previous years; *Lawson v. Jeffries*, 47 Miss. 706, 12 Am. Rep. 354, as to retrospective legislation generally, and holding void, act granting new trial in prior cases. Denied in *Milliken v. Sloat*, 1 Nev. 580, holding similar local act prospective.

26 Cal. 50-68. TOMPKINS v. WEEKS. S. C. Estate of Miner, 46 Cal. 569, on settlement of administrator's account.

Administrator cannot speculate with estate funds even if act done in good faith and in exercise of discretion, p. 59.

Cited to same effect in *In re Moore*, 72 Cal. 342, denying right to erect new hotel building and holding further as to other expenditures; *In re Rose*, 80 Cal. 173, ruling similarly as to losses incurred in carrying on decedent's business; and in *Ralston v. Cannon*, 3 Utah, 235, as to erection of new building and borrowing of money therefor. Distinguished in *Estate of Smith*, 118 Cal. 467, allowing expenses for preserving vineyard

belonging to estate; Estate of Freud, 131 Cal. 672, noted under Estate of Knight, 12 Cal. 200; note to Fletcher v. American etc. Co., 78 Am. St. Rep. 196, on general subject. Cited, also, in Edwards v. State, 47 Miss. 587, on point that association of counsel with district attorney is not error.

Probate Court cannot Authorize Administrator to use funds of estate to carry on business with surviving partner of intestate, p. 66.

Approved in Wilson v. Meyer, 23 Utah, 536, since probate court cannot order personalty of deceased partner, which was in possession of survivor and constituted part of firm property, to be sold by decedent's executor, it may refuse to confirm such sale.

28 Cal. 69-78. BRADLEY v. HARKNESS.

Co-owners of Mining Ditches or Claims are tenants in common unless relation shown to be otherwise, p. 76.

Cited to same effect in Duryea v. Burt, 28 Cal. 587, holding relationship dependent on facts of particular case; McConnell v. Denver, 35 Cal. 369, 95 Am. Dec. 108, denying power of member of unincorporated ditch company to bind it by its contracts; Decker v. Howell, 42 Cal. 642, holding strict partnership shown by facts, and consequent power to bind associates; Griseza v. Terwilliger, 144 Cal. 450, holding presumption as to relation not overcome by facts stated; Smith v. Water Co., 16 Utah, 199, on point that possession of cotenants cannot be considered adverse inter se without actual or intended ouster; Meagher v. Hardenbrook, 11 Mont. 389, as to appropriators of water, and sustaining right of co-owners, after abandonment of ditch for mining purposes, to recapture and use water for irrigation. Cited in note to Skillman v. Lachman, 83 Am. Dec. 106, 110, as to mining partnerships and ditch companies.

Mining Ditch is Real Estate, as to power of co-owners to alienate their interests, p. 77.

Cited in South Tule etc. Co. v. King, 144 Cal. 454, applying rule in action to determine water right; Hayes v. Fine, 91 Cal. 396, holding invalid a parol agreement for conveyance of interest therein.

Partition.—Dissolution of tenancy in common can be had at mere desire of any tenant, aliter as to partnership, p. 77.

Cited to same effect in Trainor v. Greenough, 145 Ill. 549, holding inability of cotenants to agree as to partition not condition precedent to suit. Cited, also in note to Goldthwaite v. Janney, 48 Am. St. Rep. 63, discussing difference between copartnership and cotenancy; note to Breaux v. Le Blanc, 69 Am. St. Rep. 434, on partnership dissolution.

Complaint in Partition.—That at bar held insufficient (see syllabus, p. 69), p. 78.

Cited in *Farris v. Hayes*, 9 Oreg. 86, on point that complaint must allege plaintiff's possession.

Partition.—Dissolution of tenancy in common may be had in partition proceedings, p. 77.

Cited in *Ivancovich v. Weilenman*, 144 Cal. 763, discussing effect of partition decree as res adjudicata.

Approved in *Sterling v. Sterling*, 43 Or. 206, complaint in partition alleging that plaintiff and defendant are tenants in common is insufficient, as not alleging that plaintiff is in possession; *Swaggart v. Territory*, 6 Okla. 347.

26 Cal. 78-79. PEOPLE v. CHARES.

Oral Instructions to Jury are error without defendant's consent, even if present and not objecting, p. 79.

Cited to same effect (as *People v. Shaw*) in *People v. Sanford*, 43 Cal. 36, on similar facts; *People v. Hersey*, 53 Cal. 575, as to additional instructions given on return of jury; and in *State v. Porter*, 35 La. Ann. 535, where refusal to give written charge on seasonable request held error; *State v. Fisher*, 23 Mont. 552, construing similar local statute.

26 Cal. 79-88. GALLAND v. JACKMAN. 85 Am. Dec. 172.

Alteration in Deed, when material and to interest of claimant thereunder, must be satisfactorily explained, p. 85.

Approved in *Mulkey v. Long*, 5 Idaho, 217, party offering in evidence promissory note showing on its face that it has been altered must show that such alteration was made before it came into his hands; note to *Alabama etc. Co. v. Thompson*, 53 Am. St. Rep. 86, on general subject.

Valuable Consideration.—Recital of, in deed is not conclusive as to strangers thereto, p. 86.

Cited to same effect in *Lake v. Hancock*, 38 Fla. 61, 56 Am. St. Rep. 163, holding further, burden of proof under Recording Act to be on subsequent purchaser; and in *Sillyman v. King*, 36 Iowa, 213, on same point; *Rogers v. Verlander*, 30 W. Va. 645, to same point when involved in fraudulent conveyance; and in *Lakin v. Sierra Buttes etc. Co.*, 11 Sawy. 239, 25 Fed. Rep. 342, on same point, as to purchaser from constructive trustee. Cited, also, in note to *Anthony v. Wheeler*, 17 Am. St. Rep. 290, on general subject, as to burden of proof; *Byers v. Locke*, 27 Am. St. Rep. 215, on evidence of consideration.

Declarations of Grantor after change of possession are inadmissible as against grantee, p. 87.

Cited in note on general subject to *Williams v. Eikenberry*, 13 Am. St. Rep. 525; and to *Welcome v. Mitchell*, 29 Am. St. Rep. 916.

Notice.—Recording act does not protect purchasers with knowledge of fact of prior conveyance though ignorant of terms, p. 87.

Cited to same effect in *Lawton v. Gordon*, 34 Cal. 38, 91 Am. Dec. 672, holding fraudulent conveyance good as to subsequent purchaser with notice; *Vaughn v. Schmalse*, 10 Mont. 197, on point that act does not protect subsequent judgment creditors. Cited, also, in note to *Ludlow v. Gill*, 1 Am. Dec. 695, on point that actual notice is equivalent to constructive notice; *Blanchard v. Tyler*, 86 Am. Dec. 62, defining bona fide purchaser without notice; *Smith v. Yule*, 89 Am. Dec. 171, on notice sufficient to put subsequent purchaser on inquiry; *Converse v. Blumrich*, 90 Am. Dec. 242, defining "notice"; *Barnard v. Duncan*, 90 Am. Dec. 425, on notice of defect of title; and to *Sutton v. Jervis*, 99 Am. Dec. 634, on notice of prior unrecorded deed.

26 Cal. 88-112. **MULFORD v. LE FRANC.**

Statute of Limitations.—Entry under enagenasion under Mexican law establishes adverse possession, p. 101.

Cited in *Vassault v. Seitz*, 31 Cal. 229, on point that court will not take judicial notice of pendency of proceedings for confirmation of land as pueblo, thus avoiding statute; and in *McLeran v. Benton*, 73 Cal. 342, 2 Am. St. Rep. 821, applying rule to bar by intruder of owner's title under Van Ness ordinance.

Mexican Conveyances.—"Cedo" is form ordinarily used, p. 108.

Cited to same effect in *Schmitt v. Giovanari*, 43 Cal. 624, construing such conveyance; and in *Steinbach v. Stewart*, 11 Wall. 576, 578, under like circumstances.

Construction of Deed.—Acts of parties done under it are admissible to show intent, p. 108.

Cited in *Schmidt v. Klotz*, 130 Cal. 224, so construing deed of right of way; *Terrell v. Huff*, 108 Ga. 658, on point that parol evidence is inadmissible to show intent and meaning of deed when unambiguous; *Chicago etc. Co. v. Powell*, 120 Mich. 57, noted under *Stanley v. Green*, 12 Cal. 148; *Reamer v. Nesmith*, 34 Cal. 627, admitting parol evidence to show location of land and calls and descriptions; *Truett v. Adams*, 66 Cal. 223, admitting parol evidence as to establishment of boundary line after conveyance; *Hill v. McKay*, 94 Cal. 20, applying rule to construction of contract; *Vejar v. Mound City etc. Co.*, 97 Cal. 668, as to property conveyed by deed; *Edens v. Miller*, 147 Ind. 214, as to reservation in will; *Kanne v. Otly*, 25 Oreg. 536, admitting evidence of intention to explain ambiguity in description; *Hamm v. San Francisco*, 9 Sawy. 47, 17 Fed. Rep. 124, as to false or indefinite description; *Pratt v. California etc. Co.*, 9 Sawy. 359, 24 Fed. Rep. 872, as to interests conveyed by deed; and in *Starr v. Stark*, 2 Sawy. 625, 22 Fed. Cas. 1124, as to contracts for adjusting claims to real estate.

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fourteen thousand eight hundred dollars would be eighty-eight dollars and eighty cents; whereas the amount levied and recovered for county purposes is one thousand six hundred and eighty-nine dollars and sixty-cents; and the whole amount sued for and recovered, including national tax, percentage and costs, is two thousand nine hundred and twelve dollars and forty-four cents—about one fifth of the entire assessed value of the property. It is claimed that for this reason, it appears upon the face of the record that the judgment is erroneous. The respondents, however, insist that as the statute does not require the valuation to be stated in the complaint, it was unnecessary to state it, and it may be regarded as surplusage. It may be that the complaint would have been sufficient without this averment, but the valuation is an essential step in the levy of a tax, and is the only basis upon which the amount of the tax can be ascertained. It is a fact, material to the validity of a tax, if not necessary to be stated in the complaint, and when stated must be considered. The valuation is alleged, and it must be deemed to have been stated correctly. From the valuation as alleged, it appears affirmatively on the face of the complaint, that the amount of the taxes levied, and claimed and recovered in this suit, is wholly unauthorized by law. The judgment, therefore, is manifestly erroneous, and must be reversed on this ground.

There is evidently some mistake in the averments, but the complaint does not afford the means of correcting it, or of determining what amount of taxes, if any, has been legally assessed.

The judgment is reversed without costs, and the cause remanded for further proceedings, with leave to both parties to amend their pleadings.

Mr. Justice CURREY, being disqualified, did not sit on the hearing of this case.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

lature to order court to grant new trials in like cases; *Estate of Sticknoth*, 7 Nev. 229, as to act whose effect was to waive escheat; *Calkins v. State*, 21 Wis. 503, as to act allowing reopening of suits against state; and *State v. Dexter*, 10 R. L. 347, as to act allowing appeal to be taken against state, although beyond legal time. Cited, also, in note to *Bank v. Cooper*, 24 Am. Dec. 542, on general subject.

26 Cal. 141-145. **LOW v. ALLEN.**

Suit on Mortgage barred as to resident mortgagors is not kept alive because of comortgagor's absence from state, p. 144.

Cited in *Brandenstein v. Johnson*, 140 Cal. 32, noted under *Lord v. Morris*, 18 Cal. 490; *De Voe v. Rundle*, 33 Wash. 611, where limitation has run against a mortgage, it cannot be reviewed by any act of mortgagor as against subsequent judgment lien, and upon foreclosure contested by judgment creditor he should be awarded priority; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor on mortgage indebtedness does not extend limitations as against judgment creditor of mortgagor who has bought mortgaged premises at execution sale; *George v. Butler*, 26 Wash. 463, absence of mortgagor from state does not suspend limitations as to mortgage when he has parted with all his interest in premises to subsequent resident grantee. Distinguished in *Law v. Spence*, 5 Idaho, 253, where action for debt is barred by limitations, lien is also barred, and whatever prevents running of statute upon one will prevent it upon both; *Lent v. Shear*, 26 Cal. 366, holding, further, no waiver of statute by fraud; *Barber v. Babel*, 36 Cal. 20, 21, on point that comortgagor (husband) cannot by his individual act waive or extend bar; and in *Wood v. Goodfellow*, 43 Cal. 188, ruling similarly as to effect of mortgagor's act on subsequent encumbrancers; *Sichel v. Carrillo*, 42 Cal. 503, on point that failure to present claim on note against maker's estate does not release mortgage given by another to secure it; *Jordan v. Sayre*, 24 Fla. 7, on point that bar of note does not bar mortgage when latter's period of limitation is longer; *Schmucker v. Sibert*, 18 Kan. 110, 26 Am. Rep. 769, on point that revivor of mortgagor after bar, by mortgagor's part payment, does not affect his grantee or subsequent encumbrancers before the revivor; in *Baldwin v. Boyd*, 18 Neb. 449, on point that grantee from homestead patentee can plead exemption from debts at issuance of patent. Cited, also, in *Goldfrank v. Young*, 64 Tex. 438, on point that bar of debt bars mortgage also; and in note to *McCarthy v. White*, 82 Am. Dec. 757, as to right of subsequent mortgagee to assert bar.

26 Cal. 149-155. **RICKETSON v. RICHARDSON.**

Service by Publication must follow statutory requirements strictly, p. 152.

Cited to same effect, holding service void, in *McMinn v. Whelan*, 27

Cal. 314, where summons as published was not that issued, and holding, further, as to publication after supplemental complaint; In re Tracey, 136 Cal. 390, noted under *Jordan v. Giblin*, 12 Cal. 100; *Columbus Screw Co. v. Warner etc. Co.*, 138 Cal. 446, holding affidavit insufficient; *Park v. Higbee*, 6 Utah, 416, holding judgment on such service void under local statutes; *Galpin v. Page*, 18 Wall. 369 (and see S. C. 3 Sawy. 120, 122, 9 Fed. Cas. 1136, 1137, cited in note to *Hahn v. Kelly*, 94 Am. Dec. 768, holding, further, as to sufficiency of judgment-roll in case of such service); and in *Gray v. Larrimore*, 4 Sawy. 645, 2 Abb. U. S. 550, 10 Fed. Cas. 1028, where affidavit for order and affidavit of publication were held defective.

Affidavit for Service by Publication is insufficient when merely using language of statute, p. 153.

Cited to same effect, holding service void, *Brady v. Seaman*, 30 Cal. 617; and *Palmer v. McMaster*, 13 Mont. 188, 40 Am. St. Rep. 436, where affidavit held insufficient as to residence of defendant; *Forbes v. Hyde*, 31 Cal. 354 (cited in *Palmer v. McMaster*, supra; in *Ervin v. Milne*, 17 Mont. 499; and in *Neff v. Pennoyer*, 3 Sawy. 290, 17 Fed. Cas. 1287); *Yolo County v. Knight*, 70 Cal. 433, 435; *Beckett v. Cuenin*, 15 Colo. 285, 22 Am. St. Rep. 401; *Palmer v. McMaster*, 8 Mont. 193; 13 Mont. 188; 40 Am. St. Rep. 436; and in *Little v. Currie*, 5 Nev. 92, where affidavit insufficient as to statement of cause of action; *Bank v. Goodsell*, 137 Cal. 427, holding affidavit sufficient (but see page 428); *Rue v. Quinn*, 137 Cal. 656, sustaining affidavit; *Neff v. Pennoyer*, 3 Sawy. 290, 294, holding affidavit insufficient; *Romig v. Gillett*, 187 U. S. 116, grantee of purchaser at foreclosure sale cannot, because of insufficiency of affidavit for service by publication, be dispossessed or judgment set aside in equity at instance of one claiming under mortgagor by deed subsequent to mortgage which remains unpaid; *Coughran v. Markley*, 15 S. Dak. 42, upholding sufficiency of affidavit for publication of summons; dissenting opinion in *De Corvet v. Dolan*, 7 Wash. 369, as to residence of defendant, main opinion holding affidavit sufficient although following language of statute; and in *McDonald v. Cooper*, 13 Sawy. 90, 32 Fed. Rep. 748, as to diligence in ascertaining residence, but holding affidavit sufficient. Distinguished, holding affidavit sufficient, in *Legard v. California etc. Co.*, 76 Cal. 613, 614, as to such diligence; and in *Ervin v. Milne*, 17 Mont. 498, holding use of statutory language sufficient under local statute.

Judgment will not be reversed on appeal as to all defendants where error assigned affects only the defendant appealing, p. 154.

Cited to same effect in *Smith v. Egner*, 28 Ark. 478, as to service of summons on appealing defendant; *Wood v. Olney*, 7 Nev. 115, reversing order sustaining joint demurrer, as to one defendant only; Cited in *Bates etc. Co. v. Scott*, 56 Neb. 479, affirming judgment as to one appellant; *Lake v. Bender*, 18 Nev. 373, granting new trial only as to property

issues in divorce suit. Cited, also, in *Nelson v. Munch*, 28 Minn. 320, sustaining power to consider joint appeal although error not common to all appellants.

26 Cal. 156-157. **KERNS v. GRAVES.**

Time for Issuing Execution on justice's judgment begins to run from entry and not from filing transcript thereof in superior court, p. 156.

Cited to same effect in *McMann v. Superior Court*, 74 Cal. 107, on point that time for execution for costs on appeal runs from entry of judgment in docket of lower court; *Phelps v. McCollam*, 10 N. Dak. 238, on point that filing of transcript does not make the judgment one of the superior court as to presumption of regularity. Distinguished in *Williams v. Rice*, 6 S. Dak. 15, under local statute, holding judgment enforceable after docketing for such period as if originally rendered in superior court.

26 Cal. 161-262. **BOULAND v. HILDRETH.**

Act Allowing Soldiers to vote irrespective of legal residence is unconstitutional, p. 177.

Cited to same effect in *Day v. Jones*, 31 Cal. 263, construing similar act (Stats. 1864, p. 434).

Statute should be construed as constitutional unless clearly and manifestly otherwise, p. 183.

Cited to same effect, holding acts constitutional, in *People v. Sassovich*, 29 Cal. 482, as to act creating new judicial districts; *Ex parte Shrader*, 33 Cal. 281 (cited in *Ex parte Casinello*, 62 Cal. 541), as to act authorizing supervisors to regulate erection of slaughterhouses, etc.; *Brooks v. Hyde*, 37 Cal. 375, as to act relating to limitations for recovery of land in San Francisco; *S. & V. etc. Co. v. Stockton*, 41 Cal. 162, as to act empowering city to issue railway aid bonds; *University v. Bernard*, 57 Cal. 613, as to act providing for funding county indebtedness; Cited in dissenting opinion in *Tucker v. Barnum*, 144 Cal. 271, discussing provisions of County Government Act; *In re Application of Bank of Commerce*, 153 Ind. 463, on point that legislature may do anything not forbidden expressly or by clear implication; and in *S. P. etc. Co. v. Ortom*, 6 Sawy. 186, 32 Fed. Rep. 472, as to act authorizing railroad to change line of road; and holding act unconstitutional in *People v. Parks*, 58 Cal. 635, as to act to promote drainage. Cited, also, in note on general subject to *Lane v. Dorman*, 36 Am. Dec. 551; and to *Santo v. State*, 63 Am. Dec. 519.

Misconduct of Election Officers cannot defeat effect of votes legally cast, p. 214.

Approved in *Davis v. Grunig*, 143 Cal. 340, as to failure to transmit tally lists; note to *People v. Bates*, 83 Am. Dec. 754, upon general subject.

"General Laws" include those which affect an entire class of persons or things, though less than all, p. 256.

Cited to same effect in dissenting opinion in Appeal of N. B. etc. Co., 32 Cal. 527, main opinion holding Kearny Street Widening Act (Stats. 1864, p. 347) constitutional; Corwin v. Ward, 35 Cal. 199, 95 Am. Dec. 94, holding constitutional act allowing percentage as costs in actions in city and county of San Francisco; Brooks v. Hyde, 37 Cal. 375, ruling similarly as to Limitation Act for recovery of land therein; Ex parte Smith, 38 Cal. 710, ruling similarly as to ordinance prohibiting presence of women in saloons after midnight; Sasser v. Martin, 101 Ga. 466, noted under Smith v. Judge, 17 Cal. 554.

26 Cal. 263-272. ST. JOHN v. KIDD.

Exception to Charge of Court should be taken in time to allow modification if necessary, p. 267.

Cited to same effect in Sill v. Reese, 47 Cal. 348, on point that such exceptions should be specific; and on same point in Dixon v. Allen, 69 Cal. 529; dissenting opinion in Valerius v. Richards, 57 Minn. 448, main opinion denying new trial for errors at law when not excepted to at trial.

Secondary Evidence is Sufficient, if not objected to as being secondary, p. 269.

Cited to same effect in Wright v. Roseberry, 81 Cal. 91, as to parol proof of patent.

Forfeiture of Mining Claim arises from failure to comply with prescribed rules for holding it, p. 271.

Cited to same effect in King v. Edwards, 1 Mont. 241, holding claim forfeited through failure to do prescribed work, although rules did not expressly declare such penalty.

Abandonment of Mining Claim is question of intention, p. 271.

Cited to same effect in Wood v. Etiwanda, 147 Cal. 234, applying rule to abandonment of water right secured by appropriation; Davis v. Perley, 30 Cal. 636, as to abandonment of land; Bell v. Bedrock etc. Co., 36 Cal. 218, admitting evidence explanatory of intention in leaving claim; Moon v. Rollins, 36 Cal. 338, 95 Am. Dec. 183; and in Mitchell v. Carder, 21 W. Va. 285, holding no intention to abandon proven by mere absence for long period; Utt v. Frey, 106 Cal. 397, as to water right, holding no abandonment shown by facts; Oreamuno v. Uncle Sam etc. Co., 1 Nev. 218, sustaining various instructions; Lakin v. Sierra Buttes etc. Co., 11 Sawy. 240, 25 Fed. Rep. 343, holding abandonment of mining claim not shown by facts; and in Hewitt v. Story, 64 Fed. Rep. 527, ruling aliter as by facts; and Valcalda v. Silver Peak Mines, 86 Fed. Rep. 95, ruling similarly as to mill site locations; and in Hewitt v. Story, 64 Fed. Rep. 527, ruling aliter as to abandonment of water right.

Cited, also, in note to Wyman v. Hurlburt, 40 Am. Dec. 464, 466, on general subject.

26 Cal. 272-278. **ELLIS v. JEANS.** S. C. 7 Cal. 409; 10 Cal. 456.

New Trial will not be ordered on appeal where evidence is conflicting, p. 276.

Cited to same effect in Appeal of Piper, 32 Cal. 537, refusing to set aside report of commissioners in street widening proceedings; Pralus v. Pacific etc. Co., 35 Cal. 37, ruling similarly as to finding.

Joint Judgment in Ejectment may be rendered when court not requested to distinguish as to separate claims of defendants, p. 276.

Cited to same effect in Andrews v. Carlisle, 20 Colo. 372, where defendants filed separate answers in suits afterward consolidated, but did not demand separate trials. Cited, also, in note to Winans v. Christy, 60 Am. Dec. 599, on general subject.

26 Cal. 279-286. **ELLSASSAR v. HUNTER.** ♦

Motion for New Trial will be denied when notice filed too late, p. 283.

Cited to same effect in Cooney v. Furlong, 66 Cal. 522, where amended notice filed after time had elapsed, no statement having been filed pursuant to first; Sullivan v. St. Helena, 10 Mont. 140, where like new notice filed too late, specifying additional grounds; and in Kent v. Upton, 3 Wyo. 45, holding erroneous an ex parte order to extend time for filing notice. Distinguished in Bates v. Gage, 49 Cal. 128, holding time for motion in equity case, where verdict rendered on special issues, to run from judgment of court.

26 Cal. 286-288. **DANNEBROGE G. M. CO. v. ALLMENT.**

De Facto Corporation.—Question of incorporation cannot be raised collaterally, p. 288.

Cited to same effect in People v. Frank, 28 Cal. 519, holding evidence of de facto existence sufficient on trial for forging draft on corporation; Oroville etc. Co. v. Plumas Co., 37 Cal. 361, and Bakersfield etc. Co. v. Chester, 55 Cal. 101, on point that substantial compliance with laws is sufficient for de jure existence against collateral attack where company acts in good faith; Pacific Bank v. De Ro, 37 Cal. 541, where question raised as to power of legislature to change corporate name by special act; and in Society v. Cleveland, 43 Ohio St. 496, holding further as to retroactive effect of judgment of ouster. Cited, also, in note to Hildreth v. McIntire, 19 Am. Dec. 67, on general subject.

26 Cal. 288-293. **MORRILL v. MORRILL.**

Pleading.—Denial of conjunctive allegation in same terms does not put in issue all facts so pleaded, p. 292.

Cited to same effect in *Landers v. Bolton*, 26 Cal. 418, as to replication denying conveyance for consideration; and in *Randolph v. Harris*, 28 Cal. 567, 87 Am. Dec. 142, as to assignment for valuable consideration; and in *Dall v. Good*, 38 Cal. 290, as to ownership of cattle of certain value.

26 Cal. 294-309. **STODDARD v. TREADWELL.** S. C. 29 Cal. 281.

Demurrer to Whole Complaint will be overruled when part of complaint is good, p. 302.

Cited to same effect in dissenting opinion in *Clark v. Smith*, 66 Cal. 653, main opinion sustaining demurrer to complaint on undertaking for use and occupation, based on statutory limitations, when suit later than four years after affrmance; and in *Stafford v. Western Union etc. Co.*, 73 Fed. 274, where some counts were good on demurrer.

Complaint on Contract may allege it according to legal effect or in *haec verba*, p. 302.

Cited to same effect in *Love v. Sierra Nevada etc. Co.*, 32 Cal. 649, 91 Am. Dec. 603, holding further allegations as to its effect surplusage when inconsistent with contract as set out in full; *Hallock v. Jaudin*, 34 Cal. 175, holding allegation as to firm indebtedness aided by note inserted in complaint; *Joseph v. Holt*, 37 Cal. 253, holding further as to necessity for supplementing contract by proper allegations when set out in full; *Murdock v. Brooks*, 38 Cal. 603, holding contract so set out to be part of pleading and not merely evidence; *Lambert v. Haskell*, 80 Cal. 613, where contract annexed to complaint; concurring opinion in *Hibernia etc. Soc. v. Thornton*, 127 Cal. 577, discussing ruling on prior appeal, 117 Cal. 481. See *Stow v. Schiefferly*, 120 Cal. 612, as to repugnance between exhibit and allegations; and in *Quirk v. Clark*, 7 Mont. 234, on same point; holding further objection waived by failure to demur (but see *Penrose v. Pacific etc. Co.*, 66 Fed. Rep. 254, distinguishing main case); *White v. Soto*, 82 Cal. 657, where contract and its modification pleaded according to legal effect; and in *Santo v. Maynard*, 57 Conn. 160, applying rule to pleading servant's act as act of master, according to legal effect. Case is cited, also, in *San Francisco v. Certain Real Estate*, 42 Cal. 518, on point that appeal from consent order will not be heard, but probably by mistake for *Treadwell v. Well*, 4 Cal. 280.

Facts Constituting Counterclaim cannot be shown unless so pleaded, p. 305.

Cited in note to *McKyring v. Bull*, 69 Am. Dec. 706, as to special defenses generally; and to *Woodruff v. Garner*, 89 Am. Dec. 492, on point that defendant need not set up counterclaim.

Prospective Profits are element of damage when natural and first effect of injury alleged, p. 307.

Cited to same effect in *Shoemaker v. Acker*, 116 Cal. 245, as to pros-

pective profits from fruit crop. Cited, also, in note to *Masterson v. Mayor*, 42 Am. Dec. 49, on damages for breach of executory contracts.

Counterclaim, if existing at commencement of action, is allowable even if for unliquidated damages, p. 309.

Cited to same effect in *Lyon v. Petty*, 65 Cal. 325, denying right to counterclaim because barred at commencement of action. Cited, also, in note on general subject to *Van Epps v. Harrison*, 40 Am. Dec. 325, as to unliquidated damages, and p. 333, as to recoupment in actions for work and labor.

26 Cal. 309-315. DEPUY v. WILLIAMS.

Failure to Perform Required Work on mining claim constitutes abandonment and subjects it to reappropriation, p. 313.

Cited to same effect in *Kramer v. Settle*, 1 Idaho, 492, construing local act. Cited, also, in note to *Wyman v. Hurlburt*, 40 Am. Dec. 466, on abandonment of mining claims.

Complaint of Ejectment need not allege evidence as to how defendants obtained possession, p. 314.

Cited to same effect in *Reed v. Calderwood*, 32 Cal. 110, as to plaintiff's acquiring of possession, in action to quiet title; *McCarthy v. Brown*, 113 Cal. 20, holding findings in ejectment, as to right of possession, sufficient; and in *Scorpion etc. Co. v. Marsano*, 10 Nev. 378, on point that question of means of plaintiff's acquiring possession is immaterial in action to quiet title.

Evidence may be Rejected as irrelevant where no offer to show connection is made, p. 315.

Cited to same effect in *Wicks v. Smith*, 18 Kan. 515, holding, however, rejection erroneous when testimony *prima facie* relevant and pertinent.

26 Cal. 316-328. GODCHAUX v. MULFORD. 85 Am. Dec. 178.

Notice of Motion for new trial may be shown to have been given, by stipulation to statement, p. 319.

Cited to same effect in *Randall v. Duff*, 79 Cal. 123, where inferred from terms of order denying motion; *Harrigan v. Lynch*, 21 Mont. 42, holding notice waived by presentation of amendments of statement.

Fraudulent Conveyance.—"Actual and continued change of possession" defined and explained, p. 322.

Cited in *George v. Pierce*, 123 Cal. 177, noted under *Stevens v. Irwin*, 15 Cal. 503; *Harkness v. Smith*, 2 Idaho, 955, holding sale fraudulent under facts stated; *Harkness v. Smith*, 3 Idaho, 224, when merchant sold stock to one of creditors, who held chattel mortgage on stock as security and sale made twenty-five miles from store, and no inventory or examination of stock made, and merchant continued to conduct busi-

ness except that he added abbreviation "Mgr." when signing letters, etc., sale was void as to creditors; holding sales fraudulent, *Woods v. Bugbey*, 29 Cal. 472, 475, as to sale of kiln of bricks; *Bell v. McClellan*, 67 Cal. 285, as to sale of hay presses; *Ray v. Raymond*, 8 Colo. 470, as to transfer of firm banking business; *Bassinger v. Spangler*, 9 Colo. 185, and *Howard v. Dwight*, 8 S. Dak. 402, as to sale of stock of goods in store; *Allen v. Steiger*, 17 Colo. 557, as to sale of household furniture. Cited, also, holding sales legal, in *Gould v. Huntley*, 73 Cal. 402, as to sale of mare; *Claudius v. Aguirre*, 89 Cal. 503, where finding affirmed because evidence conflicting; and *Meads v. Lasar*, 92 Cal. 228, as to sale of live-stock.

Fraudulent Conveyance.—Employment of vendor by vendee does not conclusively show fraud in sale, p. 324.

Cited to same effect in *Goldstein v. Nunan*, 66 Cal. 544, holding such employment only element of proof for jury; *Adams v. Weaver*, 117 Cal. 48, where vendor of wheat was employed as foreman in its harvesting; *Levy v. Scott*, 15 Cal. 48, and *Grady v. Baker*, 3 Dak. Ter. 300, where vendor of stock of goods was employed as salesman; *Rosenbaum v. Hayes*, 10 N. Dak. 324, noted under *Montgomery v. Hunt*, 5 Cal. 386; *O'Gara v. Lowry*, 5 Mont. 437, where vendor of horse and wagon was employed as driver; *Dodge v. Jones*, 7 Mont. 132 (but see dissenting opinion 136, 141, 145), where vendors of horses on range were employed to take charge of them; *Gray v. Sullivan*, 10 Nev. 424, applying rule to employment of servant of vendor of horses and wagons; *Ewing v. Merkle*, 3 Utah, 413, where vendor of saloon (under bill of sale with verbal defeasance) was employed as barkeeper; and in *Everett v. Taylor*, 14 Utah, 245, where vendor of wool was employed to hold and sell it. Cited, also, in note on general subject to *Stevens v. Irwin*, 76 Am. Dec. 604, and to *Claffin v. Rosenberg*, 97 Am. Dec. 344.

Chattel Mortgage is not void which creates trust as to surplus after payment of debt, p. 326.

Distinguished in *Catlin v. Currier*, 1 Sawy. 12, 5 Fed. Cas. 302, holding such mortgage void because of agreement that property should remain in hands of mortgagor and proceeds applied to his own use.

26 Cal. 328-336. VALENCIA v. BERNAL.

Executor de Son Tort.—Heirs cannot recover distributive shares from persons taking possession of estate under and for widow, p. 335.

Cited in *Bowden v. Pierce*, 73 Cal. 463, on point that such office is not recognized under California probate law.

26 Cal. 336-361. PEOPLE v. MORRILL.

Lands below Ordinary High Water Mark belong to state by virtue of its sovereignty, p. 354.

Cited to same effect in *Rondell v. Fay*, 32 Cal. 363, construing state patent; *Taylor v. Underhill*, 40 Cal. 473, on point that such lands are not "swamp and overflowed"; *Kimball v. MacPherson*, 46 Cal. 107, on point that sand beach on ocean shore between high and low water marks is not salable under Stats. 1867-68, p. 514; *Upham v. Hosking*, 62 Cal. 258, 259, ruling similarly as to said act, but holding sale validated by Stats. 1871-72, p. 587; *Wright v. Seymour*, 69 Cal. 126, on point that such land does not pass under United States patent unless such intent clearly appears; and in *Elliott v. Stewart*, 15 Oreg. 261, defining "tide lands" and holding those in suit not included in term.

"Swamp and Overflowed Land," under Arkansas Act, includes "salt marsh land," p. 355.

Cited to same effect in *Rondell v. Fay*, 32 Cal. 364, construing state patent; in *Tubbs v. Wilhoit*, 73 Cal. 67, on point that term does not include lands subject to periodical overflow, but cultivated.

State Patent to land bounded by sea, etc., extends to high water mark, p. 356.

Cited to same effect in *Heckman v. Swett*, 99 Cal. 307, construing patent to swamp land.

Injunction.—Owner of land (the state) may restrain removal of asphalt deposits thereon, p. 360.

Cited to same effect in *More v. Massini*, 32 Cal. 594. Cited in *Richards v. Dower*, 64 Cal. 64, as to threatened trespass and waste, although insolvency of defendant not alleged.

Parties in Equity should include all persons interested in subject matter, p. 360.

Cited in *Daly v. Ruddell*, 137 Cal. 674, sustaining joinder of plaintiffs in action affecting water rights; *Wilson v. Castro*, 31 Cal. 427, holding no misjoinder of defendants in action to declare and enforce constructive trust; *Baines v. West Coast etc. Co.*, 104 Cal. 8, ruling similarly as to plaintiffs in creditors' bill; in *Fairbanks v. San Francisco etc. Co.*, 115 Cal. 583, as to joinder as plaintiffs of owner and insurer in action for negligently setting fire to property. Cited, also, in *Torrent v. Hamilton*, 95 Mich. 161, defining multifariousness and holding each case to depend on own facts as to sufficiency of pleading in this respect.

Demurrer to entire bill will be overruled when bad as to part of bill, p. 361.

Cited in *Jones v. Iverson*, 131 Cal. 104, but sustaining special demurrer as to parts of complaint when specifically attached; *Althof v. Conheim*, 38 Cal. 234, 99 Am. Dec. 364, on point that prayer of complaint is not subject to demurrer. and in *Evans v. Fall River Co.*, 9 S. Dak. 135, on point that joint demurrer will be overruled when complaint is good as to any of defendants joining in it.

26 Cal. 361-371. LENT v. SHEAR.

Bar of Statute in foreclosure is not extended as to subsequent mortgagee by acknowledgment by mortgagor, p. 369.

Cited to same effect in *Barber v. Babel*, 36 Cal. 20 (cited in *Jenkins v. Simmons*, 37 Kan. 508), as to execution of new note by husband [co-mortgagor] on homestead; *Sichel v. Carrillo*, 42 Cal. 503, as to failure to present claim against husband's estate on note to secure which wife had mortgaged her separate property; *Wood v. Goodfellow*, 43 Cal. 188, as to effect of absence of mortgagor on subsequent holders or encumbrancers; *Jeffers v. Cook*, 58 Cal. 151, on point that subsequent grantees, not made parties to foreclosure suit until barred, may plead statute in bar of suit as to them; *Schmucker v. Sibert*, 18 Kan. 110, 26 Am. Rep. 769, as to effect on grantee of part payment by mortgagor after bar; *Hill v. Hilliard*, 103 N. C. 39, as to effect on subsequent mortgagee of mortgagor's promise not to plead statute; *Cason v. Chambers*, 62 Tex. 307, where chattel mortgagor renewed mortgage by new note after sale made after bar; and in *Gruner v. Weston*, 66 Tex. 217, applying rule to assertion by grantee of loss or extinguishment of judgment lien; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor on mortgage debt does not extend limitations as against judgment creditor of mortgagor who has bought in mortgaged premises under execution; *George v. Butler*, 26 Wash. 463, absence of mortgagor from state will not suspend limitations where he has parted with interest in premises to subsequent resident grantee. Distinguished in *Ward v. Waterman*, 85 Cal. 507, holding assertion of mistake to be personal under facts stated. Cited, also, in note to *McCarthy v. White*, 82 Am. Dec. 757, as to right of subsequent mortgagee to assert bar.

Action to Foreclose Mortgage is barred as to subsequent mortgages, in four years from its maturity, p. 369.

Cited to same effect in *Siter v. Jewett*, 33 Cal. 97, as to bar of grantee of mortgagee.

26 Cal. 372-387. PERRY v. AMES.

Act is Repealed by passage of repugnant act on same subject, p. 382.

Cited to same effect in *In re Mitchell*, 120 Cal. 387, holding, however, second act not so repugnant.

Concurrent Jurisdiction of District Court extends to issuance of writs of mandate, etc., p. 383.

Cited to same effect in *Cariaga v. Dryden*, 30 Cal. 246, as to mandate, irrespective of amount involved; *Courtwright v. Bear River etc. Co.*, 30 Cal. 583, 584, 585 (cited in *Robinson v. Fair*, 128 U. S. 83), on point that such concurrent jurisdiction extends to actions to abate nuisance; *Knowles v. Yates*, 31 Cal. 90, discussing appellate jurisdiction of su-

preme court in contested election cases; *State v. McCullough*, 3 Nev. 216, as to jurisdiction of supreme court to issue mandamus in exercise of original jurisdiction; dissenting opinion in *Rosenbaum v. Bauer*, 120 U. S. 462, main opinion denying power of United States circuit court to issue mandamus except as ancillary relief; and in *Robinson v. Fair*, 128 U. S. 80, 81, affirming jurisdiction of probate courts in partition suit among heirs after distribution of estate. Cited, also, in note to *Conant v. Conant*, 70 Am. Dec. 724, on jurisdiction of supreme court.

26 Cal. 387-393. **WALLACE v. MOODY.**

Recording Act of 1860, page 357, effected constructive notice of all deeds then recorded, whether properly so or not, p. 391.

Cited in *McMinn v. O'Connor*, 27 Cal. 245, holding certified copy of such record admissible in evidence without accounting for loss of original; and in note to *Ludlow v. Gill*, 1 Am. Dec. 695, as to effect of recording acts generally.

26 Cal. 393-420. **LANDERS v. BOLTON.** S. C. 27 Cal. 104.

Certificate of Acknowledgment is prima facie correct but may be rebutted, p. 406.

Cited in *Albany etc. Bank v. McCarty*, 149 N. Y. 80, as to nature of proof necessary to rebut. Distinguished in *Hitz v. Jenks*, 123 U. S. 306, holding married woman's acknowledgment conclusive except for fraud, under local practice; and cited in *Homeopathic etc. Co. v. Marshall*, 32 N. J. Eq. 110, to same effect, when in favor of bona fide purchaser for value.

Certified Copy of Recorded Deed is admissible under Act of 1860, though not entitled to record, p. 407.

Cited to same effect in *McMinn v. O'Connor*, 27 Cal. 245 (cited in *McMinnn v. Whelan*, 27 Cal. 310), as to deed acknowledged before consular agent; *Farmers' Exchange Bank v. Purdy*, 130 Cal. 457, on point that mortgage is valid between parties without acknowledgment.

Married Woman's Deed is void when not acknowledged in statutory form, p. 408.

Cited to same effect in dissenting opinion in *Reis v. Lawrence*, 63 Cal. 139, main opinion holding her estopped by facts as to deed executed as feme sole; and in *Wambole v. Foote*, 2 Dak. Ter. 23, holding facts necessary to be stated in certificate. Cited, also, in note to *Livingston v. Kettelle*, 41 Am. Dec. 179, 183, as to married woman's acknowledgments; *Stillwell v. Adams*, 29 Ark. 353, where certificate did not recite privy examination.

Handwriting of Subscribing Witness need not be proved when he is beyond jurisdiction of court, except when attestation is required by law, p. 409.

Cited in note on general subject to *Valentine v. Piper*, 33 Am. Dec. 723.

Documents are "introduced in evidence" when offered and not objected to, p. 414.

Cited to same effect in *Wright v. Roseberry*, 81 Cal. 93, holding papers introduced, under facts.

Denial of Conjunctive Allegation is insufficient unless each element separately denied, p. 417.

Cited to same effect in *More v. Del Valle*, 28 Cal. 172, as to answer in forcible entry suit, *Fish v. Redington*, 31 Cal. 194, where complaint was verified; *Dall v. Good*, 38 Cal. 290, as to possession of property of stated value; *Scovill v. Barney*, 4 Oreg. 290, as to allegations of mental capacity; *Rock S. etc. Co. v. S. L. etc. Assn.*, 7 Utah, 162, holding denial insufficient as being a negative pregnant.

Sufficiency of Replication to deny allegations of answer, p. 417.

Approved in *Davenport v. Dose*, 40 Or. 339, where answer denied allegations of complaint "except as hereinafter alleged," and stated that plaintiff was employed to ship grain, conceded that certain sum due him as commission and set up counterclaim, it was error to nonsuit.

Pleading Must be Construed most strongly against pleader, p. 418.

Cited in *Thompson v. Lynch*, 29 Cal. 191, as to allegations of execution of deeds; dissenting opinion in *Burke v. McDonald*, 2 Idaho, 319, as to allegations of possession.

Recording Act.—"Bona fide purchaser" does not include one having constructive notice of prior conveyance from possession, p. 419.

Cited to same effect in *Bell v. Pleasant*, 145 Cal. 413, in action to cancel deeds, when plaintiff asserts title under prior unrecorded deed, and defendant claims under recorded deeds resting on subsequent recorded deed from plaintiff's grantor, under grantee took not title as such, burden is on defendant to show he was bona fide purchaser; *Lawton v. Gordon*, 34 Cal. 38, 91 Am. Dec. 672, as to fraudulent conveyance; *Pell v. McElroy*, 36 Cal. 272, as to notice by adverse possession, as relating to vendor's lien; *Randall v. Duff*, 79 Cal. 127, as to purchase under foreclosure decree where title deraigned through agent's invalid sale; and in *Gale v. Shillock*, 4 Dak. Ter. 186, as to extent of holding when entry made under color of title. Cited, also, in note *Hunter v. Watson*, 73 Am. Dec. 549, on possession as notice of title; *Anthony v. Wheeler*, 17 Am. St. Rep. 290, defining bona fide purchaser; and in *Sillyman v. King*, 36 Iowa, 214, 215, on same point as to priority under recording act.

Possession of Tenant is notice of his landlord's title, p. 419.

Cited to same effect in *Thompson v. Pioche*, 44 Cal. 516; and in *Conlee v. McDowell*, 15 Neb. 189.

Deed to Married Woman for money consideration presumptively creates common property, p. 420.

Cited to same effect in *Schuyler v. Broughton*, 70 Cal. 283, holding property partly separate and partly community. Cited, also, in note on general subject to *Meyer v. Kinzer*, 73 Am. Dec. 543; *Cooke v. Bremond*, 86 Am. Dec. 637; and to *Shaw v. Hill*, 96 Am. Dec. 423.

Community Property is subject to husband's control, even if conveyance taken in wife's name, p. 420.

Cited to same effect in *Tolman v. Smith*, 85 Cal. 283, as to mortgage by husband, and holding further property to be community, under facts; and in *Hearfield v. Bridges*, 75 Fed. Rep. 49, as to same power, and holding further as to effect of amendment of 1891 to the Civil Code, section 172.

26 Cal. 420-435. **MAGRAW v. McGLYNN.**

Executor may be ordered to pay in gold coin an established claim against estate, p. 430.

Cited to same effect in dissenting opinion in *Fox v. Minor*, 32 Cal. 127, 130, main opinion holding erroneous a judgment payable in gold coin against sureties on guardian's bond; and in *In re Den*, 39 Cal. 70, on point that where executor has received gold he may be ordered to pay creditors in gold; aliter when receiving currency.

Probate Claim, When Allowed and Approved, becomes qualified judgment only, p. 431.

Cited in *Morton v. Adams*, 124 Cal. 232, 71 Am. St. Rep. 56, quoting *Estate of Glenn*, 74 Cal. 568; *Estate of Glenn*, 74 Cal. 568, on point that claim draws interest from allowance; and in *In re Monillerat's Estate*, 14 Mont. 251 (but see 260), on point that allowance does not protect claim from disallowance on hearing of account. Cited, also, in note to *Moore v. Hillebrant*, 65 Am. Dec. 123, on general subject.

26 Cal. 435-447. **LEONARD v. TOWNSEND.**

Judgment may be rendered against married woman, for costs, in action wherein she is a plaintiff, p. 443.

Cited in *Buford v. Adair*, 43 W. Va. 216, 64 Am. St. Rep. 858, noted under *Maclay v. Love*, 25 Cal. 367; note on general subject to *Caldwell v. Walters*, 55 Am. Dec. 608; at 609, as to validity of sale under such judgment; and to *Maclay v. Love*, 85 Am. Dec. 144, as to powers of married women generally.

26 Cal. 447-455. **WHITNEY v. BUCKMAN.**

Order Appointing Receiver cannot be reviewed on appeal from order after final judgment directing him to pay over certain moneys, p. 454.

Cited in *San Jose Bank v. Bank of Madera*, 121 Cal. 545, and distinguished as based on prior statute; and see note to *Cameron v. Groveland etc. Co.*, 72 Am. St. Rep. 39, 68, on appointment of receivers, as to other points in main case; *Smith v. White*, 62 Neb. 61.

Distinguished in *Emeric v. Alvarado*, 64 Cal. 623, holding order appointing receiver in partition suit not appealable. Cited, also, in note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 495, on appointment of receivers in ejectment suit.

26 Cal. 455-478. (De) **MERLE v. MATHEWS.**

Errors which Cause no Injury to appellant will not authorize reversal, p. 467.

Cited to same effect in *Hoag v. Pierce*, 28 Cal. 192, as to admission of evidence; *Phipps v. Hully*, 18 Nev. 140, in similar case.

Contracts of Sale of Realty Under Mexican Law.—Requisites stated and discussed, p. 468.

Cited in *Lick v. Diaz*, 30 Cal. 73, holding insufficient a certificate of renunciation by joint grantee from alcalde; *Schmitt v. Giovanari*, 43 Cal. 624, and *Steinbach v. Stewart*, 11 Wall. 578, on point that conveyance need not express consideration; and in *Maxwell etc. Co. v. Dawson*, 151 U. S. 596, on point that contract must be in writing.

Alien Grantee From Mexican Owner acquired good title under Mexican law, subject only to proceeding by denouncement, p. 474.

Cited to same effect in *Racouillat v. Sansevain*, 32 Cal. 386, as to purchase by and descent to nonresident aliens; *McNeil v. Polk*, 57 Cal. 324, as to right of aliens to inherit; *Williams v. Bennett*, 1 Tex. Civ. App. 507; *Hammekin v. Clayton*, 2 Woods, 339, 11 Fed. Cas. 376; and in *Phillips v. Moore*, 100 U. S. 211, as to deed to alien of land in Texas, while under Mexican rule.

26 Cal. 479-514. **CAPERTON v. SCHMIDT.** S. C. 85 Am. Dec. 187, and note 208.

Judgment may be pleaded in bar between parties and privies as to matters directly passed upon, p. 493.

Cited to same effect in *Garwood v. Garwood*, 29 Cal. 521, as to question of birth, when involved in order of probate court appointing administrator; *Jackson v. Lodge*, 36 Cal. 38, as to character of conveyance, when pleaded as payment in action on note, in *Young v. Brehe*, 19 Nev. 382, 3 Am. St. Rep. 894, as to delivery of deed when so pleaded; and in *Reed v. Cross*, 116 Cal. 484, as to question of fraud in execution of mortgage, in action in relation to mortgage; and in *Glen v. Savage*, 14 Oreg. 573, as to matters pleaded in first action, though withdrawn from jury on trial. Cited, also, in note on general subject, to *Betts v. Starr*, 13 Am. Dec. 99; *Agnew v. McElroy*, 48 Am. Dec. 775; *Doty v. Brown*, 53

Am. Dec. 356, as to evidence to show identity of issues; *Venable v. Dutch*, 1 Am. St. Rep. 264; and *German etc. Co. v. Shallcross*, 30 Am. St. Rep. 755.

Judgment is Not Estoppel nor res judicata as to matters only collaterally involved, p. 494.

Cited in *Graves v. Hebborn*, 125 Cal. 403, 404, 405, but holding prior judgment an estoppel when extrinsic evidence showed that issues involved were the same; *Mayberry v. Alhambra etc. Co.*, 125 Cal. 450, holding prior judgment not res judicata as to construction of contract; *Lillis v. Emigrant etc. Co.*, 95 Cal. 559, as to extent of prescriptive right pleaded; and in *Hall v. Susskind*, 109 Cal. 206, as to property in second action not included in first. Cited, also, in note on general subject, to *King v. Chase*, 41 Am. Dec. 682.

Judgment in Ejectment is conclusive as to parties or privies as to all matters in issue and passed upon, p. 494.

Cited to same effect in *Marshall v. Shafter*, 32 Cal. 189, 197, 199, 200, as to title of parties; *Satterlee v. Bliss*, 36 Cal. 514, as to right of possession, and holding further as to definition of "privies"; *Avery v. Superior Court*, 57 Cal. 249, as to title, holding right to recover rent concluded thereby; *McClellan v. Hurd*, 21 Colo. 200, as to title on question of jurisdiction of court; *Elizabethport etc. Co. v. Whitlock*, 37 Fla. 224, as to title, applying rule to purchaser pendente lite; *Bazille v. Murphy*, 40 Minn. 50, as to defenses, pleadable but not pleaded; *Sherman v. Dilley*, 3 Nev. 26, discussing general rule at common law; *Barrell v. Title, etc. Co.* 27 Oreg. 82, 85, as to title and right to possession, holding further such estoppel to date only from rendition of judgment; and in *Hayner v. Stanly*, 8 Sawy. 219, 13 Fed. Rep. 221, as to title under and effect of deed. Distinguished, holding judgment not estoppel, in *Vance v. Olinger*, 27 Cal. 359, as to plea of another action pending, where second action was not shown to embrace same issues or property; *Mahoney v. Van Winkle*, 33 Cal. 459, as to new title acquired since first judgment; and on same point in *Thrift v. Delaney*, 69 Cal. 191; *Johnson v. Vance*, 86 Cal. 113, where different property involved and ouster as to second occurred after first judgment; *Boyle v. Wallace*, 81 Ala. 355, under local statute (but see *Carlisle v. Killebrow*, 89 Ala. 334); and in *Starr v. Stark*, 2 Sawy. 620, 22 Fed. Cas. 1122, where cause of action in second suit was included in one count of first complaint but court refused to consider issue. Cited, also, in note on general subject to *Oetgen v. Ross*, 95 Am. Dec. 472; *Lea v. Lea*, 96 Am. Dec. 785; *Davidson v. Morrison*, 9 Am. St. Rep. 304; and to *Hentig v. Redden*, 26 Am. St. Rep. 96.

26 Cal. 514-527. **MOORE v. MURDOCK.**

Grounds of Motion for New Trial will not be considered on appeal when not specified, p. 524.

Cited to same effect in *Brown v. Warren*, 16 Nev. 232, holding suf-

ficient, however, specification of error in motion for nonsuit. Cited, also, in note to *Wixon v. Water etc. Co.*, 85 Am. Dec. 73, upon unassigned errors.

Nonsuit Will Not be Granted unless verdict for plaintiff on same facts would have been set aside, p. 525.

Cited in note on general subject to *Mateer v. Brown*, 52 Am. Dec. 312.

Pleading of Ownership should not allege evidentiary facts from which it might be inferred, p. 524.

Cited in *Weinberger v. Weidman*, 134 Cal. 601, on point that allegations of evidence are not admitted by failure to deny; *Siter v. Jewett*, 33 Cal. 96, on point that failure to deny facts showing deraignment does not admit them; *Wormouth v. Hatch*, 33 Cal. 128, ruling similarly as to evidentiary facts showing indebtedness; *Thomas v. Desmond*, 63 Cal. 427; as to like allegations of wife's right to property as sole trader. Cited, also, in *Foren v. Dealey*, 4 Oreg. 94, on point that answer is sufficient when raising issue as to ultimate facts resulting from evidence.

"Chattel Mortgage" includes sale made to secure indebtedness, p. 524.

Cited to same effect in *Dunman v. Coleman*, 59 Tex. 204, holding transaction a chattel mortgage.

Sunday Contracts are valid except in instances prohibited by statute, p. 526.

Cited to same effect in *Roberts v. Barnes*, 127 Mo. 416, 48 Am. St. Rep. 646, sustaining trust deed so made; and in *More v. Clymer*, 12 Mo. App. 17, ruling similarly as to note. Cited, also, in note on general subject to *Coleman v. Henderson*, 12 Am. Dec. 292.

Mortgagee of Chattels in possession cannot be deprived of possession by officer holding attachment against mortgagor, p. 526.

Cited to same effect in *Berson v. Nunan*, 63 Cal. 552, and in *Hillman v. Pollock*, 47 Mo. App. 209, where mortgage recorded though possession not changed; *Everett v. Buchanan*, 2 Dak. Ter. 264, discussing change by local law of rule that title passed by chattel mortgage; *Conwell v. Lawrence*, 46 Kan. 86, refusing to revoke permission given mortgagee to sue receiver who had taken possession of chattels; and in *Adone v. Seelgeon*, 54 Tex. 600, applying rule to pledge where only bills of lading had been assigned. Cited, also, in note to *Savacool v. Boughton*, 21 Am. Dec. 208, as to seizure of wrong property.

26 Cal. 527-534. MORTON v. SOLAMBO ETC. CO.

Local Mining Customs and Usages are valid as to manner of acquisition of claims, p. 532.

Cited to same effect in *St. John v. Kidd*, 26 Cal. 272, holding claim forfeited by failure to comply with such rules. Cited, also, in note to

McClintock v. Bryden, 63 Am. Dec. 93, as to miners' rights; and at p. 104 as to general subject of local rules.

Location Notice cannot be changed without consent of all locators even if some did not know of location when notice posted, p. 534.

Cited to same effect in Thompson v. Spray, 72 Cal. 530, and Rush v. French, 1 Ariz. Ter. 150, holding persons named in first notice unaffected by filing amended notice omitting their names; and at p. 532, and Rush v. French, 1 Ariz. Ter. 150, 151, on point that right vests on posting even if agent making same was then unauthorized; Moore v. Hamerstag, 109 Cal. 124, on point that notice of location may be made in name of another than actual locator; and in Schultz v. Keeler, 2 Idaho, 309, on point that location may be initiated by agent.

Notice Locating Claims under mining customs cannot be changed so as not to include others designated in notice, p. 534.

Approved in Dunlap v. Pattison, 4 Idaho, 476, an agent may do everything necessary to perfect mining location, including making of affidavit required by Revised Statutes, section 3104.

26 Cal. 535-546. HAYES v. JOSEPH.

Surety is Discharged by tender to creditor of amount due, notwithstanding his refusal to accept, p. 541.

Cited in Daneri v. Gazzola, 139 Cal. 418, holding surety released under facts stated; Curia v. Packard, 29 Cal. 198, as to tender by principals in bond to sheriff to release attachment; Solomon v. Reese, 34 Cal. 36, holding further as to right of surety to recover back moneys deposited as indemnity to another surety; Sharp v. Miller, 57 Cal. 417, as to tender by sureties on appeal bond; O'Connor v. Braly (Morse), 112 Cal. 35, 36, 37, 53 Am. St. Rep. 157, 159, as to tender by makers of accommodation note given as collateral security; White's Admr. v. Life Assn., 63 Ala. 429, 35 Am. Rep. 51, as to tender by administratrix of deceased principal; and in Spurgeon v. Smitha, 114 Ind. 456, as to tender by principal on note, together with acceptance of part payment.

Surety Cannot Recover from principal until he has paid debt, p. 543.

Cited to same effect in California etc. Co. v. Armstrong, 8 Sawy. 529, 17 Fed. Rep. 220, as to right of tenant under covenant to repair to recover from tortfeasor unless repairs made or paid for by tenant.

Mortgage is not Discharged by tender, when made after day of maturity of debt, p. 545.

Cited to same effect in Mahler v. Newbauer, 32 Cal. 171, 91 Am. Dec. 572; and in Ketchum v. Crippen, 37 Cal. 226, discussing, but not deciding, question. Cited, also, in note to Kortright v. Cady, 78 Am. Dec. 159, on general subject.

26 Cal. 546-577. FULLER v. FERGUSON.

Separate Property.—Mexican grant to husband became his separate property, p. 564.

Cited to same effect in *Hood v. Hamilton*, 33 Cal. 702, as to colonization grant; *Morgan v. Lones*, 80 Cal. 319, applying principle to grant to wife under Town site Act, even where husband had used his funds for obtaining of patent. Cited also (from p. 567) in *Board v. Hayden*, 4 Wash. 272, 31 Am. St. Rep. 926, on point that spouses cannot form partnership. Cited, also, in note to *Rouquier v. Rouquier*, 16 Am. Dec. 187, as to nature of public grant to one spouse; and to *Cooke v. Bremond*, 86 Am. Dec. 628, 629, defining community property; 630, as to public grant; 632, as to increase of separate property; 634, as to effect of expenditure of labor on separate property; 635, as to nature of wife's earnings; and 643, as to conveyances from husband to wife.

26 Cal. 577-581. MAUGE v. HERINGHI.

Pledged Property may be sold after default and suit brought there-after for deficiency, p. 580.

Cited in *Wilson v. Brannan*, 27 Cal. 271, as to concurrent remedies of mortgagee of personality; and in *Wright v. Ross*, 36 Cal. 429, on same point, holding further as to distinctions between chattel mortgage and pledge. Distinguished in *Winters v. Hub etc. Co.*, 57 Fed. Rep. 292, holding that mortgagee cannot bring independent suits for foreclosure and for personal judgment.

26 Cal. 581-595. HATHAWAY v. BRADY.

Supplementary Proceedings.—Moneys in hands of third party cannot be ordered to be applied, without his examination, p. 589.

Cited to same effect in *Hagerman v. Tong Lee*, 12 Nev. 335, where ownership of property disputed. Cited, also, in note to *Massey v. Gorton*, 90 Am. Dec. 297, as to appointment of receiver in creditor's suit (and see *Bates v. International Co.*, 84 Fed. Rep. 524); and to *Lathrop v. Clapp*, 100 Am. Dec. 509, on general subject.

Specific Contract Act should be restricted to actions on contracts, p. 591.

Cited to same effect in *Howe v. Nickerson*, 14 Allen (Mass.), 405, denying specific performance of contract to pay in gold.

Money Deposited with Sheriff to release attachment is in custody of law, p. 594.

Distinguished in *Coffee v. Haynes*, 124 Cal. 566, 71 Am. St. Rep. 103, holding property of defendant taken by police after his arrest and at his direction, subject to garnishment by his creditor; *Kimball v. Richardson etc. Co.*, 111 Cal. 394, as to moneys voluntary paid into court by interpleading garnishee.

Same Case.—See *Hathaway v. Patterson*, 45 Cal. 299, 300.

26 Cal. 595-605. GREEN v. BUTLER.

Equity and Law Cases do not differ as to practice on taking of appeal, p. 599.

Cited to same effect in *Doe v. Vallejo*, 29 Cal. 391, as to affirmance of order denying new trial in equity case, where evidence conflicting; and in *Burbank v. Rivers*, 20 Nev. 84, as to review of evidence on appeal from judgment in such case, when no motion for new trial made.

Mortgagee may purchase equity of redemption when acting in good faith, p. 601.

Cited to same effect in *Watson v. Edwards*, 105 Cal. 76 (cited in note to *Hall v. Hall*, 44 Am. St. Rep. 700), as to surrender of defeasance, etc., and holding, further, nature of consideration therefor immaterial; and in *Wilson v. Carpenter*, 62 Ind. 502, as to surrender of defeasance on cancellation of debt; *Shaw v. Walbridge*, 33 Ohio St. 5, holding parol agreement to release equity of redemption valid under statute of frauds; *De Martin v. Phelan*, 47 Fed. Rep. 763, holding purchase good in absence of fraud, undue influence, or confidential relation. Cited, also, in note on general subject to *Bradbury v. Davenport*, 55 Am. St. Rep. 103, as to contemporaneous agreements, and 105, 106, as to subsequent agreements.

26 Cal. 606-615. KOHLER v. WELLS FARGO ETC. CO.

Duress of Goods does not embrace seizure of property on attachment for just debt, p. 611.

Cited to same effect in *Holt v. Thomas*, 105 Cal. 277, as to moneys paid under threats of suit even if claim is illegal; and in *Burke v. Gould*, 105 Cal. 283, as to conveyance of mortgaged property made under threats to foreclose; *St. Anthony etc. Co. v. Bottineau County*, 9 N. Dak. 351, but holding tax payment recoverable back when paid under protest and in order to avoid seizure and sale by tax collector; note to *Mayor v. Lefferman*, 45 Am. Dec. 158, as to general subject, and 157 as to recovery of money paid under duress.

Plaintiff Must Prove His Negative Allegations when an essential element in his case, p. 611.

Cited to same effect in *Wilson v. California etc. Co.* 94 Cal. 174, as to proof by common carrier of destruction of goods in warehouse without its fault; and in *Parrott v. Barney*, 1 Sawy. 455, 2 Abb. U. S. 230, 18 Fed. Cas. 1249, as to negligence.

Order refusing to allow plaintiff to reopen case will not be reversed except when abuse of discretion, p. 613.

Cited to same effect in *Clavey v. Lord*, 87 Cal. 419 (cited in *Haynes v. Schwartz Co.*, 5 Wash. 434), as to order permitting such evidence; *Young v. Brady*, 94 Cal. 130, as to order refusing to admit rebuttal evidence when properly part of plaintiff's main case; *McLeod v. Lee*,

17 Nev. 119, as to order allowing plaintiff to reopen case; and in *Kerr v. Lunsford*, 31 W. Va. 687, ruling similarly as to admission of evidence in rebuttal by proponents of will.

26 Cal. 615-633. **DE ARGUELLO v. GREER.**

"Third Persons" under Congressional Act of 1851 do not include those having inchoate grant before cession to California, p. 626.

Cited to same effect in *Miller v. Dale*, 44 Cal. 577; and in *Phelan v. Poyoreno*, 74 Cal. 452, on point that holders of perfect titles before cession need not present claim for confirmation.

Description by Courses and Distances must yield to boundaries when marked by permanent objects, p. 631.

Cited to same effect in *Baldwin v. Temple*, 101 Cal. 402, as to discrepancy between acreage and boundaries; *Ford v. Association*, 8 N. Mex. 62, noted under *Stanley v. Green*, 12 Cal. 148.

26 Cal. 633-635. **CURTISS v. MURRY.**

Corporation Must Sue and be sued in corporate name, p. 634.

Cited to same effect in *Stewart v. Thornton*, 75 Va. 217, dismissing suit by individuals as directors of county school board when latter is incorporated.

26 Cal. 635-641. **PEOPLE v. MAGUIRE.**

Statement on Appeal in criminal case from police court is unnecessary when record shows the error, p. 640.

Cited to same effect in *Morley v. Elkins*, 37 Cal. 457.

26 Cal. 641-651. **PEOPLE v. ALAMEDA COUNTY.**

County is "Party Beneficially Interested," and may be relator in application for mandate to compel levy of tax when to be paid into its treasury, p. 647.

Cited to same effect in *Commissioners v. Trustees*, 71 Cal. 312, as to petition by commissioners of funded debt for mandate to compel tax levy; and in *Aggers v. People*, 20 Colo. 352, as to mandate by town against assessor to compel extension of special taxes levied by town.

Legislature May Order levy and apportionment of taxes on division of county, p. 648.

Cited in *Riverside Co. v. San Bernardino Co.*, 134 Cal. 521, 523, but denying mandamus to compel particular action by board of commissioners appointed to adjust accounts on such division; *In re Fremont Co.*, 8 Wyo. 22, sustaining local statute as to apportionment on such division; *People v. Pacheco*, 27 Cal. 207, sustaining power to issue

railroad aid bonds for railroad to be used for military purposes during war; *Chapman v. Morris*, 28 Cal. 395, ruling similarly as to act authorizing county to allow interest on refunding debts; *Napa etc. Co. v. Napa Co.*, 30 Cal. 438, as to act authorizing county subscription to railroad stock; *Beals v. Amador County*, 35 Cal. 633, as to act directing further tax to pay interest on debt theretofore authorized to be paid by one county to another; *Sinton v. Ashbury*, 41 Cal. 530 (cited in *Wilcox v. Deer Lodge Co.*, 2 Mont. 579), as to act directing payment of commissioners on street opening; *Johnson v. San Diego*, 109 Cal. 475, 490, as to act adjusting existing corporate debts on exclusion of territory from city; and in *Portwood v. Montgomery County*, 52 Miss. 528, as to like act on formation of new county; *Custer Co. v. Yellowstone Co.*, 6 Mont. 48, upon right of one county to sue the other for sharing of indebtedness on division; *Esmeralda Co. v. District Court*, 18 Nev. 439, on point that duties of district judge under local act in apportioning indebtedness on county division are not judicial; in *Grant County v. Lake County*, 17 Oreg. 457, construing act transferring territory from one county to another. Distinguished in *People v. Lynch*, 51 Cal. 36, 21 Am. Rep. 693, denying legislative power to exercise power of assessment for local improvements within city, when granted to latter by charter. Cited, also, in note to *Gilman v. Contra Costa Co.*, 68 Am. Dec. 298, on legislative control.

26 Cal. 655-665. **PEOPLE v. MAYHEW.**

Purchaser at Execution Sale acquires only lien, which is satisfied by redemption by debtor within statutory time, p. 660.

Cited to same effect in *Baber v. McLellan*, 30 Cal. 137, as to rights of transferee of certificate as security; and see also *Wood v. Conrad*, 2 S. Dak. 410, as to rights of transferee; *Swain v. Stockton etc. Soc.*, 78 Cal. 604, 12 Am. St. Rep. 119, as to right of purchaser to subrogation during redemption period; and in *Semplex v. Bank*, 5 Sawy. 99, 21 Fed. Cas. 1068, as to purchase made by prohibited foreign corporation: Cited in *McNary v. Wrightman*, 32 Or. 582, discussing rights of purchaser on payment of taxes. Distinguished under local statutes, in *Otis v. McMillan*, 70 Ala. 55, holding title to pass on sale, subject to right of redemption. Cited, also, in *Glenn v. Caldwell*, 74 Miss. 53, on point that statute of limitations does not run against purchaser until execution of deed.

Legal Tender Notes may be used in redemption from foreclosure sale when kind of money not specified in judgment, p. 662.

Cited in *Belloc v. Davis*, 38 Cal. 254, on point of constitutionality of Legal Tender Act; *Boyd v. Olvey*, 82 Ind. 303, as to receipt by clerk of bank notes on redemption.



ANN

27 CAL.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 27

WITH

NOTES ON CAL. REPORTS

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OCTOBER TERM, 1864.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OCTOBER TERM, 1864.

GEORGE F. HOOPER *v.* WELLS, FARGO & CO.

CARRIERS AND FORWARDERS.—The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

CARRIER OF COMMON CARRIERS.—The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is usually responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

CARRIER OF FORWARDERS.—Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employes.

RESTRICTIONS ON COMMON LAW LIABILITY OF COMMON CARRIER.—Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier.

RESTRICTIVE CLAUSE IN COMMON CARRIER'S RECEIPT.—If a common carrier, who undertakes to transport goods, for hire, from one place to another, and deliver to address, inserts a clause in a receipt signed by him alone, given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause is not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employes on a steamboat owned and

Argument for Appellants.

controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employes of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employes of the carrier.

CONSTRUCTION OF COMMON CARRIER'S RECEIPT.—A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms.

AMENDMENT OF COMPLAINT AFTER VERDICT.—Under our Practice Act a complaint cannot be amended in this Court so as to make it correspond with the verdict. The District Court, in a proper case, before judgment, may direct the complaint to be so amended.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The complaint did not ask judgment for or allege the damages at a sufficient amount to include interest on the value of the bullion.

The verdict of the jury included interest.

The other facts are stated in the opinion of the Court.

Delos Lake, and *A. Campbell*, for Appellants.

If the defendants are to be deemed common carriers, then, by the agreement under which the treasure was received in this case, their responsibilities and duties were limited to those of forwarders only.

The term "forwarder," or "forwarding merchant," has a well defined and ascertained meaning. A forwarder of merchandise, or forwarding merchant, is one whose business is to receive and send forward goods to their place of destination by the usual modes of public transportation. His character is that of a depository for hire in storing, and that of an agent in forwarding the goods. (Edwards on Bail. 293; *Roberts v. Turner*, 12 John. 233.)

A forwarder of merchandise is discharged from liability on showing that he used ordinary diligence and prudence in sending on the property by responsible persons engaged in the carrying business. (Edwards on Bail. 294; Angell on Car.

p. 81; Story on Bail, § 444; 2 Kent, 591-2; *Platt v. [?]*, 7 Cow. 497; *Brown v. Dennison*, 2 Wend. 593; *v. Kellogg*, 8 Cow. 223; *Roberts v. Turner*, 12 John.

s Lake, and *John H. Saunders*, also for Appellants.

The cases agree that a receipt, delivered and received under circumstances, is a contract. (See *Parsons v. Monteath*, 10 Barb. 353; *Dorr v. N. J. Steam Nav. Co.* 1 Ker. 485; *v. Evans*, 14 Barb. 524; *Wells v. The Steam Nav. Co.* 12 John. 204; Same case, 4 Selden, 375; *Holford v. Adams*, 12 John. 480.)

In each of these cases, the contract was a receipt or a "bill of lading" signed only by the carrier; and in each case the receipt was held to be a valid and binding agreement. In the case of *Dorr v. New Jersey Steam Nav. Co.* (*supra*) the court said: "The exception to the common law liability being made in the bill of lading and delivered to the agent of the carrier, must be deemed to have been agreed upon by the parties."

In the contract, by its terms, discharge the defendants from liability for loss caused or occasioned solely by the negligence of those in charge and having the management of the vessel? The language of the contract is: "It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible, *except as forwarders*, nor for any loss, or damages arising from the dangers of the land, ocean, or river navigation, fire, etc." The respondents contend that the word "forwarders," as "used in the contract should be construed to mean, not technical forwarders, but such forwarders as expressmen are."

The contract, and every clause of it, must be presumed to have some meaning. Like all other agreements, it must be construed in the light of existing facts and circumstances at the time it was made. Interpreted by such existing facts and circumstances, then what did the parties mean by their contract?

What are the facts?

Argument for Appellants.

The defendants are a company engaged in the regular business of an express company, in receiving, forwarding, carrying, and delivering, by sea or by land, treasure, goods, and packages, for hire, in care of their own messengers, in vessels, conveyances, steamers, boats, and vehicles, owned by others, and ordinarily used by the public at large as the common and public mode of transportation and conveyance. They have no interest in, or control over, these public vehicles, nor any voice in their management, nor control over the actions of those having their management. In case of negligence the most apparent, threatening disaster the most fearful, they are as powerless to prevent as any other stranger; and yet, in their character of common carriers, they are liable for all injuries to property which they have undertaken to transport, resulting from the negligence or unskilfulness of those who are employed in the navigation of steamers, boats, or vessels, or in the running of railroad cars or public stage coaches. This both parties well knew, and they also knew that accidents frequently occur, resulting from carelessness of engineers, and others engaged in navigating steamboats on ocean and river. In the light of all these facts, the defendants say, "We will take charge of your treasure, and will guard it on its passage, but inasmuch as we are compelled to use agencies, over which we have no control, we will only undertake to exercise proper care and prudence in the selection of the proper public vehicle, and we will not be responsible for the acts of the agents, nor accidents to the agencies, over which we not only have not, but are not permitted to have, any control." The words selected to express this meaning are apt and proper.

The term "*forwarder*" has a well defined and ascertained meaning. A forwarder of merchandise is one whose business it is to receive and send forward goods to their place of destination by the usual modes of public transportation. And he is discharged from liability on showing that he used ordinary diligence and prudence in sending on the property by responsible persons engaged in the carrying business.

The defendants agreed "to forward and deliver to address,"

Argument for Appellants.

"not to be liable except as forwarders." Their agreement forward did not oblige them to transport this bullion in their vehicles, or in vehicles over which they exercised control. There was no breach of contract on their part to employ the ordinary public conveyances, such as the *Ada Hancock*.

Supposing the *Ada Hancock*, then, to have been, to all appearance, a safe and proper vehicle, the defendants were in the course of fulfilling their contract "to forward" when the loss took place, and the bullion was lost through the fault of the engineer. They agreed "to forward," and they proposed to do so.

"to forward" in the contract is to be read "to carry," "forwarders" to be changed into "carriers," the defendants must fail, for they admit that if their contract makes them common carriers, they are liable in this action.

If the contract of the defendants, properly interpreted, does make them liable as carriers, there was nothing in the service they rendered in respect to this bullion to fix that charge upon them. They dispatched it *en route* to the place of destination on board a steam tug, a public vehicle, over which they had no control, and in which they had no interest, neglecting the additional precaution of sending a messenger to accompany it in its transit. This is the service of a forwarder, not of a common carrier; and any one doing business in this way and exclusively under the denomination of a forwarder could not have been liable under the circumstances of this case. (*Roberts v. Turner*, 12 Johnson, 232.)

Whatever is the true interpretation of this contract, it may well be said to bear in mind that the loss of the bullion has in no respect affected its signification. What did its language fairly import at the time it was entered into, in view of the facts of the case? The statement sets forth that the defendants in conducting their business, employed vehicles owned by others, and used by the public at large. Of course this was known to the plaintiff, and he knew therefore that this bullion must necessarily be subjected in its transit to operations and agencies over which the defendants had no control. He knew

Argument for Respondent.

that the defendants had no more authority over the Ada Hancock or the steamer Senator than he had himself. When with these facts before him he delivers his bullion to the defendants, and they agree to "forward to San Francisco, and deliver to address," stipulating "not to be liable except as forwarders," the meaning of the contract seems too clear for dispute, unless we examine its terms under the influence of the preconceived idea that the defendants were carriers in spite of their contract, and could not be liable in any other capacity.

H. & C. McAllister, for Respondent.

Express companies are common carriers. This proposition is fully sustained by the following authorities: *Haslam v. Adams Express Co.*, 6 Bosworth, 241, 242, 244; *Place v. Union Express Company*, 2 Hilton, 19, 25, 26; *Russell v. Livingston*, 10 Barb. Sup. Ct. R. 346, 352-355; *Read v. Spaulding*, 5 Bosworth, 395, 404; *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith, 115, 121-125; *Baldwin v. American Express Co.*, 28 Illinois, 198; *Stadhecker v. Combs*, 9 Richardson, 193, 199, 200; *Redfield on Railways*, 240, 241; *Adams & Co. v. Blankenstein*, 2 Cal. 413, 418; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185.

Whether common carriers use their own vessels or those of others in no way varies or modifies their responsibility. (*Wilcox v. Parmlee*, 3 Sandf. 610; *Fairchild v. Stocum*, 19 Wend. 332; *Place v. Union Express Co.*, 2 Hilton, 26; *Krender v. Wolcott*, 1 Hilton, 223; *Russell v. Livingston*, 10 Barb. 352.)

If the receipt of the defendants be considered a contract, binding upon plaintiff, and otherwise valid and operative, still, the exceptions and restrictions therein contained must be construed strictly and *fortius contra proferentem*.

It is a familiar maxim of the law that *verba chartarum fortius accipiuntur contra proferentum*.

They who choose the words, frame the language, draft the

Argument for Respondent.

ent, and execute it, ought rather to be held to a strict construction of the paper than he who merely accepts it. The rule of construction is especially applicable to deeds, and other instruments of unilateral execution. When an indenture, the reason of the rule becomes less obvious even in such case, words of exception or reservation regarded as the language of the party in whose favor the exception or reservation is made. If a deed may inure to several different purposes, he to whom it is made may elect in what way to take it. So, it has been held, that if an instrument may be either a bill, or a promissory note, the holder may choose which to consider it.

See v. Baker, 2 Starkie's N. P. C. 255 (3 Eng. Common Law Reports 39) *Syllabus*: "A carrier who gives two notices, and his responsibility, is bound by that which is least favorable to himself." (*Barney v. Prentiss*, 4 Har. & Johns. 105; *Beckman v. Shouse*, 5 Rawle, 179; *Eagle v. White*, 6 Mass. 505.)

The word "forwarders," as used in the receipt, should be construed to mean not technical forwarders, but such forwarders as carriers or messmen are.

The counsel of defendants lay great stress upon that clause in the receipt which reads "*that Wells, Fargo & Co. are not responsible except as forwarders*;" in fact, it is their defense. They admitted, on the oral argument, that they make no claim for exemption under those additional words: "*nor any loss or damage arising from the danger of fire, flood, railroad, ocean, or river navigation, fire, etc.*"

The position of the defendants, as we understand it, is that in the receipt the language, "*Wells, Fargo & Co. are not responsible, except as forwarders*," they became forthwith relieved from all the responsibilities of a common carrier, and their nature of their vocation became changed, and their duty was reduced to shipping the packages and treasure entrusted to them by the ordinary channels of conveyance. When their obligation ended, and their service was completed.

No matter what the subsequent fate of the goods;

Argument for Respondent.

no matter how gross the negligence, how criminal the fraud by which they were lost in process of transportation, there was no liability on the part of the express company.

The gross injustice of any such construction is obvious. Its mere statement shocks the legal as well as the moral sense.

Express companies are not employed for any such pretended purpose. They are paid, not in order to commit to others for transportation the thing bailed to themselves, but that *they* may carry and deliver it. They receive a higher freight than ordinary bailees, because they profess to exercise a closer custody of, a more special supervision over the goods intrusted to them than does the ordinary carrier.

The packages bailed to them are generally of small bulk, but of great value; they remain during the entire transportation in the personal charge of the express messenger, and their delivery is made, not at the wharf or warehouse, as in the case of ordinary goods, but specially by the express employé at the office or residence of the consignee.

So far from merely forwarding the goods, merely delivering or shipping them by the usual channels of conveyance, their custody begins before that of the ordinary carrier, (for express packages are taken in charge, not at the stage or steamer, but at the express office,) is conducted throughout the journey more specially and carefully, and continues after the duties of the ordinary carrier have ceased.

In the present case, was the contract merely to *forward* the treasure? The receipt reads, "*Received of Geo. F. Hooper, dust and bullion package, value ten thousand seven hundred and fifty-five dollars, address, Geo. F. Hooper, which we agree to forward to San Francisco, and deliver to address.*"

The word "*forward*" is used in the sense of *transport*, and the whole contract in its language, in its effect, in its compensation, in all its elements, is utterly dissimilar to that of a *technical forwarder*. To particularize:

1. The defendants were to receive the whole of the consideration of carriage and delivery, to wit: eighty dollars and sixty-five cents.

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Freight was charged by the defendants for the whole

the treasure was never delivered to the officers or employees of the steam tug.

The package remained in the exclusive custody of the messenger, the servant of the defendants, and was so one of the loss.

The package was in the treasury box of the defendants for the transportation and at the time of the loss, and this box was in the special charge of the express messenger.

Freight was paid the steam tug for the carriage of the treasure; no contract was made with the steam tug for its transportation; no notice of its existence on board was given to the officers or employees of the steam tug; its presence on board neither recompense nor responsibility to the steam tug.

Suppose, instead of travelling by the steam tug, the plaintiff had hired a row boat to put him on board the Sentinel and the treasure had been lost from the row boat, would the owner of the boat have been the carrier, and the defendants the forwarders?

The party who carries is, in the eye of the law, the one who has the profits of carrying. Of necessity, all others in the transportation must be agents of him who has the profits. Shall a party have all the profits of an enterprise, and evade all its responsibilities?

Who did undertake to carry this treasure? Some one or other of the defendants, who distinctly contracted to forward and deliver it, or was it the steam tug, whose officers and employees had no control over it, and did not even know of its presence on board? (*Stadhecker v. Combs*, 9 Richardson, 40; *Reed v. Spaulding*, 5 Bosworth, 396; *Mercantile v. Chase*, 1 E. D. Smith, 121; *Blossom v. Griffin*, 3 Barb. 571; *Sweet v. Barney*, 24 Barb. 533.)

As to the *technical forwarders*, their vocation, compensation, and liabilities, *vide* Angell on Carriers, Sec. 75.

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Clearly, the business of defendants is not that of *technical forwarders*. Upon general principles, by numerous adjudications, by the judgment of this very Court, they are common carriers. Neither did they temporarily assume, or contract for a different character in this particular transaction. They received the bullion of plaintiff, and agreed to transport and deliver same, in the ordinary course of their business, and under their usual printed form of receipt. They agreed in the first part of that paper to assume all the duties of a common carrier as to the gold dust, "*to forward and deliver*" it; and here, the word forward is manifestly used in the sense of carry, or transport.

Upon the very threshold of their contract, therefore, they disclaim all character as *technical forwarders*; and yet, we are told, that in the latter part of the same contract, they declare themselves such. Why should the second use of the word *forward* (that is, *forwarders*) have a different meaning from that which it *must* bear when first used? If the verb *forward* is used to signify *to carry and transport as an express company*, why should not the noun, *forwarder*, in the same paper, be taken in the same sense; that is, *not to be responsible except as express carriers and transporters*?

Shall the word *forward* when first used, be taken according to its natural meaning, and then immediately thereafter a *technical* signification to be ascribed to the word *forwarders*?

Shall this be the construction, in view of the rule that words are to be taken in their plain and popular sense? (4 East, 135; 3 Kern. 574.)

By the Court, SAWYER, J.

This is an action to recover the sum of ten thousand seven hundred and fifty-five dollars, the value of a package of gold bullion delivered to defendants, at Los Angeles, to be transported to San Francisco, and which was lost in consequence of the explosion of the boiler of the steam tug, "Ada Hancock," while being transported in charge of defendants' mes-

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from the shore, at San Pedro, to the anchorage of the "Senator."

Plaintiff, to maintain the action on his part, proved that defendants were, and are a company engaged in the public express business; that is to say, in receiving, forwarding, and delivering, by sea or by land, for any one who employs them, treasure, goods and packages for hire from place to place, within and without this State, in care of their own agents, in vessels, and conveyances, and steamers, and wagons and vehicles, owned by others, and ordinarily used by the public at large, as the common and public mode of transportation and conveyance.

It said defendants had an agency and an agent at Los Angeles for the purposes of their said public express business; principal office and agency for the State of California at San Francisco.

That the usual modes of public conveyance and transportation between Los Angeles and San Francisco were, at the time hereinafter mentioned, and for a long time prior thereto, one by stage coaches the whole way, and also by stage coaches from Los Angeles to San Pedro, and from San Pedro to San Francisco by a steamer called the 'Senator;' that an agent of defendant always travelled on said steamer, 'Senator,' between San Francisco and San Pedro, who, on arriving at San Pedro, proceeded to Los Angeles by stage coach, and there delivered from the Los Angeles agent all express matter that was left there to be forwarded, carried and delivered, together with such express matter to San Pedro in time for the steamer, 'Senator's' return voyage, placed and shipped the express matter on board of such steamer, and returned on the steamer with the express matter in his charge to San Francisco, where it was in the first instance delivered at the general agency, and then delivered by such agency to the consumers or owners.

That it was usual and customary for the steamer, 'Senator,' and other coast steamers, on arriving at or approaching San Pedro, to anchor some three miles from shore, there not

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being sufficient depth of water to enable such vessels to approach the shore. That the usual means and mode of transporting goods and passengers between the shore and steamer was by steam tug and lighters.

"That one of such usual and ordinary means was by a steam tug boat of about forty-two (42) tons burden, called, the 'Ada Hancock,' that is, it was usual and customary for the defendants' messenger to go from the shore to the steamer with the express treasure in charge on said tug boat, the heavier express freight being usually transported on lighters. That the express company was charged by the steamer the usual price for the passage of the express messenger and freight for all express goods, except treasure, which was carried in an iron box called the treasure-box, and was kept in the special charge of the messenger while on board the steamer, and no charge made by the steamer for its transportation.

"That as to any and all treasure transported by defendants upon said steam tug, 'Ada Hancock,' or upon said steamer, 'Senator,' no bill of lading was ever given, and no written contract of affreightment was ever made therefor, neither was any note or memorandum in writing of the true character or value thereof ever given by the defendants, or by their agents or servants, to the master, or officers, or agent, or owner of said steam tug, or said steamer, 'Senator.' That no freight was ever paid by or charged against defendants or their agents for treasure laden by them on board said steam tug to or from said steamer, 'Senator.' That the defendants used the usual means of public transportation in conducting their business, which was notorious, and known to the plaintiff at the time hereinafter stated.

"That on the 21st day of April, 1863, the plaintiff delivered at the City of Los Angeles, California, to the agent of the defendants at Los Angeles, a package of gold bullion of the value of ten thousand seven hundred and fifty-five dollars, (\$10,755) to be transported to San Francisco in consideration of the sum of eighty dollars and sixty-five cents, then and there agreed to be paid to defendants by plaintiff, and on such deliv-

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received and accepted from said agent a paper, partly and partly written, of which the following is a copy, the portion thereof italicised being written, and the portion not italicised being printed, namely:

“ ‘WELLS, FARGO & CO.’S EXPRESS.

“ ‘Wells, Fargo & Co.,

“ ‘Express,

“ ‘Los Angeles.

“ ‘Value, \$10,755.

April 21, 1863.

Received of George F. Hooper, *dust and bullion*. Package, *ten thousand seven hundred and fifty-five dollars*.

Address, *Geo. F. Hooper*, which we agree to forward to *San Francisco*, and deliver to *address*.

We are not to be liable beyond our route as herein provided. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be liable except as forwarders, nor for any loss or damage from the dangers of railroad, ocean or river navigation, unless specially insured by them, and so specified on receipt. For the proprietors,

“ ‘P. BANNING, Agent.

Charges Col., \$80 65.

Per SANFORD.’

The package of gold bullion of the value of ten thousand and fifty-five dollars has never been delivered to plaintiffs, or to his address.”

Plaintiffs’ agent, at Los Angeles, delivered said bullion to Ritchie, the messenger, or traveling agent of defendants at Los Angeles and San Francisco, who took charge of the same and transported it to San Pedro by public stage. For the purpose of placing said bullion and other goods on board the steamer, “Senator,” which then lay at anchor as usual, off the shore, for transportation to San Francisco, said Ritchie placed it on board the steam tug, “Ada,” with himself accompanying the bullion and having it in his possession. Soon after, said steam tug having on board said bul-

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lion, said Ritchie and several other passengers for San Francisco, started from the wharf for the purpose of placing said passengers, bullion, etc., on board said steamer, "Senator." Before reaching the anchorage of the "Senator," the boiler of said steam tug exploded, whereby the said Ritchie and several other passengers were killed, and said bullion lost. There was evidence tending to prove, that the explosion was caused by the carelessness of the engineer, and other officers of the said steam tug. Defendants had no interest in said steam tug, and no control over her management or navigation. The agents of defendants at Los Angeles had no authority to insure said bullion. The plaintiff had no option as to insuring, or not insuring the same with defendants at Los Angeles. Insurance could only be effected thereon with said defendants at their office in San Francisco.

The Court gave the jury the following instructions:

"First — That if defendant be an express company, publicly engaged in transporting freight from one place to another, for hire, they are common carriers, and subject to all the responsibilities of common carriers, except so far as they have modified them by agreement.

"Second — That the mere fact that an express company use their own vessels and steamers, or the vessels or steamers of others, in no way affects their liabilities as common carriers.

"Third — That if Wells, Fargo & Co. shipped the treasure in question on board the steamer, 'Ada Hancock,' and there was an explosion of said steamer, by which the treasure was lost, and that explosion was occasioned by the negligence of the parties in charge of the 'Ada Hancock,' then, Wells, Fargo & Co. are liable for the value of said treasure.

"Fourth — An express company which is in the habit of carrying, for hire, packages containing coin, dust and other articles of value, from one place to another, is a common carrier.

"Fifth — Express companies which carry packages over

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where they employ other vehicles or means of conveyance of their own, are common carriers.

1st — They may, however, by contract, limit their liability as common carriers, and if you find by the evidence that the defendants in this case did so limit their liability to the extent of the special agreement, then the Court charges you that such limit of responsibility must govern; but that does not relieve defendants from the duty of ordinary care in the discharge of their duties.

2nd — The special agreement received in evidence cannot exempt defendants from accountability for losses occasioned by an accident in the vehicle or mode of conveyance used to effect transportation.

3rd — If you find, from the evidence, that defendants undertook to forward the gold dust in question from Los Angeles, and deliver the same to plaintiff, at San Francisco, and that the special agreement limiting the liability, defendants are deemed to have undertaken the same degree of responsibility as that which attached to a private person, and are therefore, bound to use ordinary care in the custody of the gold dust, and its delivery, and to provide proper means of conveyance for its transportation.

* * * * *

4th — Should you find that the defendants shipped the treasure on board the steamer *Ada Hancock*, and there was an explosion of said steamer by which the treasure was lost, and the explosion was occasioned by the negligence of the captain in charge of her, then defendants are liable for the loss of the said treasure, by reason that they are responsible for the consequences caused by the negligence of the agencies they employed in fulfilling the obligations of their undertaking."

The Court also refused the following instruction asked on the part of the defendants, to which refusal defendants excepted:

"That if the defendants, by their agents, selected the steamer *Ada Hancock* for transportation of the treasure from the Senator, and the jury find that at the time of selection and of placing the treasure on board, the said

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tug was sufficient for the purpose of such contemplated transportation, then that the defendants are not responsible if the treasure was lost by any subsequent carelessness of the officers of the boat."

It is admitted by appellants' counsel that defendants, as to the transportation of said bullion, were acting in the capacity of common carriers; and such was undoubtedly their legal relation to said bullion at the time of its loss. It is further admitted—and this proposition also admits of little doubt—that defendants, under the law applicable to common carriers, are liable for its loss, unless such liability is restricted by the express stipulations of the contract between the parties for the conveyance of said bullion.

It is insisted, however, on the part of defendants, that the contract contains express stipulations which exonerate them from all liability for the loss under the circumstances disclosed by the record; while on the part of plaintiff, this proposition is controverted. If mistaken on this point, it is further claimed by the plaintiff, that any stipulation in a contract which purports to exonerate a common carrier from loss resulting from the carelessness, negligence or misfeasance of the carrier, or of his servants or agents, is contrary to the policy of the law and void. It is not pretended—and it could not with any show of reason be pretended—that the loss in question is within the meaning of the last clause of the receipt set out in the record relating to the dangers of navigation, etc. The clause relied on by defendants to relieve themselves from responsibility is as follows: "It is further agreed, and it is a part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders."

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. "The common carrier who undertakes to carry goods for hire, is bound to deliver them at all events, unless injured or destroyed by the act of God, or the king's enemies." (Edwards on Bail, 295.) "A common carrier is regarded by the law as an insurer of the property intrusted to him; or in

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...ards, he is legally responsible for acts against which
not provide, from whatever cause arising, the acts of
the public enemy only excepted." (Angell on Car-
riers, 67.) There are many accidents against which com-
mon carriers cannot protect themselves by the exercise of the
care and skill on the part of themselves and their em-
ployees, the result of which they are nevertheless responsible.
(Story on Bail, 454, *et seq.*, and Angell on Carriers, Chap. 11,
cited.) But the liability of "forwarders," is like
that of warehousemen and common agents, and is governed
by the general rule applicable to other bailees for hire not
subject to extraordinary liabilities. They are responsible for
the same care, skill and diligence—that is, such care and dili-
gence as prudent men in similar circumstances usually exer-
cise in the management of their own business. (Story on Bail,
cited.) They are not, it is true, insurers like common
carriers, but they are responsible for all injuries to property
in their charge resulting from negligence, or misfeasance
on the part of themselves, their agents or employés. In view of these
principles governing the liabilities of "carriers" and "for-
warders," what is the effect of the disputed clause in the con-
tract under consideration upon the rights of the parties, plain-
tiffs and defendants? What is the extent of the restriction upon
the common law liabilities of the defendants? The language
is taken most strongly against the defendants. (Edwards
on Carriers, 492.) The instrument is executed by them
and it was drawn up with care, in language selected by
them, the blank form having been printed in advance
and to be presented to all persons offering property for trans-
portation by their express. The restrictions were for their
benefit. The owners of packages sent by express rarely exam-
ine the terms of the receipt presented to them; and general
under such circumstances, are apt to mislead. These
are some of the reasons for the rule given in the books. In
view of a covenant in a charter party, Mr. Justice Curtis
said: "The rule of construction as to exceptions is, that

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they are to be taken most strongly against the party for whose benefit they are introduced. * * * These words of exception being introduced by the covenanter for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenanter." (*Aiery v. Merrill*, 2 Curtis, 11.) And Mr. Chief Justice Gibson, in *Atwood v. Reliance Transportation Company*, 9 Watts, 88, in relation to a restriction in a contract by a carrier, said: "Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." And such is the well settled rule of construction in such cases.

The contract of defendants is not merely to forward the bullion, but to "forward to San Francisco and deliver to address." They are not merely to start it upon the way by some suitable conveyance, but are to see that it reaches its destination, and are to "deliver to address." They were undoubtedly common carriers, and not forwarders in the technical sense of the term. But there was an evident intention on the part of defendants to restrict their liability, and, although they were acting in the capacity of carriers, they stipulated that they were "not to be responsible except as forwarders." As we construe this clause, it does not mean that defendants would start the package upon the way by some suitable conveyance, and that thereupon their responsibility should cease, for that would be directly in conflict with the covenant to "deliver to address." It simply means, that defendants would not assume the extraordinary responsibilities of a common carrier, and become an insurer of the goods, except as against loss resulting from the act of God or public enemies. There is no express covenant or exception against loss by negligence on the part of defendants, or of those employed by them in the transportation of their express matter. The exception fixes the limit of responsibility by referring to another class of bailees,

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responsibilities are different from those of carriers; and
 thing, as we construe the restrictive clause, is, that
 be governed in respect to their liabilities by the same
 as those applicable to forwarders. It is manifest
 was not intended by this clause that all responsibility
 cease as soon as the package was started upon its pas-
 sage from the office of defendants at Los Angeles; for the
 instrument also contains the clause, "In no event to be liable
 for loss on our route as herein receipted." The route as therein
 extended to San Francisco. The printed form of the
 instrument used in this case was evidently framed with a view
 to general use, where the point of destination was beyond, as
 within the routes established and used by defendants.
 It was contemplated, that defendants might be lia-
 ble for loss occurring on their "route." If it was intended
 to exempt themselves from all responsibility while the package
 was in transit, this clause would doubtless have been
 read, "In no event to be liable for any loss arising
 from the time leaving our office at Los Angeles," or some other lan-
 guage equivalent import. The defendants were carriers,
 and not warehousemen. The goods were lost while in their possession in the char-
 acter of carriers. It was not received to be stored, or to be
 upon its passage merely, by the first convenient oppor-
 tunity to be carried and delivered "to address," and for
 its purpose. There was no point at which defendants
 acted as mere forwarders, in the technical sense of the
 law in which they were warehousemen. The goods were
 in their possession in such character, but in the char-
 acter of carriers only. They could not be liable in a character
 which they never occupied; and their contract, that while
 carriers, they shall only be liable "as forwarders," in
 accordance with the other language of the instrument, can-
 not mean that the liability shall be governed by the principle
 applicable to forwarders; that is, that they shall only
 be liable for losses arising from a want of ordinary care on the
 part of themselves, and in the agencies made use of by them
 in the exercise of their ordinary business of carriers.

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The word "as," is defined in the last edition of Webster's Dictionary as follows: "Like; similar to; of the same kind, or in the same manner; in the manner in which." And this is obviously the ordinary import of the word standing in relations similar to that in the instrument under consideration. Defendant's liability was to be "similar to" that of forwarders—"of the same kind." They were to be liable "in the same manner"—"in the manner in which"—forwarders are liable. In what manner are forwarders responsible? Of what kind is their liability? They are not insurers, like carriers, but they are liable for losses of goods while in their custody resulting from negligence of themselves and those whom they employ in their business of forwarders. And if a forwarder, or warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control. If the liability of these defendants under their contract is to be "similar to" that of forwarders—if it is of "the same kind"—if they are to be responsible "in the same manner," then they are liable for any loss resulting from the negligence of themselves, or negligence in the agencies employed by them, while the bullion was in their custody and control; and that custody, without doubt, continued up to the moment of the loss, and would have continued but for the loss up to the time when it would have reached its destination, and been delivered "to address." The fact that defendants made use of various public conveyances, their messenger with the treasure travelling a part of the way by stage, a part by steam tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes the managers of those various conveyances were their agents and employés. Defendants had the means of holding the proprietors of those various vehicles used in their business

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of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault. The defendants, although employing public conveyances, were still carriers having the actual custody and management of the treasure during the transit, as well as while it remained at the office of defendants at the extremities of their route. Ritchie, the messenger of the defendants, was in the actual custody of the treasure during the transit. Suppose, by the carelessness of Ritchie in transferring the treasure from the steam tug to the "Senator," it had been dropped into the ocean and lost, can it be pretended that the defendants would have been exempt from liability under the restrictive clause of their contract under consideration? Would it be claimed, in such case that the liability of defendants ceased as soon as the treasure left their office at Los Angeles? We do not think any such construction would be claimed for the stipulation. If the defendants would not be protected by the exception against loss from the negligence of one of their servants, why should it protect them against the negligence of another, who as to the same matter is in law their servant or agent. Both are, in contemplation of law, the agents or employes of defendants, and the acts of both are the acts of defendants, and the language of the restrictive clause under consideration no more excludes the liability resulting from the negligence of one than from that of the other.

The defendants were common carriers, but under the contract they were carriers with limited responsibilities. There is an ample margin for the operation of the clause restricting the defendants' liability in the numerous accidents and losses not arising out of negligence, or malfeasance, and not even comprehended in the exception, "damages arising from the dangers of railroad, ocean or river navigation, fire," etc., against which the carrier is an insurer, and from which forwarders are exempt.

Much stronger language has been held not to exempt bailees from losses arising from negligence. To justify the conclusion that such exemption is contemplated, the language should

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be unequivocal, and susceptible of no other reasonable interpretation. In *Wells et al. v. Steam Navigation Company*, 8 N. Y. (4 Seld.) 375, the contract for towing a vessel from New York to Albany contained the clause "at the risk of the master and owners thereof." Although persons engaged in towing vessels have, in New York, been held not to be common carriers, the defendants in that case were still held to be liable for damages resulting from the carelessness of those engaged in towing the vessel, notwithstanding this restriction in their contract. Mr. Justice Mason said: "I cannot think the expression contained in it, 'at the risk of the master and owners thereof,' was understood by the parties as a protection against all kinds of negligence. It would be an extraordinary contract, which should in express terms give such a latitude in performing a kind of service of so important a character as the one under consideration; and to permit a contract to have so unreasonable an effect as it would imply, the intention of the parties should be clearly and unequivocally expressed, so as to leave no room for doubt or misconstruction. (6 John. 180; 7 Hill, 547.) In this contract nothing is said about negligence." (Page 379.) In the same case, Mr. Justice Gardiner, referring to *Alexander v. Greene*, 7 Hill, 544, said (page 382): "We held then if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility, on account of the gross negligence of himself and servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to the general custom and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given" — and that he saw no reason now for changing this rule. So, also, in *Schieffelin v. Harvey*, where goods shipped to England were "returned to the shippers at their own risk," and were purloined from the ship, the owner of the ship was held liable. The Court says: "It is undoubtedly true that the general operation of law may be controlled by the agreement of the parties. But such agreement ought to be clear and

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capable of but one construction, unequivocally and necessarily evincing that such was the intention of both the parties." (6 John. 180.) A similar rule is stated in *Buckman v. Shouse*, 5 Rawle, 189. As further instances of the application of the rule to restrictive clauses in the contracts of carriers, see *Sager v. P. S. & P. E. R. R. Co.*, 31 Maine, 238, 239; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exchequer R. 734.

So, also, in the case of the *New Jersey Steam Navigation Company v. Merchants's Bank*, in the Supreme Court of the United States, 6 How. 344. The contract provided that: "The following conditions are stipulated and agreed to as part of this contract, to wit: The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any or every description, to be conveyed or transported by him in said crate or otherwise, in any manner, in the boats of the said company. Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:

"Take Notice—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

Mr. Justice Nelson, in construing this contract says, (p. 383): "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agree-

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ment, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants, or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

To apply these principles to the case in hand, we think it cannot be said that the contract in question in clear and unequivocal terms necessarily evinces an intention on the part of both parties, or of either party, that defendants shall be exonerated from any loss resulting from negligence in the agencies employed by them in the transportation of treasure committed to their care. If such had been the intention, it certainly could, and doubtless would have been expressed in language about which there could be no misapprehension by either party. Nothing is said about negligence. The language used is not such as necessarily expresses, or as men would ordinarily employ to express the idea now claimed for it, and if so used, it would be likely to mislead a party to whom it is tendered ready executed upon the receipt of his property for transportation. That plaintiff could not have understood the contract in the sense claimed for it by the defendants, seems in the highest degree probable, for it can scarcely be credited, that a man of ordinary capacity and intelligence would commit so valuable a package to others to be transported a long distance, without supposing that somebody would be responsible to him for at least good faith, and ordinary care during the transit. But if the construction claimed for the stipulation in question is to prevail, the defendants were neither responsible themselves for ordinary care, after the treasure left their office at Los Angeles, nor bound to take the measures prescribed by the statute to make the owners of the vessels used by them as a means of transportation responsible.

The language of the stipulation under consideration, at least,

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admits of the construction which we have given it; and to hold that the exception includes losses arising from negligence would, in our judgment, be to adopt a strained construction in favor of defendants, and to depart from its obvious import, while as we have seen the rule to be, the construction must be most strictly against the defendants.

Holding, as we do, that the exception in the contract, for the reasons stated does not exempt the defendants from losses resulting from the negligence of those in charge of the steam tug, it becomes unnecessary to determine the more difficult question, in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers.

The instructions of the Court, considered in connection with the instrument in evidence, are substantially in accordance with the views here expressed. We therefore find no error in them, or in refusing the instruction asked by defendants.

The damages alleged in the complaint are ten thousand seven hundred and fifty-five dollars, and judgment is asked for that amount only. The verdict and judgment are for eleven thousand seven hundred and forty dollars and eighty-seven cents. This exceeds the amount embraced within the issues. There is no provision in our Practice Act authorizing this Court to allow an amendment to the complaint making it correspond with the verdict. The Court below, before judgment, might have permitted an amendment so as to make the complaint correspond with the verdict, but this was not done. Upon consent of the respondent the judgment may be so modified as to reduce the recovery to the amount claimed in the complaint.

Ordered, that respondent have fifteen days within which to file his consent in writing, that the judgment be modified so as to reduce the amount to the sum of ten thousand seven hundred and fifty-five dollars, and upon filing such consent in writing, the judgment will be modified in pursuance thereof. In default of filing such written consent, it is ordered that

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judgment be entered reversing the judgment of the District Court and granting a new trial.

It is further ordered, that appellants recover their costs of appeal.

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Upon the facts of this case, as detailed in the opinion of the Court delivered by Mr. Justice Sawyer, the Court below instructed the jury, in substance, that if the defendants were an express company, publicly engaged in the transportation of freight from one place to another for hire, they were in law common carriers, and subject to all the responsibilities of common carriers, except so far as they may have lawfully modified them by agreement; and that their responsibilities were wholly unaffected by the fact that they used other vehicles, vessels, or means of conveyance than their own, for the purposes of such transportation. That, as common carriers, the defendants could, by contract, limit the liability imposed upon them by the common law, to a certain extent; but they could not, by such contract, relieve themselves from the exercise of ordinary care in the discharge of their duties; and if the treasure was lost through their negligence, or the negligence of any of their agents, they were responsible for the loss, notwithstanding any contract to the contrary. That if the defendants shipped the treasure on board the *Ada Hancock*, and there was an explosion, occasioned by the negligence of the persons in charge of her, by which it was lost, they were liable, for the reason that by so shipping the treasure, they made, so far as the test of their liability to the plaintiff is concerned, the *Ada Hancock* their vessel, and the persons in charge of her their agents, for the purpose of fulfilling the obligations of their contract with him, notwithstanding they may have had no authority in the management or control of the vessel, or those in charge of her.

The Court below did not undertake to construe the contract in question, or to determine whether by its terms the defendants had stipulated for exemption from liability for any loss

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which might result from the negligence of their agents, or any portion of them; but, assuming such to be the true meaning and intent of the contract, in effect charged the jury that the contract was void upon grounds of public policy so far as it attempted to protect the defendants against the negligence of their agents, whether such agents were in their immediate employment and directly under their supervision and absolute government, or were the parties in charge of the various public conveyances used by them in transporting the treasure in question, and not directly in their employment and in no respect under their control. Such is the theory upon which, as I understand the instructions, this case went to the jury.

The propositions contained in these instructions were duly excepted to by the defendants, and it is alleged that they are erroneous so far as they instruct the jury that the defendants could not, by contract, relieve themselves from liability for losses caused by the negligence of their agents, it being claimed that a common carrier may, by express agreement, circumscribe or limit his common law liability so as to protect himself from the consequences of any act of negligence or wrong committed by any person or persons other than himself, notwithstanding such persons may be his agents, or, in other words, he may by express contract nullify the common law doctrine of *respondeat superior*; and that this was done in the present case by the terms of the receipt which was given by the defendants and accepted by the plaintiff.

It is insisted on the part of the plaintiff that the receipt for the treasure and the annexed conditions given by the defendants, and accepted by the plaintiff, does not establish a contract between them restricting the common law liability of the defendants, because it does not appear to have been signed by the plaintiff, nor does it appear that he either read or was informed of its contents, or that he in any manner assented to its terms further than is implied by his acceptance and silence; and that, therefore, it, in contemplation of law, only amounts to a notice brought home to the plaintiff, to the effect that the defendants would not be responsible except as therein provided.

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It is well settled that, if it is to be regarded as a notice merely, notwithstanding it was brought home to the knowledge of the plaintiff, it did not relieve the defendants from any responsibility imposed by the common law for a loss of the treasure occasioned by their negligence or the negligence of their agents. (*Sayer v. The Portsmouth S. and I. and E. Railroad Co.*, 31 Maine, 228; *Wild v. Pickford*, 8 Mees. and Welb. 443; Story on Bailments, 4th edition, § 571.) But the weight of authority seems to be that a receipt delivered and received under, like circumstances amounts to a contract. A similar paper was so regarded in *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524; and in *Holford v. Adams*, 2 Duer, 480; and was expressly so decided in *Dorr v. N. J. Steam Navigation Co.*, 1 Kernan, 485, and in *Wells v. The New York Central R. R. Co.*, 24 N. Y. 183. In the former case, the Court said: "The exception to the common law liability being made in the bill of lading and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties;" and in the latter: "The word 'agreed' means the concurrence of two parties, and the act of acceptance binds the acceptor as fully as his hand and seal would. (Co. Litt. § 217, note; 5 Hill, 258, 259; 1 Seld. 229; 27 Barb. 140, and cases cited.) The point is too well settled to admit of debate."

It is also insisted on the part of the plaintiff that this contract when properly construed does not exempt the defendants from the liability sought to be enforced in this action. The instrument was prepared by the defendants without previous consultation with the plaintiff, who had therefore no choice in the selection of the terms employed. And it is well settled that the language creating the exceptions from liability in such cases must be strictly construed against the party in whose favor they are made. The language was introduced by the defendants for their benefit, and if it is susceptible of a more or less extended meaning the rule of construction in such cases is to adopt that which is the least favorable to the party who is to be benefited thereby. (*Munn v. Baker*, 3 Eng. Com.

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Law, 339; *Airey v. Merrill*, 2 Curtis C. C. 8; *Atwood v. The Reliance Transportation Co.*, 9 Watts, 88; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exchequer, Welsby, Hurl. and Gord. 734.)

The language to be construed is as follows: "Received, etc., * * * which we agree to forward * * * and deliver. It is further agreed, *and is a part of the consideration of this contract*, that Wells, Fargo & Co. are not to be responsible, *except as forwarders*, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt."

It is insisted by defendants that, notwithstanding they were common carriers and received full compensation for the transportation of the treasure in question, their liability touching such transportation is reduced from that of common carriers to that of forwarding merchants by the foregoing language, or in other words that their liability ceased when the treasure was placed on board the stage coach at Los Angeles, *en route* for San Francisco by coach, steam tug and steamer, the same being the usual mode of public transportation between those places; and that thereafter the treasure was at the risk of the plaintiff until it reached the general agency of the defendants at San Francisco, where their responsibility again attached and continued until a delivery thereof to the address of the plaintiff.

This contract must be read by the light of surrounding circumstances as disclosed by the evidence in the case. The defendants were engaged in the express business; that is to say, in receiving, carrying and delivering, by sea or by land, treasure, goods and packages for hire, in the care of their own messengers, but in vessels, conveyances, steamers, boats and vehicles belonging to other parties, in no way connected or associated with the defendants in their express business, and ordinarily used by the public at large as the common and public mode of transportation and conveyance. In these vessels, etc., the defendants had no interest and no voice in their management, nor

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any authority or control whatever over the persons in charge of them, and were as powerless for the purpose of preventing negligence on their part as the plaintiff himself or any other stranger. But in their capacity as common carriers the defendants were liable for any loss resulting from a defective construction of these public conveyances or a careless and negligent management of them by persons in charge of them. All these facts and circumstances were notorious and well known to plaintiff who had had previous dealings with the defendants in the line of their business. Viewed in the light of these circumstances it is obvious upon a mere glance at the contents of the instrument that it was designed to place a restriction upon the common law liability of the defendants. And I think this has been done in language which every business man would find no difficulty in understanding. They agree to transport the treasure to San Francisco and deliver it to the address of the plaintiff, who, on his part, agrees to pay them the sum of eighty dollars and sixty-five cents, and *in part consideration* relieve them from all liability for any loss or damage for which common carriers are, but mere forwarders of goods are not responsible. A forwarder is one whose business it is to receive and forward goods, by the usual modes of transportation, to their place of destination. He discharges himself from liability by showing that he has used ordinary diligence and prudence in forwarding the goods intrusted to his care by trustworthy and responsible parties engaged in the carrying business. His calling and the legal liabilities thereby imposed upon him are as well known among business men as that of common carriers and the liabilities imposed upon them by the law of the land. I find no difficulty in understanding the terms of this contract, and have no doubt that they were fully understood by the plaintiff at the time he accepted it without a word of dissent.

Having disposed of the preliminary points made by the plaintiff, we now come to the main question involved in this case, and which, so far as I am advised, is presented for the first time in this State. Counsel for the defendants affirm the

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broad proposition that a common carrier may by contract with the shipper protect himself against all liability for losses occasioned by the negligence, fraud, or felony of his agents or servants. That the defendants are common carriers, and that their common law liabilities are wholly unaffected by the fact that they use means of conveyance not belonging to them or under their control or management, are propositions not denied by them. They fully concede that, aside from the contract they would, under the law and the facts of this case, be liable for the loss of the treasure in question; but they insist that they are relieved from that liability by the express terms of the contract of shipment made with the plaintiff. On the part of the plaintiff it is contended that the contract in question is a contract by the defendants against actual negligence and fraud of themselves, their servants and agents, and therefore void upon grounds of public policy. Thus the question as to what extent a common carrier may, by express contract, restrict his common law liability, is clearly and fairly presented by the record. This question has been fully argued upon both sides with much learning and ability, and our task has been rendered comparatively easy by the industry and reasearch of counsel.

That a common carrier may stipulate for exemption from liability for losses not resulting from any fault or negligence on his part, or on the part of his agents, notwithstanding much controversy heretofore, may now be regarded as well settled. By the common law he is absolutely liable for the safety of the goods intrusted to his care; and is responsible for injuries or losses arising from the acts of others, without any neglect or fault on his part, except such as arise from the "acts of God, the public enemies, or the fault of the party complaining." His liability is of two kinds: one is the liability of a paid bailee, and is for losses resulting from neglect on his part, or on the part of his agents; the other is that of an insurer, and is for losses resulting from accident or other unavoidable causes, without any fault on his part or on the part of his agents. Against this latter liability it is now well settled,

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both in England and America, that he may protect himself by contract with the shipper of the goods; for no principle of public policy can be contravened by a contract which merely exempts him from liability for losses which have not been occasioned by any neglect or fault on his part, or on the part of those for whose acts the law holds him responsible. Whether he may go beyond this is a mooted question, for it is claimed by the defendants that there are cases both in England and America which seem to sustain, to its full extent, the doctrine for which they contend.

Austin and another v. The Manchester, Sheffield, and Lincolnshire Railway Company, 70 Eng. Com. Law R. 453, was an action to recover damages for the loss of a horse which was killed while being conveyed on defendants' railway. The horse was delivered to the railway company to be carried by them for hire subject to a note or ticket in the following words: "This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriage and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway or upon their vehicles." And it was held that, giving to the words of the contract their most limited meaning, they must apply to all risks, of whatever kind and however arising, to be encountered in the course of the journey; and that, therefore, the company were not responsible for the loss of the horse which was occasioned by the firing of a wheel in consequence of the neglect of the servants of the company to grease it.

Carr v. The Lancashire and Yorkshire Railway Company, 14 Eng. Law and Equity, 340, was a like case and founded upon a like contract, and it was held that, under the terms of

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the contract, the railway company were not responsible. In both of these cases the loss was occasioned by the gross negligence of the defendants, but it is to be observed that they were made to turn entirely upon the construction of the contracts upon which they were founded, and upon the assumption that the contracts were legal under the provisions of the Carriers' Act authorizing special contracts to be made; and it seems to have been admitted that railway companies had a right to protect themselves in such cases, doubtless, upon the principle that they were under no public obligation to transport cattle and live stock. In the case last cited, Parke, B., said: "Prior to the establishment of railways, the Courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. Before railways were in use, the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger; the rapid motion, the noise of the engine, and various other matters, are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts."

Thus there are marked differences between those cases and the present, and the precise ground upon which this case rests was not considered or regarded as being involved, and hence the theory of the defendants finds in them but little, if any, support. But there are several late cases decided by the Court of Appeals, of the State of New York, which seem to go a great way in sustaining the doctrine for which the defendants contend.

Wells v. The New York Central Railroad Company, 24 N.

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Y. 181, was an action to recover damages for injuries sustained by the plaintiff while a passenger upon defendants' road from a collision between the train in which he was riding and a freight train carelessly left on the track in the night time. The plaintiff paid no fare, but was carried under a free ticket, on which were printed the following words: "The person accepting this free ticket assumes all the risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket;" and it was held that such contract was not against law or public policy and was valid. That Court is composed of eight Judges—a bare majority concurred in the judgment, two dissented and one was absent. Mr. Justice Sutherland delivered the dissenting opinion in which he held that the contract exempting the defendants from liability for the negligence of themselves and agents was null and void as being against public policy. The leading opinion is very brief and unsatisfactory, while the other is able and conclusive upon the question as it was presented by the facts of that case.

This case was followed by *Perkins v. the same company*, (24 N. Y. 196) where it was held that a railroad corporation could not by contract exempt itself from liability to a passenger for damages resulting from its own wilful misconduct, but might, in respect to a gratuitous passenger, by contract exempt itself from liability for any degree of negligence in its servants, other than the board of directors or managers who directly represent the corporation. Here a distinction was made between passengers who pay and those who do not, and between immediate and remote agents.

Smith, Administrator of Joseph Ward, deceased v. the same company, 24 N. Y. 222, was an action under the statute for damages resulting from the negligent killing of the plaintiff's intestate while a passenger on the defendants' railroad. The deceased made a written contract for the transportation of two car loads of hogs. The contract recited that they were carried

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at a reduced rate in consideration of the owner's assuming certain specified risks in respect to the safety of the hogs. It also contained this clause: "It is further agreed that the said Ward is to load, transship, and unload said stock at his own risk; the said New York Central Railroad Company furnishing the necessary laborers to assist. And it is further agreed that the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." Ward went upon the train in charge of his hogs. At Rochester the car in which Ward and other drovers had previously ridden was taken from the train, and an old emigrant car, unsafe by reason of a flattened wheel, was substituted. This car was thrown off the track, and Ward was killed. The plaintiff had a verdict. The judgment was affirmed by a majority of the Court, five being for affirmance and three for reversal. But the majority differ as to the grounds of affirmance. Mr. Justice Wright and Mr. Justice Sutherland held the contract void, the latter doing so irrespective of the question whether the transportation was gratuitous or for hire. Mr. Justice Smith was for affirmance on the ground that the negligence was that of the corporation itself, and not its agents. Mr. Justice Denio and Mr. Justice Davis were of the opinion that there is no general public policy forbidding a contract by which a railroad corporation may exempt itself from liability for the negligence of its agents in respect to a purely gratuitous passenger, but such contract was prohibited by the Railroad Act and its policy in the case of a paying passenger, and were for affirmance on the ground that the plaintiff's intestate was not a gratuitous passenger. So the case establishes no principle, and decides nothing except itself.

Bissell v. the same company, 25 N. Y. 442, was an action precisely like the last. The plaintiff had judgment, which was reversed on appeal, five Judges being for reversal and three for affirmance.

The most that can be said for these cases is that they establish the doctrine in New York that a railroad corporation may, by express contract, exempt itself from all liability for the

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negligence or misconduct of its subordinate servants and agents, leaving, however, undetermined the question whether there are not certain agents so directly and immediately connected with the corporation that a contract relieving it from liability for their negligence would be illegal, (see opinion of Mr. Justice Selden in case last cited, p. 446,) which it must be confessed is not a very clear or satisfactory condition in which to leave so important a principle, and it admits of serious doubt whether, after all the discussion had in those cases, there is any common ground upon which a majority of the Court stand. Regarding them, however, as establishing the doctrine that a common carrier may contract against the negligence of his immediate agents, I think them opposed to principle and the weight of authority in America, and am not disposed to follow them. On the contrary, in my judgment, a contract exempting a common carrier from liability for losses to property, or injuries to persons resulting from the negligence of their agents, is null and void upon grounds of public policy, irrespective of the question whether the transportation be gratuitous or for hire. (See authorities cited in respondent's brief.) But in applying this principle a distinction is to be made between agents, as whether they are immediate or remote. By the former I mean such as are directly employed by the party sought to be charged, in his business exclusively, and are of his own selection, paid by him and in all respects subject to his will. By the latter I mean such as are made his agents (if I may be allowed the expression), not by contract directly between him and them, but by operation of law merely; or, in other words, persons not directly selected and employed by him and not in any respect under his control, but who nevertheless are in law considered as his agents, and for whose acts he is held responsible, notwithstanding they are in fact selected, employed and paid by and owe obedience to other parties who have no concern in his business and are in no just sense subordinate to him. Against the negligence of this latter class the common carrier may, in my judgment, protect himself by contract without violating any

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principle of public policy, but as against the negligence of the former he cannot. As to the former the carrier occupies the position of a principal in fact as well as law, and the true reason upon which the doctrine of *respondeat superior* is founded exists; but his relation to the latter is not strictly that of a principal, and the maxim, *Qui facit per aliam facit per se*, does not apply in any just sense. On the contrary, as to their acts he occupies a position *analogous to that of an insurer only*, and there is therefore no rule of public policy which precludes him from protecting himself by express contract against the risk of their acts. It cannot be claimed with any show of reason that negligence on the part of persons in charge of public conveyances, such as railroad trains, steamers and stage coaches, is induced by a contract between two strangers to the effect that one will and the other will not take upon himself the risk of their conduct in respect to the transportation of a particular shipment of goods. The transaction is too remote and can possibly have no bearing or effect upon the conduct of the parties in question. To say that the persons in charge of the Ada Hancock were less careful in the performance of their duty by reason of the contract between the plaintiff and defendants, of which they knew nothing, is to assert a proposition which is contrary to reason. Had the treasure been lost through the negligence of Ritchie, the defendants' messenger and immediate agent, or any other agent directly employed by them in their express business, the defendants would have been liable notwithstanding any contract to the contrary, upon grounds of public policy. But the defendants may lawfully contract (as I understand them to have done, in effect, in the present case) for indemnity against losses resulting from defects in the public conveyances used by them in the prosecution of their business, and against the negligence of the persons having such conveyances in charge, without violating any principle of public policy. Such losses are not the result of their fault or neglect within the true intent and meaning of the rule invoked by the plaintiff. The business in which the defendants are engaged, and the

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mode in which it is transacted, are of comparatively modern growth, and had no existence at the time when the rule in question became a part of the common law; and the new conditions presented by their use of remote, or, so to speak, foreign agencies in the transaction of their business, do not in my judgment fall within either the letter or spirit of that rule. The question is simply as to which of the contracting parties shall assume the risk of loss which may or may not result from the negligence of other parties over whom neither has any authority or control. In its determination the public can have no possible concern, for whichever way it may be decided the decision can have in the nature of things no effect whatever either by way of inducing or preventing the negligence in question. Nor is there any force in the suggestion that by holding such contracts valid the shipper will be placed at the mercy of the carrier. He is not bound to make the contract. On the contrary, he may insist that the carrier shall receive his goods upon the terms and conditions imposed by the law of the land, and the carrier cannot refuse to take them without subjecting himself to an action. Having engaged in a business, in its nature of a public character, he is bound to accommodate the public, and to receive and transport all goods coming within the line of his business, under all the responsibilities imposed by the law, upon the payment of a reasonable compensation.

It is urged, by way of argument on the part of the plaintiff, that, unless the defendants are held liable, the plaintiff will be without remedy, for the reason that the owners of the *Ada Hancock*, under the peculiar circumstances of this case, cannot be made responsible. This point rests upon the fact that the defendants did not give the master, agent or owners of the *Ada Hancock* a note in writing of the true character and value of the treasure in question, pursuant to the provisions of an Act of Congress of the 3d of March, 1851, entitled "An act to limit the liability of shipowners, and for other purposes." (United States Statutes at Large, 635.) That Act, by its own terms (Section 7), does "not apply to the owner or owners

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of any canal boat, barge or lighter, or to any vessel of any description whatever, used in rivers or inland navigation." It would seem that the *Ada Hancock* comes within the description of vessels excepted from the operation of the Act. She plies only between the shore and the anchorage of the steamer *Senator*, a distance of only three miles. Such can hardly be deemed ocean navigation. That term can only be applied to the voyage performed by the *Senator*. The ocean voyage commences and ends at the anchorage of the vessels by which it is performed. The office performed by the *Ada Hancock* was that of a lighter. She was used solely for the purpose of carrying passengers and light freight from the shore to the steamer *Senator*, and was, therefore, no more engaged in ocean navigation than the other small boats or vessels called lighters, in the record in this case, by which the heavier freight was usually transported. The latter are within the exact letter of the exception in question, and the *Ada Hancock*, in view of the purpose for which she was employed, can hardly be said to be without it merely because she is called a steam tug instead of a lighter. I am, therefore, of the opinion that the Act in question has no application to the facts of the present case; but were it otherwise, it is by no means clear that the defendants were guilty of negligence in not complying with its provisions in order to charge the owners of the *Ada Hancock*. The Act was intended solely for the benefit and protection of shipowners, and I see no reason why they may not waive its observance on the part of shippers, if so disposed. There are facts in this case which tend to show that such may have been the case in the present instance.

My conclusion is that the case was not tried in the Court below upon the proper theory, and that the judgment ought to be reversed and the case remanded.

Statement of Facts.

A. S. HURLBUTT v. PETER BUTENOP.

CERTIFIED COPY OF A DEED AS EVIDENCE.—A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not then in his power or control.

RECORD OF DEED NOT PROPERLY ACKNOWLEDGED.—The record of a deed not properly acknowledged does not give constructive notice to subsequent purchasers in good faith.

DECREE IN ACTION BROUGHT BY ONE FOR HIMSELF AND ON BEHALF OF OTHERS.—Where an action is brought by one of several persons, claiming title from a common source, on his own behalf and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent.

PURCHASERS AFTER *Ne pendens* FILED.—If a *Ne pendens* is filed at the commencement of an action brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree.

ASSESSMENT MUST FIX VALUATION ON PROPERTY.—An assessment of town lots for taxation, which does not give their cash valuation either in gross or detail, is radically defective. Figures placed opposite town lots in an assessment roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation to the same.

TAX DEED—WHEN VOID.—A tax deed executed in 1860, for land sold for taxes, is void if the assessment shows that there was not any cash valuation of the lot which the deed purports to convey.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

In the suit brought by Edward Gibbons, on behalf of himself and others, the complaint set forth the execution of the deed of Vincente Peralta to Hays, Caperton *et als.*, dated 13th day of March, A. D. 1852, and that he, Gibbons, had become a purchaser under the said deed of a certain tract of land in the City of Oakland; that a large number of persons, several hundred, had likewise become purchasers under the said deed, and for valuable considerations; that the parties similarly situated with himself were numerous, and that it was impracticable to bring them all before the Court.

The plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Argument for Appellant.

ge & Loughborough, for Appellant.

plaintiff sought to introduce copy of deed under the
ty of the second section of the Act of 1857. It was,
re, upon the plaintiff to *show* — not merely *swear* — that
original deed was not under his control, or that it was lost,
he should be permitted to use the certified copy. This,
end, he failed to do. He *swore*, it is true, *in the words*
statute, that he had not control of the original. His
e was: "*I never had control of the original deed, and*
it now in my power or control."

was only swearing to a *conclusion* of law, but does not
the Court that the original was not under his control.
s an established rule that the best evidence must in all
given of which the nature of the fact to be established
divided is capable. This is a rule of policy grounded upon
enable suspicion that the substitution of inferior for
evidence arises from some sinister motive, and an ap
tion that the best evidence, if produced, would alter the
the prejudice of the party." (Petersdorff's Com. Law,
vidence; *Bagley v. McMickle*, 9 Cal. 445.)

o rule which excludes substitutionary evidence so long
best evidence can be had, was made for the prevention
d, and has become essential to the pure administration
ce." (1 Green. Evidence, Sec. 82.)

the rule being general in its application, it *would not*
sufficient to rebut this presumption in any particular case, so
t in the substitutionary evidence. Thus it would be of
l to prove that the *copy* tendered in evidence was in
spect quite correct; it would be still inadmissible while
n the *power* of the party to produce the *original*." (1
Ev., 4th Am. Ed., 570.)

e Act of 1851, which provided that copies of papers
e Recorder's office shall be received in evidence with
effect as the original could be if produced, did not dis
with the production of the original if it could be ob
(*Macy v. Goodwin*, 6 Cal. 582.)

Argument for Respondent.

Before a certified copy can be offered in evidence, the party *must prove the loss of, or his inability to produce the original.* Per Judge Field, in *Touchard v. Keyes*, 21 Cal. 211.

As to the sufficiency of the proof that a deed is lost, see *Fallon v. Dougherty*, 12 Cal. 105, and the cases there cited.

As to what proof, or rather what facts are sufficient to show the inability of the party to produce the original, see numerous cases cited in Note 446 to 2 Phil. Ev., Edwards' Ed., p. 514; see also p. 552.

The tax deed of the defendant shows upon its face that all the requirements of the law were fully complied with, and is therefore *prima facie* evidence of all the matters set forth by it and of title in the grantee. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

If the plaintiff was the owner of the land, it was his duty to pay the taxes. He could not have been misled by any act of the defendant, for the land was assessed to P. C. Lander, who conveyed to the plaintiff after the lien had attached and before the taxes became payable.

The defendant was under no obligation to the plaintiff to pay these taxes, nor can he be required to hold the tax title in trust for the plaintiff, for there was no privity in estate nor fiduciary relation existing between them.

The defendant was under no obligation to the State to pay the taxes unless the land was his, or at least assessed to him as the owner.

Samuel J. Clarke, Jr., for Respondent.

The proof was stronger than that required by the statute. The plaintiff testified that he never had control of the original deed, and in the very words of the statute, "it is not now in my power or control." The plaintiff's counsel argues that this was only swearing to a conclusion of law. Whether he swore to a conclusion of law or not, makes very little difference; he swore to what the law required he should swear to.

But we differ from the counsel as to *what is a conclusion of*

Argument for Respondent.

When a party swears that he has not the control of a particular lot, the counsel understands that he swears to a fact. The counsel contends that the evidence did not show that the original owner was under the control of the plaintiff. On this point we refer to one of the authorities referred to by the defendant — the case of *Bagley v. McMickle*, 9 Cal. 449. Judge Stanford says "the preliminary proof is addressed to the question as to its sufficiency the Court is the sole judge."

The only proof upon the question was the evidence we have produced. No evidence was produced on the other side; and the plaintiff, acting upon the only proof before them, admitted the copy in evidence.

The owner is not bound to select from a long list of particular lots, and make a calculation of the amount proposed to be charged thereon; that is a duty imposed upon the officers of the law. That was the information that the assessment roll should convey to the owner.

At this point we refer to Blackwell on Tax Titles, page 100. When one owns several tracts or parcels of land, they should be listed and valued separately, else the assessment will be void. Thus, in *Skimin v. Hinman*, the statute required the Assessors to set forth in these lots the number of unimproved lands which they may have taxed on the part of a non-resident proprietor, and the value at which they may be assessed the same."

It appears from the statement in Blackwell, that three lots were assessed to William Chemin: the aggregate value was \$200 at two hundred and forty dollars; the State and County tax at sixty-one cents; the number of acres; the town tax at six dollars and twenty-two cents, and the total tax, \$206.18 and eighty-three cents. The Court held the list was invalid, saying a fair construction of the statute requires that the lots should be valued and assessed separately.

Lots may be owned by different persons, and if a joint assessment and assessment was allowed, one owner could not be liable for the amount of the tax on his own land, or pay or be liable for the land when sold, without paying the tax upon all

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the other land assessed with it, although in this case the several lots appear to have been owned *by one person*. That fact cannot dispense with the law, or excuse a deviation from it. (26 Maine, 228.) Blackwell then proceeds to cite the case of *Willey v. Scovill's Lessee*, 9 Ohio, 43. It appears from that case that there were *nine lots* assessed together. Mr. Justice Grinke says: "The law requires that the Auditor should so list and advertise the land as to furnish the owner with a description of the land subject to taxation, and that the sale shall be advertised and conducted in conformity with that rule." In this instance there was no assessment in gross upon the whole amount of the taxes chargeable upon the nine lots, and yet each lot was put up to pay the tax on it separately.

"The land is not treated as an entire part in the list advertisement for sale, but is so treated in the apportionment of the tax. Now, it is evident that the course pursued should be consistent with itself; if the lots might be treated as separate and distinct parcels of land, then the tax charged upon them should have corresponded with the fact in the description; and if they should be treated as one entire tract, then, although the assessment of the tax in the advertisement in one aggregate sum would have been correct, the description of the land itself would have been erroneous, and so would the sale under it. In either case the title would be defective, and the Court was right in ruling out the evidence."

By the Court, SHAFTEE, J.

This is an action of ejectment brought to recover the possession of Block Sixty-seven, situated in the City of Oakland, and is parcel of lands granted by the Mexican Government to Peralta. Both parties claim under the said grantee. The plaintiff, at the trial, offered in evidence, as part of his deraignment from Peralta, a certified copy of the record of a deed from Irving to one Marshal. The plaintiff was sworn and testified that he "never had control of the original deed, and that it was not then in his power or control." The defendant

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to the admission of the document, on the ground there was not sufficient evidence of the loss of the original and that no diligence had been used to produce it. The opinion was overruled by the Court, and the defendant

the ruling was correct. (*Skinker v. Flohr*, 13 Cal. 638.) The plaintiff, having connected himself with J. C. Hays and grantees of Peralta, by deed dated March 13, 1852, and on March 17, 1852, on a defective acknowledgment, and further proved that Peralta was in possession of the property in 1849, and the defendant was in possession at the commencement of the action, July 30, 1860, rested his case. The defendant then gave in evidence a deed of the premises from Peralta to Francisco Galindo, dated October 8, 1857, recorded on that day, and a deed from Galindo to defendant dated July 27, 1860, duly recorded. The defendant also produced a tax deed to himself, dated July 27, 1860, recorded on July 30, 1861. The plaintiff, in rebuttal, produced the tax map showing that the sale was to Henry Butenop and the defendant, and also gave in evidence a deed from Galindo to Pacheco, dated September 24, 1858, and recorded on that day, and also the judgment roll in an action brought by Ed-ward Gibbons against Peralta and wife, Galindo, and Pacheco, dated February 12, 1859, in which action it was adjudged that the aforesaid deed from Peralta to Galindo, and the deed from Galindo to Pacheco, were fraudulent and void as to the defendant Gibbons, "and those on whose behalf he sues." It appears by the record that Gibbons sued on his own behalf and on behalf of all others claiming, as he claimed, under the deed from Peralta to Hays and others, of March 13, 1852. A writ of *lis pendens* was filed in the action, and, as we understand the record, on the day the action was brought.

The Court instructed the jury that the plaintiff had proved himself—that the defendant had failed to make out a case, and that the plaintiff was entitled to a verdict—to charge the defendant excepted.

Reversing the decree in *Gibbons v. Peralta* out of account,

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the case stands thus: The plaintiff proved title in himself through the unrecorded deed of Peralta to Hays and others, of March 13, 1852. The defendant then proved a title apparently better than that, through the recorded deed of Peralta to Galindo, of October 8, 1857. The plaintiff, however, for the purpose of showing that the defendant took nothing by Galindo's deed of July 27, 1860, proved that Galindo had no title at that date by showing a previous conveyance by him to Pacheco. Assuming that the evidence accomplished its purpose, yet standing by itself it demonstrated also that the plaintiff himself had no title, the deed of Peralta to Hays not having been duly recorded. There was evidence in the case tending to prove that Peralta was in possession in 1849, but none tending to prove any entry on the part of the plaintiff. But the case did not go to the jury on the state of facts suggested. The decree in the case of *Gibbons v. Peralta and others*, established that the deed from Peralta to Galindo, and the deed from Galindo to Pacheco, were nullities as to Gibbons and all others claiming under Peralta through his deed to Hays and others. The plaintiff herein is one of the unnamed parties for whose benefit that suit was brought, and as such is entitled to participate in the benefit of the decree. The defendant is bound by the decree, for there was a notice of *lis pendens* filed, and the defendant bought of Galindo pending the litigation. It is further to be observed, that the defendant neither proved nor offered to prove that Galindo was a *bona fide* purchaser under Peralta for a valuable consideration.

2. It is further insisted that the instruction was erroneous, for the reason that the defendant became the owner of the lands by force of the tax deeds.

The tax was assessed under the Act of 1857 and other Acts amendatory thereof and supplementary thereto. The assessment roll was put in evidence, from which it appeared that the block in question (No. 67, situated in Oakland township) was listed to P. C. Lander. The question discussed by counsel as to whether the defendant could purchase the property at tax sale, he having been in possession at the time the tax

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assessed, does not arise, for the reason that the record shows that the property was purchased by Henry Butenop, and there is no evidence in the case showing that the property was in trust for the defendant or by any collusion with him. It appears by the recitals in the deed that the certificate of title issued to the purchaser was assigned by him to the defendant, and we shall assume, for all the purposes of this case, that the fact is established by force of the recitals. We consider that the assessment is radically defective in a number of particulars. There are seven distinct lots assessed under, described severally by numbers, but their value is given neither in gross nor in detail. Under the head of "value of city and town lots," there are figures written off against the numbers of the lots respectively, and in case of Block 1, even, the figures "500;" but whether they stand for dollars or eagles does not appear.

It is to be further observed, in relation to the first three lots, that they are flanked on the right, in the assessment, by a single sum, "14 50." The "total value of the property" is not represented otherwise than by the barren figure "21.05," which sum, if read as a whole number, is less than the sum of the figures first referred to by fifty, and the "total tax" is set down as 32.63 cents. Passing by these obvious discrepancies, however, it is sufficient to say that the deed is void for the reason that it appears there was no cash valuation of the lot which the deed purports to convey. (Acts 1857, p. 327, Sec. 4; Black. Tax Tit., 176, *Trust v. Merriam*, 2 Greenleaf, 375.) The judgment affirmed.

AM K. REED v. THOMAS SPICER AND DANIEL SPICER.

CONVEYANCE OF LAND IN A DEED.—If a deed recites two descriptions of the property conveyed, one of which sufficiently identifies the property, while the other is false in fact, the false description should be rejected as surplusage.

Argument for Appellants.

DEED OF A DITCH.—A deed conveying a right of way upon land, in, to, and for a ditch called the Mountain Brow Ditch, is a conveyance of the ditch itself.

A DITCH NOT AN EASEMENT.—A ditch used for the conveyance of water for mining purposes is not a mere easement or incorporeal hereditament.

SALE BY TENANTS IN COMMON.—If two persons own a tract of land as tenants in common, and one of them conveys to a third person a ditch crossing the same, and the other afterwards conveys to another third person the same ditch, the deeds are valid conveyances as between the parties, and the persons to whom the conveyances are made become tenants in common in the property.

STATUTE OF LIMITATIONS — MEXICAN GRANT.—The Statute of Limitations does not commence to run, with regard to lands held under a Mexican or Spanish grant, until a patent for the same has been issued by the Government of the United States.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

The facts are stated in the opinion of the Court.

Coffroth, and Spaulding, for Appellants.

The first ground of objection was "that said deed did not convey any interest in the land in question, nor any easement therein, but merely an interest or easement in certain lands belonging to defendant Spicer."

It is true that in the description of the thing granted, the words occur: "All the right of way in and upon the land owned by the said party of the second part." This may have been a verbal error, or it may have been a mistake of the parties as to their legal rights. In either case it is immaterial.

The palpable mistake of a word will not defeat the manifest intention of the parties. (Dougl. 384.)

The property is described in the deed by a certain name. This is sufficient. (*Castro v. Gill*, 5 Cal. 42; *Stanley v. Green*, 12 Cal. 166.)

There can be no mistake as to the intention of the parties to this deed.

In the *habendum* of the deed Haley conveys to Spicer "all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described

Argument for Appellants.

es, and every part and parcel thereof, with the appur-
s."

office of the *habendum* is properly to determine what
r interest is granted by the deed. (2 Black. Com. 298.)
is case all the interest of the grantor passed. The mis-
ignorance of any of the parties to a conveyance of
ghts in the estate will not render the deed void. (Sug-
Vendors, Vol. II, p. 514; *Storrs v. Baker*, 6 John. Ch.

Court erred in excluding the oral testimony offered by
ants, to wit: "That the defendants, and those from
they deraign title, had constructed said ditch in 1856,
d ever since held the same adversely to the plaintiff and
ators."

objection to this evidence was, "that the patent had
ued in 1863, and from that time alone did the Statute
tations begin to run."

plaintiff in this case seems to have proceeded upon the
that fee simple titles to real estate and easements are
d by the same laws, or, at least, that the Statute of
ions applies in the same manner to one as to the other.
w of easements, as applied to running waters, (the
uctus of the civil law,) must govern and control the
bar.

asements are things incorporeal, mere rights, invisible
angible. (*Bowen v. Team*, 6 Rich. 298; *Kowbotham v.*
8 Ellis & B. 123; Wash. on Easements, 18.)

grant by which an easement is created may be evi-
in several ways. It may always be done by the pro-
of an existing deed. So it may be by prescription or
joyment of the easement claimed.

he law often regards the *enjoyment* of an easement as
e that a deed once existed, and gives to this presump-
e same effect in establishing a title as if the deed were
d. This mode of treating the enjoyment of an ease-
s evidence of a title to the same by deed, has taken the

Argument for Respondent.

place in modern practice of the ancient doctrine of prescription. (Wash. on Easements, 19.)

In such cases, in the language of Lord Mansfield, "not that the Court really thinks a grant has been made, but they presume the fact for the purposes, and from the principle of quieting the possession." (*Eldridge v. Knott*, Cowp. 214.)

H. P. Barber, for Respondent.

Whether the property was conveyed to plaintiff by tenants in common or not, makes no difference, as one tenant in common is entitled to hold the *entire* property against all the world, except his co-tenant; and unless the defendant, Spicer, can show himself a co-tenant, he has no defense. (*Touchard v. Crow*, 20 Cal. 150.)

The deed conveys no interest whatever to Spicer in any property owned by Haley. Appellant *assumes* this was a mistake. Suppose Haley had held a lease from Spicer of this land, and gave him the deed to enable him to construct a ditch over the land so leased, would there have been any mistake in this deed?

It will be remembered defendant merely offered the *deed* in evidence — no offer whatever was made to show that there was *any* mistake in it. The deed itself evidently conveyed no right of way over any lands owned by Haley, and the Court was right in rejecting it. Errors and mistakes in deeds must be corrected in equity. They cannot be corrected, collaterally, in a Court of law. (*Cameron v. Irwin*, 5 Hill, 272; *Leavitt v. Palmer*, 3 N. Y., 3 Comst., 19; *Adams' Equity*, 4 Am. ed. 382, 387.)

Defendant's *entire* title to the right of way, claimed by him, is founded on this deed from Haley. Even were the deed valid on its face, it would be ineffective; for one tenant in common does not possess the power to create an easement on the joint property. At the time of the alleged deed from Haley, Stebbins and Haley were tenants in common of the land over which this pretended right of way was granted by

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and his *sole* grant was void. The reason of the rule is. If either tenant in common possessed power to grant of way over or create an easement on the common, he might totally ruin it, as by granting the right to anal or construct a road through it. The principle is laid down in Washburn on Easements, 29; 3 Kent's 78, note *a*.

the Court, SHAFER, J.

is an action of ejectment brought to recover the possession of certain premises described as "The Mountain Brow Company's Ditch — consisting of dams, ditches, flumes, reservoirs used for mining and irrigating purposes, lying and situate in the Counties of Calaveras and Stanislaus." Verdict and judgment for plaintiff. The appeal from the judgment and from the order overruling defendant's motion for a new trial.

Appears from the record that the ditch in question crosses two leagues of land which, on the 25th of January, 1860, were owned by Salsbury & Haley and James Phelan, tenants in common — and certain other lands belonging to Packard, adjoining the lands first mentioned, on the west. On the aforesaid date Packard conveyed to the plaintiff that portion of the ditch which crossed his own land, and ten feet on each side of it; and on the 26th of June, 1862, he executed to the plaintiff a deed purporting to convey the portion of the ditch which crossed the two leagues owned by the grantor in common with Haley, with a like selvedge of land on either side. The plaintiff having proven these facts, and shown the defendants in possession, rested his case. The defendants, in support of the issue on their part, offered in evidence a deed executed by said Haley to Thomas Spicer, on the 25th of January, 1860. The evidence was taken, to, first, on the ground that the deed did not convey, and, second, on the ground that the deed did not purport to convey, any interest in the land in question, but only an interest or easement in certain lands belonging

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to Spicer, the grantee; and, second, on the ground that Haley, being merely a tenant in common of the land, could not grant an easement therein. The objections were sustained, and the defendants excepted. The defendants then offered to prove by Spicer that the ditch was constructed in 1856, and that it was constructed by the defendants and those from whom they derived title, and that they had ever since held the ditch adversely to the plaintiff and his grantors. It being already in proof as a part of the plaintiff's case, that he held under a Mexican grant confirmed under the Act of Congress, and that the patent founded thereon did not issue until 1863, the Court excluded the evidence, on objection of the plaintiff, and the defendants excepted. These rulings of the Court we are now called upon to review.

1. As to the exclusion of the deed from Haley to defendant Spicer.

By the deed, Haley, the party of the first part, "for and in consideration of one dollar to him in hand paid by the party of the second part (Spicer) remised, released and quitclaimed unto the said party of the second part, and to his heirs and assigns forever, all the right of way in and upon the land owned by the said party of the second part, in, to and for the ditch called 'Mountain Brow Water Company,' together with the privilege of building a dam across Little John's Creek, for the purpose of a reservoir for said ditch. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining. And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part or parcel thereof, with the appurtenances. To have and to hold," etc.

The interest intended to be conveyed is, literally, a "right of way." There are two independent descriptions of the way; first, by name — "a way to, in and for the ditch called Mountain Brow Water Company;" second, by indicating the land which the way crosses, viz: "land owned by Spicer."

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clearly shown by the record, and counsel on both sides the second description to be false. If false, the description should be rejected. (Broom's Maxims, 490.) In the case of a lease of a portion of a park, described as being in the occupation of S., and lying within certain specified abutments with all the houses, etc., belonging thereto, "which are in the occupation of S.," it was held that a house within the abutments but not in the occupation of S. would pass. (*Doe v. Smith v. Galloway*, 5 B. and Ad. 43; *Beaumont v. Field*, 1 Ald. 247.) The ditch is spoken of in the deed as a ditch existing. Its *termini* and branches are set forth in the deed, and the disseisin alleged comprehends the whole of the ditch, branches included. Stakes, the surveyor, called by the plaintiff, testified that "the property described in the deed was located in part on the two leagues owned by Phelan and Daley, and in part upon the three and a half leagues to which, owned by Packard;" and this was the only testimony upon the subject. Nor was there any evidence in the deed showing that there was any ditch in the Counties of Stanislaus and Stanislaus known as the "Mountain Brow Ditch," other than the one crossing the lands above mentioned.

The deed then does not present the case of two alternative phrases, one of which by restraining or narrowing the scope of the other, makes it more specific — both having the same legal effect; but instead presents the case of two descriptions, independent and detached, each of which goes upon a matter of fact which the proof of the plaintiff shows had no existence at the time when the deed was executed.

As to the second objection to the admissibility of the deed, it is not in our judgment well taken. Substantially the same was of the ditch, for there can be no distinction between a "right of way in a ditch" or "for" an existing ditch, and the ditch itself. The argument of the respondent proves too much; for if a mining ditch is to be regarded as an easement, or incorporeal hereditament, it would fol-

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low that this action could not be maintained. But passing this, we do not consider it necessary to inquire as to the effect of a deed executed by one tenant in common of all his interest in a given part of the common property, or of some estate therein of a quality inferior to his own. That question does not arise on this record. Assuming the fact which the rejected deed would have established had it been admitted, Haley, one of the tenants in common of the ditch, conveyed all his interest in it to defendant Spicer in 1860, and Phelan conveyed all his interest in it to the plaintiff in 1862. The parties to this suit then are tenants in common of that portion of the ditch crossing the two leagues, if the validity of both deeds be assumed; but if the deed under which the defendants claim from one of the tenants in common be held as invalid for the reason that the co-tenant was not a party to it, then the deed under which the plaintiff claims must be void by parity of reasoning, and the plaintiff is out of Court. But the deed of Haley to Spicer is good as between the parties to it, and so as to the deed from Phelan to the plaintiff. Phelan might have avoided the deed of his co-tenant to Spicer, (1 Hill R. P. 585,) and so could the plaintiff if he had succeeded fully to Phelan's rights. But he has not. Phelan and Haley are still tenants in common of the two leagues, less the ditch. Haley has conveyed his interest in the ditch to Spicer, and Phelan has conveyed his interest in it to the plaintiff. The respective grantors have co-operated in withdrawing the ditch from the operation of the common title, and as between the two neither can now be considered as having conveyed against the will of the other. The conveyance by Phelan was all that was wanting to make Spicer's title perfect, and the prior conveyance by Haley to Spicer was the very fact which put it in the power of Phelan to make a perfect title to the plaintiff. As neither of the grantors can now question the action of the other, their respective grantees cannot do it. As between themselves, they are what the several but co-operative deeds of Phelan and Haley have made them, viz: tenants in common of the ditch and its branches. (*Stark v. Barrett*, 15 Cal. 368; 1

Argument for Appellant.

on R. Prop. 417.) Therefore the deed of Haley to should have been admitted.

evidence of the defendants offered in support of the the Statute of Limitations was properly excluded, for ute began to run only from the issuing of the patent, y 31, 1863. (*Richardson v. Williamson et al.*, 24 Cal.

ment reversed and cause remanded.

THE PEOPLE v. THOMAS BLACKWELL.

MENT OF INDICTMENT.—It will be presumed that an indictment was ted to the Court by the Foreman of the Grand Jury, and in their nce, although that fact is not indorsed on it, if the record of the shows nothing to the contrary.

COURTS.—County Courts are Courts of general criminal jurismc- and as such all intendments are in favor of the regularity of their edings.

COUNSEL FOR DISTRICT ATTORNEY.—Whether the District Attor- should be allowed associate counsel to aid him in the management of a is a matter resting in the discretion of the Court, and where there is use of that discretion the appellate Court will not interfere.

THAT WITNESS EMPLOYED ASSOCIATE COUNSEL.—If the District ey is assisted by associate counsel in the prosecution of a criminal counsel for the defense have a right to ask the prosecuting witness if s employed such associate counsel.

AL from the County Court, San Joaquin County.

facts are stated in the opinion of the Court.

& Cobb, for Appellant.

Court erred in refusing to set aside the indictment upon of defendant, upon the grounds stated in the motion. al Practice Act, Secs. 233, 278.)

y fact necessary to give the Court jurisdiction should affirmatively in the record. It nowhere appears in the hat the indictment was presented to the Court by the n of the Grand Jury, in the presence of the Grand Jury. t being *in fact* so presented, the Court would have no tion to try it. If it was necessary that the *fact* should L. XXVII.—5

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exist, it is most certainly just as necessary that the record should show the fact. Nothing will be presumed in favor of the jurisdiction of the Court. When jurisdiction is once acquired, then the rule is different. (*Powers v. The People*, 4 John. 292.)

The Court erred in refusing to allow defendant to ask the prosecutrix, upon cross examination, if she had employed Messrs. Budd & Carr, and Messrs. Healep & Jenkins, to assist the prosecution of the defendant.

We had a right to the testimony upon two grounds: First — Because it is always competent to inquire of counsel at whose instance he appears as such, and *a fortiori* to inquire of the client as to whether counsel appears for him or at his request. Second — Because it went to the credibility of the witness testimony. If she felt such an interest in the conviction of defendant as to hire the assistance of two eminent legal firms to assist the District Attorney in procuring a conviction, defendant had a right to show that fact, as a circumstance going to her credibility.

J. G. McCullough, Attorney-General, for the People.

Upon motion to set aside indictment, we cite Criminal Practice Act, Sec. 233. Don't require the indictment to *show* the presentation, etc. (*People v. Connor*, 17 Cal. 361; *People v. Hobson*, 17 Cal. 429, 363; Criminal Practice Act, Sec. 247; *People v. Mills*, 17 Cal. 277; *People v. Lawrence*, 21 Cal. 372.)

Upon the refusal of the Court to allow the prosecuting witness to be asked if she had employed associate counsel, we cite 1 Wharton Crim. Law, Sec. 474, etc.; *Byrd v. State*, 1 How. Miss. 250; *Jarragin v. State*, 10 Yerger, 530; *Bush v. Cavanaugh*, 2 Barr, Pa. 189.

By the Court, SHAFER, J.

Indictment for rape. Verdict — Guilty of assault with intent to commit a rape.

1. After arraignment the defendant moved the Court to set

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the indictment on the ground "that it does not show by proper indorsement that it was presented to the Court by the reman of the Grand Jury and in their presence." The was overruled, and the defendant excepted. indorsement was as follows:

presented and filed in open Court, this 14th day of March, 1864.

"H. E. HALL, County Clerk."

exception is not well taken. It may be admitted that matter of jurisdictional consequence that an indictment in fact be presented by the Foreman of the Grand Jury in their presence, but that the indictment in question was presented will be presumed, inasmuch as the record shows to the contrary. The Criminal Practice Act prescribes of indorsement. County Courts, under the late amendment to the Constitution and the Act of April 20, 1863, in pursuance thereof, are Courts of general criminal action, and as such all intendments are in favor of the validity of their proceedings. (*People v. Connor*, 17 Cal. *People v. Robinson*, 17 Cal. 368; *People v. Hobson*, 17 Cal. 24; *People v. Lawrence*, 21 Cal. 372.)

It appears from the record that the Court, by the request of the District Attorney, permitted other counsel to assist him in the trial. Before the trial commenced, however, the counsel for the appellant moved the Court to vacate the order. The was overruled and the defendant excepted.

It appears that the District Attorney had the active superintendence and management of the case during the progress of the trial. Whether the State, through him, should be allowed to avail itself of additional professional aid, was a matter addressed to the discretion of the Court, and there is nothing in the record showing that the Court abused its discretion in granting the request of the attorney. (*Commonwealth v. Wilcox*, 2 Cush. 582.)

On the cross examination of the prosecutrix, defendant's counsel asked the witness if she had employed Budd & Carr

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and Heslep & Jenkins to assist the District Attorney in the prosecution. The District Attorney objected to the question, on the ground that the proof was incompetent. The objection was sustained and the defendant excepted.

We cannot determine, nor is it either necessary or proper for us to inquire, what, if any, effect an affirmative answer to the question would have had on the minds of the jury. The defendant had a right to ask the question. If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The witness may have thus interposed on considerations of humanity, or of public justice, or he may have been influenced by private grudge; but the party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and, if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it. (1 Greenl. Ev. Secs. 449, 450; *Baker v. Joseph*, 16 Cal. 173.)

Judgment reversed and cause remanded for further proceedings.

HORACE ALLEN v. EDWARD FENNON.

MOTION FOR NEW TRIAL.—If no motion is made for a new trial in the Court below, the findings of the Court and verdict of the jury are conclusive as to the facts.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

H. Allen, for Appellant.

Edward Tompkins, for Respondent.

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the Court, SAWYER, J.

is an action to recover the possession of land. The case was tried without a jury. The issues as to title and possession were found against the plaintiff, and the defendant had judgment. No motion for a new trial was made. The appeal is from the judgment, and the error relied on is, that the evidence appearing in the statement on appeal, the court should have found the issue upon the title in favor of the defendant instead of against him.

It has been settled by a long series of decisions in this State that when no motion for a new trial has been made the findings of the Court and verdict of the jury are conclusive as to the facts. Such has always been the construction of the Practice Act in cases at law, and it is now settled that the practice in equity cases must be the same. (*Brown v. Tolles*, 7 Cal. 395; *Farwood v. Simpson*, 8 Cal. 108; *Rhine v. Bogardus*, 13 Cal. 379; *Duff v. Fisher*, 15 Cal. 379; *Gagliardo v. Hoberlin*, 16 Cal. 395.)

There is nothing in this case to take it out of the rule established by the cases cited. The judgment affirmed.

Justice CURREY, being interested, did not participate in the decision of this case.

THE PEOPLE v. DAVID F. BATCHELDER.

ACT OF AN ISLAND FOR GATHERING THE EGGS OF WILD BIRDS.—Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of husbandry, residence, or commerce, are not in such possession of the same as to entitle them to exclude others who desire to occupy it for a similar purpose, or to justify them in resisting by force others who attempt to do so and upon it to engage in the same pursuit.

ISLAND HOMICIDE.—If several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and others attempt to land there to engage in the same pursuit, and their

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attempt to land is resisted by force by the party first there, they are justified in using such force as may be necessary to effect their object; and if one of the opposing party is slain, it will be justifiable homicide.

SAME.—If the persons attempting to land on the island are armed with guns, this does not affect their right to land; and if they are attacked by those on shore with deadly weapons and murderous intent, and their lives placed in danger, they are not obliged to retreat, but may stand their ground, and, if need be, kill their assailants.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Van Arman, Lane & Howe, for Appellant.

J. G. McCullough, Attorney-General, for the people.

By the Court, **CURREY, J.**

The defendant was indicted by the Grand Jury of the City and County of San Francisco, for the crime of manslaughter in the killing of Edward Perkins at the Farallone Islands, on the 4th of June, 1863. The defendant pleaded not guilty, and was afterward tried and convicted and sentenced to be imprisoned in the State Prison for one year. From this conviction and judgment he has brought the case to this Court upon a statement embodying all the testimony produced on the trial, in which is contained the charge of the Court to the jury, and also certain requested instructions on the part of the defendant, which the Court refused to give to the jury, together with the exceptions taken by the defendant to various rulings during the progress of the trial.

The evidence discloses that on the 3d of June, 1863, the defendant and some twelve or fifteen other persons repaired in vessels to the anchorage adjacent to the principal of the Farallone Islands, situated about thirty miles westward from the City of San Francisco, and there remained during the night of that day; that on the morning of the next day, between six and seven o'clock, a portion of this party attempted

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and upon the island, when they were met at the shore by a shore guard armed with guns, who, by words, accompanied by menacing acts, warned them not to land. Upon thus being warned and threatened, the party so attempting to go ashore returned to their companions upon the vessels at anchor, where they were joined by all, or nearly all, the shore party, and were furnished with loaded guns, and thus reinforced and equipped, made another attempt to land at a point upon the island a short distance from where the shore guard on shore were. Upon nearing the land, the shore guard confronted them and again warned them off, but notwithstanding they were thus warned, the defendant's party continued to approach the island, for the purpose of landing ashore, when the shore guard opened fire upon them, which was immediately returned by a volley from the defendant's party who were together in a boat. The shore party fired several shots after the first round, when the defendant's party fled. By the first fire from the men on shore several persons were wounded, one of whom subsequently died, and by the fire from the defendant's party one of the shore guard, John Perkins, was killed.

The object which the defendant and his companions had in view in going to the Farallone Islands was to gather the eggs deposited there in great abundance by wild sea fowls. Before the time of the collision which resulted in the death of Perkins and his companions, a number of persons known as the Farallone Egg Company had been engaged in procuring the eggs deposited there by wild sea birds upon this island and selling the same in San Francisco market; and the shore party, of whom Perkins was one, were in the employment of this egg company. It appears from the testimony of some of the persons composing the shore party that their chief business was to guard the island for the benefit of the egg company, against the intrusion of any other persons who might desire to visit it for the purpose of gathering eggs there. The egg company, it was claimed, claimed the exclusive right of gathering wild birds' eggs upon the island, as the prior occupants of it for that pur-

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pose. The defendant refused to acknowledge any such right, or to yield to such claim, and in attempting to avail himself of what he deemed a right common to all citizens, he met with resistance from an armed force, who assumed to be acting in the defense of what they claimed as their employers' prior and paramount right. Upon the trial of the defendant the question as to the right of the respective parties to occupy the island for the object of procuring the eggs deposited there by sea fowls was in some degree involved, and the further question as to whether the defendant and his party were acting in the necessary defense of themselves, when the deceased, Perkins, was slain, was also a legitimate subject of inquiry.

When a person is accused of a criminal homicide, and in his defense undertakes to justify himself on the ground that the person slain was the aggressor, and that his death was the result of force used in the necessary defense of the person of the accused, then the character of the conduct of the deceased, with the concomitant circumstances, as well as that of the accused, is a proper subject of investigation. While Courts and juries should be extremely cautious how they excuse the slayer of his fellow upon the pretext that the act was the result of a necessity, they should be equally careful not to find the accused guilty if it appears that the homicide was committed in the necessary defense of himself, or in the defense of those whom he is bound by natural law to protect and defend.

In charging the jury the Court left it to them to determine from the evidence whether the deceased and those acting with him were, at the time of the fatal rencounter, in the actual possession of the place where the defendant and his party attempted to land, and whether the defendant and his party had actual notice of such possession, and also whether he or they attempted at the time to forcibly enter and intrude into and upon such possession.

We have examined the evidence in the record with care and have not been able to find anything therein from which it could be inferred even, that the deceased and those engaged with him in resisting the landing of the defendant and his

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their employers were in the actual possession of the island, which the defendant's party attempted to land, or had the right to prevent any persons who desired to land upon the island from doing so, or from engaging, in a peaceable manner, in the lawful business of gathering the eggs deposited there by the wild birds of the ocean. Both on the part of the prosecution and defense it seems to have been conceded on the trial that the island was a part of the public domain of the United States, and it is not pretended that the Farallone Egg collectors, or their servants, the armed guard, of which the defendant was one, had reduced the island, or any portion of it, to the exclusive and exclusive occupation for the uses and purposes of habitation, residence, or commerce. We are not disposed to reject the doctrine which recognizes the actual possessor of land as the owner for the uses to which land is ordinarily employed, as distinguished from the casual and temporary occupant, whose use is subordinate to the pursuits of hunting and fishing, or the gathering of the eggs of birds whose resting places are the islands of the sea. It would be equally reasonable to recognize in the hunter who had first penetrated the mountain in quest of game, the exclusive right to it as his private ground, as it would to accord to the Farallone Egg collector the right to the exclusive possession of the Farallone Islands for any one of them, for the business of gathering eggs deposited by wild birds. The defendant and his party had the right to enter upon the island, provided the Government, in the legitimate exercise of its proprietary and sovereign authority, made no objection; and we cannot but regard the resistance made by the shore party, of which the unfortunate defendant was one, to the landing of the defendant and his companions, as unwarranted by any principle of right and justice. The mere fact that others were on the island for the purpose of gathering the wild birds' eggs there, at the time defendant attempted to land, did not impair in any degree his right to engage in the like business, nor justify such other conduct as resisting the defendant's landing; and the Court

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ought to have so charged the jury when requested on the part of the defendant.

The Court was requested, on behalf of the defendant, to give certain instructions to the jury, some of which were given and others refused. Of those refused was the following among others, which is in these words:

"The fact that the defendant and others were armed with guns at the time of landing on said island did not of itself render the landing unlawful or justify the deceased and others in resisting such landing or attacking them while so landing. Therefore, if the jury find from the evidence that defendant and others armed with guns, while landing on said island were attacked by deceased and others with deadly weapons, and their lives placed in immediate danger, and that the fatal shot was fired by one of the party with defendant, under such circumstances and in necessary self-defense, it is justifiable homicide, and the jury ought to acquit."

The evidence in the case did not show who fired the shot by which Perkins was killed, and the Court in its general charge to the jury instructed them that in order to convict the defendant it was not necessary that the evidence should show that the deceased was killed by a deadly weapon or gun discharged by the accused, but that it was enough if the evidence showed him to be an accessory to the unlawful killing; and in connection with this the Court clearly and accurately defined the character of an accessory. The requested instruction here set forth in *hæc verba* proceeded upon the hypothesis that the fatal shot was fired, not by the defendant himself, but by one of his party after being attacked by the deceased and those with him, and that the deceased was slain in necessary self-defense.

The act of bearing arms did not of itself affect the right of the defendant and his companions to land upon the island, nor justify the resistance and attack of the shore guard. The law justifies the individual who slays his adversary in his own necessary self-defense. The instruction as requested states as a postulate the true rule of law as applied to certain facts and circumstances assumed to have existed, and then declares fur

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that if the jury should find from the evidence that the defendant and his companions were placed in immediate peril by the attack of the guard on shore, armed as they were with deadly weapons, and that the homicide was committed in the necessary self-defense of the lives of those so endangered, then such defense was justifiable.

The defendant also requested the Court to charge the jury in the following words: "The fact that defendant and those who were with him on the occasion of the alleged homicide, were armed with deadly weapons at the time of landing on said island (if the jury should be satisfied of such fact from the evidence) does not justify the act of landing illegal, nor justify the deceased and those who were with him on the island with him in resisting such landing, or in attacking them while landing. Therefore, if the jury shall find from the evidence that defendant and those who were with him while attempting to land on the island on the occasion of the alleged homicide, were attacked with deadly weapons and murderously intent by the deceased, and his life placed in immediate danger, he was not obliged to retreat, but might stand his ground, and, if need be, kill his assailant."

The defendant requested instruction which was refused, as the one which was considered, states as a basis a legal proposition exonerating the defendant and his party from the charge of an infringement of the law by the simple act of seeking to land on the island, armed as they were, and at the same time involves the commission of a wrong in resisting such landing, and in attacking the defendant and his party while attempting to land, and then proceeds to inform the jury if they should find that the defendant and his companions were armed with deadly weapons and murderous intent by the deceased, by which the defendant's life was placed in instant danger, he was not obliged to retreat, but might at once act in self-defense, and if necessary slay his assailant.

Had the defendant had requested the Court to so charge the jury, they had been correctly instructed as to the law governing justifiable homicide. The Court had informed the jury that in order to make the killing of a human being jus-

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tifiable it must be in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. And the Court had further instructed the jury that a bare fear of these enumerated offenses was not enough to justify the killing; but that it must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge; and also, that if one person kill another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and that it must appear also that the person killed was the assailant; or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. (Act concerning crimes and punishments, Laws 1850, p. 232, Sections 29, 30, 31.)

The requested instruction last set forth comprehends the essential circumstances on which the right of self-defense, in the given instance, arose and depended, viz: defense of the person of the accused against the attack of the deceased, having at the time the means in hand, which he was using with murderous intent against the defendant. If the jury had been instructed to find as to these facts, and had found them to be true, and also that by means of the attack the life of the defendant was in immediate danger, or, in other words, that the danger was urgent and pressing, it would have appeared that these circumstances were sufficient to excite the fears of a reasonable person, and the jury, in such event, would have been bound to have inferred, as a sequence legitimately deducible from these constituent elements, the absolute necessity of the defense which resulted in the homicide committed.

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appears from the charge given by the Court to the jury, specifies with careful particularity the essential circumstances which must precede the existence of the right to life in self-defense. Whether the facts and circumstances proved by the testimony constituted a case of necessary self-defense, was to be passed upon and determined by the jury from the evidence, considered in subordination to the law of the subject. It was their province and duty to ascertain the facts from the evidence, and to determine as to the alleged necessity of self-defense which resulted in the death of Perkins; and it was the right of the defendant to have the question submitted to the jury in a distinct and palpable form to answer by their verdict whether the homicide was committed by the defendant, or by one of his companions, in his or their necessary self-defense; and it was also his right, if they should find the issue of self-defense particular in his favor, to have the Court instruct them that their verdict should be in justification of the accused.

By other instructions were requested on the part of the defendant which the Court refused to give to the jury. These instructions were not necessary to notice in detail, as what we have said is sufficiently comprehensive to embrace the various propositions involved in the proposed instructions.

The judgment is reversed and a new trial ordered.

WYER, J., dissenting.

I do not think the right of possession of the Farallone Islands, or the right to gather the eggs deposited thereon by the birds, was in question in this case. The right might have been in some extent in question had a party in possession been disturbed for slaying one of a party seeking to enter with violence against his will. But men have no right to go with violence and enter with force, even upon their own land, against parties already there, armed and violently, though lawfully, resisting. In a contest arising under such circumstances both parties are in the wrong, and if it results in the loss of life, caused while the contest actually continues,

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the slayer cannot shield himself upon the ground of self-defense without at least first showing some disposition to decline further conflict. The law furnishes peaceable remedies for injuries, and will not tolerate the pursuit of one's rights, even, in a manner liable to induce breaches of the peace and lead to homicide.

In this instance I think the Judge stated the law correctly, and submitted the case fully and fairly to the jury. The charge covered all the points necessary to enable the jury to consider the case intelligently and render a just verdict. I think there was no error in refusing the charges asked on the part of the defendant, and refused. I suppose it may be fairly assumed that the two instructions selected and commented on in the prevailing opinion as the grounds of reversal, are those least objectionable among the large number refused, and the ones which should have been given, if any. Yet, in my judgment, these instructions, without qualification, must necessarily have misled the jury. They wholly omit to bring to the notice of the jury the question as to whether the defendant's party prepared with arms to overcome resistance, were entering in a violent and hostile manner, knowing they would be resisted by men also armed for that purpose. The unlawful act of the shore party was not the only element to be considered, for the approaching party might also be seeking to enter in an unlawful manner, and the evidence tended strongly to show that they were. This element, as well as the unlawful act of the shore party, should also have been taken into account, as the foundation of the legal proposition with which the instruction asked terminates. It cannot be said, as a legal proposition, under the circumstances of the landing shown by the evidence, that "the fact that defendant, and those with him on the occasion of the alleged homicide, were armed with guns at the time of landing on said island, does not render the act of landing illegal." And the instruction must be considered in the light of the testimony to which it was to be applied. Thus considered, the jury would be in effect instructed that the defendant, up to the time of firing the fatal shot, was

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ing a lawful right in a lawful manner. Yet the testimony shows that defendant's party went there with the knowledge that the party of the deceased were on the island, armed, for the purpose of resisting by force the landing of defendant and his associates; that defendant's party came prepared for a fight; that they first approached the island in a small boat without arms, and that, having been warned not to land by the other party with arms, and that their landing would be resisted, they returned to their vessel, increased the party to the number of twenty or twenty, armed themselves with guns and returned to the island to overcome any resistance offered by those on shore; that they advanced with loaded guns, protecting their retreat while advancing by barricades, till after having been ordered to stop without effect, a volley was discharged by the other party, which was immediately returned by the defendant's party of defendant, and the deceased slain. The testimony as to which fired the first shot, before the volley fired by the respective parties, is conflicting. To say that such mode of attack is not, as a legal proposition, unlawful, is more than I am prepared to do; and yet such is the effect of the instructions asked and refused when considered in connection with the evidence to which they were to be applied. An advance by a party of fifteen or twenty men, with loaded guns, against another party, also armed, knowing that a deadly resistance to the advance will be made, is to court a conflict, and is of necessity a violent and forcible attempt to enter, and therefore unlawful. And it is none the less unlawful and wrongful, if the resistance is also unlawful. If to justify the homicide it must appear," in the language of the statute, "that the defendant had really and in good faith endeavored to decline further struggle before the mortal blow is given," he will not be justified in inviting an attack in a violent manner, with arms in his hands, and upon the attack being made immediately slaying his opponent.

Other respects, also, the instructions are framed in such a manner as to make them liable to be misapprehended. The

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Court, I think, was justified in refusing them. I am of the opinion, therefore, that the judgment should be affirmed.

JAMES OTIS, WILLIAM A. MACONDRAI, AND FREDERICK W. MACONDRAI v. WILLIAM HASELTINE, AND JAMES L. KING.

SPECIFIC CONTRACT ACT.—The Act of eighteen hundred and sixty-three, commonly called the "Specific Contract Act," applies to contracts made before as well as after its passage.

STATUTE OF FRAUDS.—An indorsement made by a third person on a contract entered into between two parties, and made simultaneously with the contract, by which the indorser, without expressing any consideration received, agrees that the undertaking of one of the contracting parties shall be fulfilled, is an original and not a collateral promise of the indorser to answer for the debt of another, and not within the Statute of Frauds.

SAME.—By such act the indorser makes the contract his own, and the consideration therein expressed becomes the consideration of his promise.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

"In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, *expressing the consideration*, be in writing and subscribed by the party charged therewith. * * * 2. Every special promise to answer for the debt, default, or miscarriage of another." (Sec. 12, Act of April 19th, 1850.)

The plain reading of the statute is, that the promise must be in writing, and the writing subscribed by the party must *express* the consideration.

"That which the words declare, is the meaning; and neither Courts nor Legislatures have the right to add to or take away from that meaning." (Sedgwick on Stat. and Const. Law, 246; *Newell v. The People*, 3 Selden, 97; *Bidwell v. Whitaker*, 1 Michigan, 469, 479.)

Argument for Respondents.

in this new State, untrammelled by "judicial legislation,"
 and this statute be enforced as it reads, or shall it be frittered
 away by construction?

The language of King's undertaking shows that it was made
 subsequent to the execution and delivery of the agreement be-
 tween plaintiffs and Haseltine: "I hereby agree to indorse
 * as provided in the *within* agreement," & c., the *within*
indorsed agreement, not a draft of an agreement; if not exe-
 cuted, it was not an agreement, and the language, "within
 agreement," would not have been used. It follows, then, the
 consideration of Haseltine's contract did not attach to and up-
 on King's. (*Ellison v. Jackson Water Company*, 12 Cal.
 553; *Clay v. Walton*, 9 Cal. 328; *Purkett v. Bates*, 4 Ala.
 343; *Doyle v. White*, 26 Maine, 341; *Packer v. Wilson*, 15
 Cal. 343; *Hall v. Farmer*, 2 Comstock, 557.)

Sidney L. Johnson, for Respondents.

The question raised here is not an open one in this State.
 (*Wells v. Post*, 6 Cal. 104; *Haseltine v. Larco*, 7 Cal. 33.)
 In New York, it has been fully settled by the decision of
 the Court of Appeals, in *Church v. Brown*, 21 N. Y. 315, in
 which the case of *Brewster v. Silence*, 4 Selden, 210, and other
 cases cited by appellants, are reviewed and commented upon.
 We refer to the exhaustive opinions of Mr. Justice Wright and
 Mr. Chief Justice Comstock in that case, as decisive of this
 question in our favor, both upon principle and authority. In
Church v. Brown, the ruling in the *Union Bank v. Coster's*
Executors, 8 Comstock, 203, is followed as the settled law.
Brewster v. Silence, and *Draper v. Snow*, 20 N. Y. 331, are
 distinguished from them, and by Mr. Chief Justice Comstock
 Mr. Justice Welles are held to have been decided in error.
 Upon the cases in California and New York, we are content
 to leave this point.

Opinion of the Court.

By the Court, SANDERSON, C. J.

The plaintiffs sold by contract in writing to the defendant Haseltine a certain invoice of Chinese goods, for which Haseltine agreed to pay ten thousand dollars in gold coin of the United States; the goods to be sold at auction as then advertised and the proceeds to be paid to the plaintiffs by the auctioneers. If the proceeds proved insufficient to pay the ten thousand dollars, the balance was to be paid by Haseltine's note at sixty days, indorsed by his co-defendant King. This contract was signed by plaintiffs and Haseltine on the 29th of December, 1862. On the back of the contract, bearing the same date, is the following indorsement:

"I hereby agree to indorse William Haseltine's note as provided in the within agreement.

(Signed:)

"JAMES L. KING."

This indorsement was executed by King before the delivery of the contract to the plaintiffs, and before the delivery of the goods to defendant Haseltine. The ten thousand dollars were not paid by the proceeds of the sale, and the plaintiffs demanded the note called for by the contract. Defendants refused to give it, but promised to pay the balance in gold when due, which they failed to do, hence this action. Plaintiffs had judgment payable in gold against both defendants who appeal.

It is insisted upon behalf of both defendants that the judgment is erroneous so far as it directs payment in gold, because the contract was made before the passage of the so-called "Specific Contract Act" of 1863, and therefore not governed by its provisions. This question has already been decided by us in the case of *Galland v. Lewis*, 26 Cal. 46, in which we held that the Act applied to contracts made before its passage.

On the part of the defendant King, it is insisted that his contract was "a promise to answer for the debt, default, or miscarriage of another," within the Statute of Frauds, and

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because it does not express the consideration. We think this question also has been decided against the appellants in several cases in this State.

Evoy v. Tewksbury, 5 Cal. 285, was an action to recover the lease, and on the day of its date, Tewksbury wrote signed the following promise: "I hereby agree to pay what stipulated above when it shall become due, provided he said McMakin does not pay the same." The Court held that this agreement was a part of the lease and not within the Statute of Frauds, but was to be regarded as an original contract, upon the strength of which McMakin obtained possession of the land and enjoyed its use.

Jones v. Post, 6 Cal. 102, the agreement and the guaranty were in separate instruments, yet the Court construed them as one, and held that the consideration of the latter was fully expressed in the former in order to satisfy the Statute of Frauds.

Haseltine v. Larco, 7 Cal. 32, the plaintiff, as master of the bark Acadia, entered into a charter party with one Nicholas Larco, and on the back of the same instrument the defendant Larco indorsed the following guaranty: "I, N. Larco, guaranty the fulfilment of the within charter on the part of the charterer. Nicholas Larco."

It was conceded that the guaranty was made at the same time with the charter party, and that the consideration of the one was in fact the consideration of the other; and it was held that the two instruments were to be regarded as one, and that together constituted Larco's contract with the plaintiff. That by the reference to the "within charter" he made a part of his guaranty for all purposes not expressed in the charter itself.

We are unable to distinguish between the foregoing cases and the present. The promise by King was made before the delivery of the goods to Haseltine, and constituted in whole the consideration for which the sale was made. The goods did not part with the goods upon the sole credit of

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Haseltine, but upon the credit of King as well, to the extent of his indorsement. So the facts are found by the Court below. Thus viewed, the undertaking of King was original and not collateral to the promise of Haseltine, the sale from plaintiffs to Haseltine being the consideration. But regarding King's undertaking as being within the Statute of Frauds requiring a note in writing expressing the consideration upon which it was made, we think the statute in that respect has been sufficiently complied with. His promise is indorsed upon the back of the contract between the plaintiffs and Haseltine, and therein he expressly refers to that contract; and it is apparent that the full nature and extent of his undertaking cannot be determined except by a reference to it. Instead of expressing in full the terms of his contract, as he might have done, he refers for that purpose to the principal contract. By so doing he made the language of that contract the language of his own. From that language the consideration of his promise clearly appears. It is not necessary that the consideration should be expressed in any set phrase. If it is obvious from the general language used it is sufficiently expressed to satisfy the statute. (*Church v. Brown*, 21 N. Y. 315.)

Judgment affirmed.

DANIEL N. HASTINGS v. HUGH McGOOGIN AND
MARTIN ALVORD.

ACT OF CONGRESS CONCERNING SUSCOL RANCHO.—The Act of Congress of March 3d, 1863, providing for the survey and sale to the purchasers from Vallejo of the land known as the Suscol Rancho, withdraws said land from the operation of the general laws providing for the disposal of the public lands.

SUSCOL RANCHO.—Prior possession by an inclosure, and a claim made before the Register and Receiver to purchase land, a portion of the so-called Suscol Rancho, within one year from March 3d, 1863, by one who was a *bona fide* purchaser from Vallejo, entitles him to recover in ejectment as against one who enters after March 3d, 1863, and claims the same land under the general pre-emption laws of the United States.

APPEAL from the District Court, Seventh Judicial District,
Napa County.

Argument for Respondent.

the facts are stated in the opinion of the Court.

Man & Hays, for Appellants.

This Court will take judicial knowledge that the claim to Muscol Rancho as a Mexican grant was finally rejected by the Supreme Court of the United States. (*United States v. Valero*, 1 Black. 555.)

The entry of defendants was authorized by the United States as the first step to be taken in her primary disposition of the land; and to oust defendants from the same by this entry is in violation of the Act admitting California into the Union, as it interferes with such primary disposition. (See Act, *Lester's Land Laws*, 158, 159; Section 13 of Act to ascertain and settle the private land claims in the State of California, *Lester's Land Laws*, 177; Section 6 of Act of Congress, passed March 3d, 1853, to provide for survey of public lands in California, the granting of pre-emption rights, etc., *Lester's Land Laws*, 207; Section 7 of Act of Congress, passed May 30th, 1862, to reduce the expenses of the survey and sale of public lands in the United States, *Laws of Congress*, 37th, p. 410; *Doran v. Pacific Railroad*, 24 Cal. 245.)

Whitman & Wells, for Respondent.

The plaintiff pretends to set up a pre-emptive claim to the prem- and urges this as good reason in law why judgment should be given against him.

The pretended entry of the defendants was upon unsurveyed land at a time when such entry was unauthorized by law, the same only having been authorized, if at all, which we have never had occasion to question, by Act of May 30th, 1862: (*U. S. Stat.*)

The plaintiff held a title derived from Vallejo, and the Act of March 3d, 1863, has extended to all persons standing in that position the privilege of pre-emption, limited only by the fact of their possession at the time of the rejection of the original grant.

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The case finds² that they are proceeding to avail themselves of the privileges granted by that Act.

By the Court, SANDERSON, C. J.

Plaintiff sues to recover the possession of eight hundred and fifty acres of land. The complaint is in the usual form. The defendants answer separately, denying the allegations of the complaint, and further aver that each of them has settled upon one hundred and sixty acres of land and claims the same under the pre-emption laws of the United States. McGoogin further says that only forty acres of his tract is a part of the land sued for, and as to the remainder of the land described in the complaint he disclaims. The other defendant, Alvord, says that only eight acres of his tract is a part of the land described in the complaint, and he disclaims any interest in the residue. The case was tried by a jury, the plaintiff obtained a verdict and judgment in his favor, and the defendants appeal.

It appears from the transcript that the land in controversy is or was a part of the so-called Suscol Rancho, formerly claimed by Mariano G. Vallejo, under a grant from the Mexican Nation, which grant was held to be invalid by the Supreme Court of the United States in February, 1862, and the claim accordingly rejected. Previous to this rejection, however, the plaintiff had become a *bona fide* purchaser of the tract in question, under the supposed Mexican grant, and had inclosed the same by a fence. After the grant was rejected, in April or May, 1862, each of the defendants settled upon his tract and built a house, and has resided thereon ever since. On the 12th of October, 1863, the defendant McGoogin filed with the Register of the United States Land Office his declaratory statement giving notice that he claimed his tract under the pre-emption laws of the United States; and the defendant Alvord filed a like notice on the 18th day of November, 1863. On the 3d of March, 1863, Congress passed an Act authorizing the Commissioner of the General Land Office to cause the lines of the public surveys to be extended over the Suscol

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o, and to have approved plats thereof duly returned to proper District Land Office; and further providing that twelve months after the return of such surveys it should be full for all *bona fide* purchasers from Vallejo or his assigns to enter according to the lines of such surveys the land so surveyed, to the extent to which the same had been reduced to possession at the time said grant was rejected. Within the time prescribed by this Act the plaintiff made claim to the land in question under its provisions before the Register and Surveyor of the proper Land Office.

It is unnecessary to notice defendants' exceptions in detail, the only question involved, generally stated, being whether, on the foregoing facts, the verdict and judgment of the court below was right, and of this we think there can be but no doubt. The facts bring the plaintiff clearly within the provisions of the Act of Congress specially providing for the disposal of the tract of public land in question. By the passage of that Act the land in question was withdrawn from the operation of the general laws providing for the disposal of the public lands and its disposal specially provided for before the plaintiff had filed their declaratory statement under the Act of 1850. The prior possession of the plaintiff, acknowledged by this express license of the General Government, was sufficient to entitle him to recover. The judgment affirmed.

Justice CURREY expressed no opinion.

JOHN N. KERNAN v. JOHN GRIFFITH.

SWAMP AND OVERFLOWED LANDS.—The Act of Congress of September 23, 1850, granting to California the swamp and overflowed lands within the limits thereof, vested in said State the absolute ownership of all said lands then surveyed, disposed of, and the title of the State in no way depends upon the issue of a patent to the State by the United States.

The State of California, since the 28th day of September, 1850, has had the absolute power of selling the swamp and overflowed lands within the limits thereof.

The Government of the United States has no right to determine by

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an *ex parte* survey of its own what are and what are not swamp and overflowed lands in this State.

EVIDENCE AS TO LAND, BEING SWAMP OR OVERFLOWED.—One who claims a tract of land under a patent issued to him by this State, conveying the same as swamp and overflowed land is not bound, in an action of ejectment brought by him against one claiming under the Homestead Act, by a survey of the United States designating the same as high land, but may introduce evidence of the real character of the land.

SAME.—The fact, whether a given tract of land is swamp or overflowed, or dry land, cannot be determined by the separate decision of either the State or the United States, but must be settled by evidence given in the course of judicial proceedings.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Defendant recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

John B. Hall, for Appellant.

Tyler & Cobb, for Respondent.

By the Court, **SHAFTER, J.**

This was an action of ejectment, brought to recover the possession of the northwest quarter of Section Number Seventeen, in Township Number Three south, Range Seven east, according to the surveys of public lands of the United States, in the County of San Joaquin.

The plaintiff claimed by title derived from John D. Winters, to whom the lands were patented by the State as swamp and overflowed lands, January 15, 1856, and who had purchased them under the Act of April 28, 1855. This claim the plaintiff sustained, *prima facie*, at the trial, by the introduction of the patent and a series of *mesne conveyances* terminating in himself.

The defendant, having proved that he, on the 20th of February, 1864, duly entered the lands in question in the office of the Register of the United States Land Office for the Stock-

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strict, under the Homestead Act of 1862, gave, in evidence the map of the survey by the Government of the United States of the township embracing the quarter section in controversy. The survey, from which said map was prepared, was made in December, 1854, and was approved by the Surveyor-General of the United States for the State of California, in January, 1855, sixteen months after the issuing of the patent in controversy. It appeared by the map that the quarter section in controversy was high land, and not swamp and overflowed. The court instructed the jury that the character of the lands was established conclusively by the Government survey, and that under that instruction the jury returned a verdict for the plaintiff. The question is upon the correctness of the instruction.

The instruction was erroneous. The title of the State to swamp and overflowed lands within its limits, was derived from the General Government under the Act of September 24, 1850. It was held in *Summers v. Dickinson*, 9 Cal. 554, upon the passage of the Act of Congress referred to, the State became the absolute owner of all the swamp lands within her limits which had not been disposed of, and that the title of the State in no way depended upon a patent, the patent itself operating as a full and perfect conveyance *in praesentia*. The Court arrived at the same conclusion in *Owen v. Owen*, 9 Cal. 322, further holding, however, that a patent issued to the State under the second section of the Act, would have no operation except by way of further assurance. These provisions are not only in harmony with the language of the Act when properly construed, but are fully sustained by the case of *Foley v. Harrison*, 15 How. 447, and the case of *Wilcox v. Jackson*, 13 Pet. 516. As late as November, 1858, Attorney-General Black, in an official communication to the Secretary of the Interior, held that "it was not necessary that a patent should issue in order to vest the title under the Act of September 28, 1850;" and in repeated instances circulars have been issued from the Department of the Interior expressing the same view of the effect of the grant has been

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taken. In view of these authorities we are not at liberty to consider the question as an open one.

If the grant to the State was absolute, clothing the State presently with the "absolute power of disposing" of the lands falling within the description contained in the grant, as was held in the two cases cited from the 9th Cal., it follows that neither the United States, the grantor, nor the State, the grantee, could by any *ex parte* survey, or other proceeding of like character, determine or in any manner affect the rights of the other. True, by the second section of the Act of 1850, the Secretary of the Interior is directed, as soon as may be practicable after the passage of the Act, to make out a list and plats of the swamp and overflowed lands granted, and to transmit them to the Governors of the States respectively in which the lands may be situated; but this is a purely ministerial service, to be performed by the Secretary, not as agent of both parties, but as agent of the Government, and to enable it to advise itself as to the more minute description to be inserted in the further assurance which it proposed to give, and which the State might or might not call for in the election of the Governor. It is doubtful if the survey, which the Court below considered as decisive, was even admissible in evidence, but to hold that it concluded the rights of the plaintiff by its own vigor, would be to hold that the Act of 1850 contained a reservation of a power to the Government to defeat its own grant *in toto*, and that all the cases cited are erroneous. Did the grant, in fact, contain a stipulation of the character named, the saving would, on the principles of the common law, be null and void, on the ground that it would be utterly repugnant to the body of the Act. (1 Black. Com. 89.)

It is urged, on the part of the respondent, that the Act of Congress admitting California into the Union, states as a condition, that the people, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits. The Act was passed on the 9th of September, 1850, and thereafter, on the 28th of the same

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, Congress, in the full exercise of its admitted powers, and to the State absolutely all the public lands therein were then swamp and overflowed; thereby presently stating them, by clear and apt description, from the mass of public domain, and reducing them to private ownership and therefore, a survey of those lands thereafter by the Government cannot be considered as having any just relations to the power reserved to the United States by the Act under which California came into the Union.

The State has heretofore and is now determining for itself the position and extent of the swamp and overflowed lands within its limits, and is now, and has been since 1855, making surveys and conveyances thereof, and those sales now amount to over one million of acres. On the other hand, the General Land Office has, by its own independent action in the prosecution of the public surveys, been engaged in determining for itself the location of the same lands, not with a view, however, of claiming them as its own, but with a view of discharging them whenever their exact extent and position should be ascertained to its satisfaction. Neither of the parties is bound by the action of the other. It is not the uncommon case of grantor and grantee making surveys respectively of lands granted, which surveys are not in agreement with each other. In such case, if each party, assuming the correctness of his own survey, makes a conveyance on the basis of his own survey, and the holders of the respective deeds fail to harmonize, and the holders of the respective deeds fail to harmonize the conflict of titles between them, the controversy is to be determined by the Courts in due course of proceedings. Cases like the one at bar, the question will be, as it is here, a question of fact: Were the lands "swamp and overflowed" on the 28th of September, 1850, the date of the Government's survey? And that question must always be responded to by the Courts on evidence submitted to them and applicable to the facts of the case.

Judgment reversed and cause remanded.

JOSEPH MCGILLIVRAY v. DAVID EVANS; CHARLES
BARTLETT, AND ELIZABETH GARRITY.

PARTITION OF WATER.—Water flowing in a ditch and owned by tenants in common cannot be mechanically partitioned. The only partition which a Court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds.

OBJECT OF A PARTITION OF PROPERTY ITSELF.—The object of a partition of the property itself among tenants in common, is to enable each party to obtain the title to and the use for all future time, in severalty, of some definite portion of the property owned in common.

APPEAL from the District Court, Ninth Judicial District, Trinity County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

This proceeding is complex in every feature—and the decree therein, instead of finally adjusting the rights of the parties, will give rise to greater uncertainty, confusion and litigation than existed before the attempt of the plaintiff to have set off to him in severalty his part of an uncertain volume of running water—which swells and falls with the variations of the seasons, and though in contemplation of law divided into accurate parts, is only so on paper—the stream, after division as before, being but a single body of water with its irregular flow, through reaches and bends, over natural and contending with artificial obstructions which chance or design may place in its bed.

There may be power to order a sale and declare the respective interests of the conflicting claimants, but none to order the division of that which by reason of its absolute indivisibility must, after a theoretical separation, remain precisely in the same condition as before, and thereby give rise to the same litigation which the final decree was designed to end. In the nature of things and by the ordinary rules of common sense this must be so.

Argument for Respondent.

we see it possible in some cases, such as where water is a motive power, in connection with large mills or factories, for a Court of equity, by its decree, to regulate and declare the rights of various parties therein at fixed stationary points, such as the head gate of a mill or manry, the water being the incident, as it were, to the mill, and there being no common interest in all the property only in the use of the water.

In such cases there would seem to be an obvious necessity for the exercise of the power, which is well illustrated in the case (cited by opposite counsel) of *Smith v. Smith*, 10 Cal. 470.

W. Upton, for Respondent.

The inherent powers of a Court of equity are competent for the disposition of all questions that arise in a case of partition (Story's Eq. Juris. 654-656; *Hansen et al. v. Wilfair*, 147), and will afford redress for every substantial wrong (*Merced Mining Company v. Fremont*, 7 Cal. 325), it being a question not essential in this case, whether or not the case is within the statute regulating partition of real estate. I think it is. The tenement is a ditch, and the water runs in it; ownership of the ditch embraces and includes the land in which the ditch is constructed. (Ang. on Water, 159.) The parties hold as tenants in common, and the land is an estate of inheritance.

The right to running water, also, is real estate, and embraces the land covered with water, not only while mingled, but the land where it is separated, and that over which it afterwards flows and is used. "The party does not appropriate the water" "but the land covered with water." (*Crandall v. Wells*, 8 Cal. 136.) "It has none of the characteristics of personalty," it is "a corporeal right or hereditament," (*Newman v. Newman*, 5 Cal. 446.) And "although the soil may belong to the United States, a grant is presumed in favor of the occupant," ownership of *usufruct* interest pre-

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sents the question of "title to land." (*Conger v. Weaver*, 6 Cal. 556.) And it is real estate within the statute governing partition. (*Hughes v. Devlin*, 23 Cal. 501.)

Although the waters of the plaintiff and defendants are mingled together, there is no partnership relation existing between them, as neither has gain or loss in the other's business. (Story on Part. Sec. 3; Story on Contracts, Sec. 178.)

Tenants in common are not partners. (8 Greenl. 253; 9 Johns. 470; 2 Ib. 329; 15 Wend. 187; 2 Hall, 415; Steph. *Nisi Prius*, 2,368.)

There is nothing in the relation of the parties to prevent either party from taking his share of the water from the stream above the ditch, and thus sever the relation without any change of interest in the water, (*Kidd v. Laird*, 15 Cal. 161,) or selling his interest, and thus introducing a new party without consent of others.

The case of *Butte Canal Company v. Vaughn*, 11 Cal. 149, recognizes the condition and character of separate and distinct interests in running water as it exists, in fact, in our State.

By the Court, SAWYER, J.

This is an action for the partition of the water of a mining ditch, admitted to be owned by the parties as tenants in common. The three defendants are entitled to the first flow of twenty inches when the water is high, which, the Court finds, is to be measured without pressure. But in the summer, when the water is low, they are entitled to the first flow of one-fourth of the whole, provided one-fourth does not exceed twenty inches. The plaintiff is entitled to two-fifths, and the defendants to three-fifths of the remainder, after the twenty inches, or the one-fourth at low water, has been taken out. The answer alleges, that, as between themselves, the twenty inches is owned jointly by all the defendants, and that the three-fifths are owned by two of them only—but the Court does not find how the defendants hold, as between themselves. The defend-

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ants appear to use the water for mining purposes, and the plaintiff formerly used his for irrigating his garden, and for sale to miners—the parties dividing it among themselves. Upon the facts found, the Court ordered the water to be divided, according to the proportions ascertained to be owned by the plaintiff and defendants respectively, and appointed three Commissioners to make the division in pursuance of the order of the Court, and to report at the next term. Two of

Commissioners presented a report, in which they say: We first, by means of a box and gate, placed in the end of a ditch where defendants were wont to take out their twenty inches of water, divided or separated from the main body of the first flow of the water twenty inches thereof, without pressure, in the same manner as it was measured when first made in 1852, as directed by the Court in said order, so arranged the gate in the box as to slide up or down, as the quantity of water in the ditch varies, which said twenty inches of water turned out to and set apart for said defendants, which will run to them constantly all the year round. The balance or remaining portion of said water of said ditch, described in said commission, we divided at the lower end of said race between the plaintiff and defendants, giving to the said plaintiff two fifths of the water, and to the defendants three fifths thereof. The said division of water was made in the following manner: After we had separated and set off to the defendants twenty inches of the first flow of the water (as it run in the ditch) we partitioned the balance by means of a division box, placed at the lower end of said ditch, with five equal apertures arranged side by side on the same level in such manner that the water of the ditch, whether low or high, will flow out through said five openings in equal quantities; three fifths of said balance of water, after flowing through three of said openings, falls into a ditch of the defendants and flows off to them, it being optional with them to keep it separated into three parts or to mingle it. The other two fifths of said balance of water flows through two of said apertures and falls into a ditch of the plaintiff, and thus flows to him."

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The other Commissioner dissented, and made a counter report, in which he maintains that the water is not properly divided; that the defendants do not get their full amount of the first flow by the division made; that it is impracticable to make a just and permanent partition of the waters; and that any such attempted division would prove greatly injurious to the interests of the parties. The Court adopted and confirmed the majority report, and made a final decree in accordance therewith, in which it was "ordered and adjudged that said report stand, and the same is the judgment of the Court in partition to be of perpetual effect between the plaintiff and said defendants," etc.; to all of which proceedings defendants objected, and excepted, and they now appeal from the judgment.

Appellants allege that the court erred in assuming to make a partition of the water in the mode provided by the judgment. It would, to our minds, be utterly impracticable for the Court to make a mechanical division of the water running in a ditch, owned by tenants in common, and used for mining purposes, in such a manner as to permanently do justice between the parties. The object of a partition of the property itself is to enable each party to obtain the title to, and the use for all future time, in severalty, of some definite portion of the property owned in common, and thereby permanently end all disputes and remove all obstructions to its free enjoyment. In the case of two mills upon a stream comparatively constant in its flow, which are permanently located at a permanent dam upon its banks, and to which a right to the use of the water of the stream for propelling them is appurtenant, and where permanent gates and gauges may be fixed, it is possible, perhaps, to arrange a division of the water in such a manner as to approximately do justice between the parties. The Chancellor so thought in *Smith v. Smith*, 10 Paige, 470. But in the case of water conducted in ditches for mining purposes, the circumstances are entirely different. The use of the water is rarely had for any considerable length of time at the same point. When the claim of a miner is

out he must remove to another. There is occasion
ally to change the point at which he uses the water
which he takes it from his ditch. Besides, when a
quantity is to be taken out of the first flow of the stream,
pressure, where the amount of water in the ditch is
to great fluctuation, gates must be arranged so as to
or diminish the aperture through which the water is
ed, according as the amount of water increases or
es, as was actually done in this instance. But the
annot say at what point the gate shall stand to-mor-
next day, or the next—nor can it take upon itself the
ment of an officer, to stand at the gate, and gauge it
dance with the ever changing current of the stream.
stment of the "apparatus" which would make a per-
air division to-day, might produce an entirely different
-morrow. This partition is to be "of perpetual effect,"
e "of perpetual effect," it would be necessary to take
r out at that particular point, through the box placed
rder of the Court, by means of which the partition
whether the parties can any longer make it available
e mining purposes at that point or not. It is manifest
itions, made upon this theory, cannot, ordinarily, at
permanent without working great injury to the par-
the language of appellants' counsel: "The water to
ble must follow the mines, and be used at those points
he mining claims are situated, which involves the
y of shifting the ditch line from place to place, and
struction of extensions and lateral ditches, as new occa-
quire." The ditch and the right to take the water
e creek above in this case, are still held in common,
expenses of keeping the ditch in repair must still be
on charge. There is no partition, except of the water.
nifest that the Court has assumed a duty that is utterly
cable for it to perform. The Court may determine
s of the parties, and ascertain and adjudge the amount
est which each party holds; but it cannot assume to
mechanical division of a material which, from its
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nature and the nature of the uses to which it is applied, incapable of any permanent division that shall do justice between the parties. The only partition that the Court can make which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale and distribute the proceeds.

In this case the Court did not attempt to make a complete partition. It only divided the water between the plaintiff, on one side, and the three defendants, as one party, on the other. The record shows that the three defendants owned the twenty inches jointly, and two of them three fifths of the remainder. The defendants demanded that the twenty inches should all be partitioned among them; but it was not done, and it is obvious that it would be utterly impracticable for the Court to adjust such complicated interest by a single mechanical division by means of boxes, gates and gauges to permanently remain. An attempt to do it would be, not to end, but to encourage and multiply litigation to an unlimited extent.

The necessary facts to enable the Court to make a proper distribution of the proceeds, on a sale, do not appear in the findings, and a new trial will be necessary.

Judgment reversed and a new trial ordered in pursuance of the principles indicated in this opinion.

By the Court, SAWYER, J., on petition for rehearing.

The correctness of our decision is not questioned in the petition for rehearing. A rehearing seems to have been asked on the supposition that the District Court was directed to enter a judgment ordering a sale of the property and division of the proceeds. But such is not the order. The order is: "Judgment reversed and a new trial ordered in pursuance of the principles indicated in this opinion." When the case goes back a new trial will be had. The plaintiff prays for a partition. If a partition is to be had, it can only be made by sale and a division of the proceeds. Plaintiff now urges that upon the pleadings a partition would not necessarily follow.

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ther relief may be had which will accomplish the object parties. These questions do not arise upon this appeal. a new trial the Court will doubtless afford such relief as lges the parties may be entitled to upon the pleadings acts established on the trial. The defendants do not ap- to demand affirmative relief, they simply submit to a ion, but insist that they are entitled to a larger share s accorded to them in the complaint, and that, if a par- is decreed, it should be made according to the interests imed in the answer. If the pleadings do not present the ons which the parties desire to litigate and have deter-, in view of the fact that a mechanical division of the cannot be had, perhaps the suit might be dismissed, and er commenced upon another theory, or parties might ge to amend. At all events, when the cause goes back for trial, the parties can pursue such course as they may their interests to require. We do not see that a different ent could be entered upon this record. rehearing is denied; but, to guard against misapprehen- the order for judgment is modified so as to read: Judge reversed and new trial ordered.

**LAMPING & CO. v. J. HYATT AND J. G. JOHN-
SON *et als.***

MUST FOLLOW SUMMONS AND PRAYER OF COMPLAINT.—If judg-
ment is rendered in favor of plaintiff by default, the Court cannot grant
greater relief than is demanded in the prayer of the complaint and
specified in the summons.

AGAINST PERSONS NOT NAMED IN THE COMPLAINT.—If persons are
served with summons who are not named in the complaint, either by real
fictitious names, it is error to render judgment against them by default.
NOT TO EXCEED AMOUNT PRAYED FOR.—If the complaint on a prom-
issory note prays for judgment for a sum certain, which sum is the principal
interest due when the complaint is filed, judgment by default should
include interest accruing after the complaint is filed.

FOR INTEREST WHERE RATE IS NOT NAMED.—If the prayer for
judgment asks for interest to accrue after the complaint is filed, and neither
prayer or summons mention the rate of interest, the clerk should not
render judgment for a rate greater than ten per cent per annum.

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GOLD COIN JUDGMENT.—If the complaint does not pray for a gold coin judgment, and the summons does not say that judgment will be taken for gold coin, the clerk should not, on default, render a gold coin judgment.

WHAT IS NOT GOLD COIN CONTRACT.—If a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of the United States if not paid in gold coin.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

The complaint set forth in words and figures the following promissory note as the cause of action:

"DOWNEVILLE, May 20th, 1863.

"One day after date, for value received in gold coin of the Government of the United States, we, the Red Star Co., promise to pay to the order of P. A. Lamping & Co., at their banking house, in Downieville, five thousand dollars, with interest at the rate of three per cent per month, payable monthly in advance, and if the said principal sum and the interest thereon is not paid in gold coin of the United States, at maturity, then, in that case, for value received, we, the Red Star Company, undertake and promise to pay to the order of the said P. A. Lamping & Co., in addition to the said sum, as settled damages, such further sum as may be equal to the difference in value, in the San Francisco market, between such gold coin and the paper currency of the United States, that is now, or may hereafter be made, legal tender, by laws of the United States, or of this State.

"J. HYATT,

"Secretary for Red Star Company.

"J. G. JOHNSON, Treasurer.

"L. G. WRIGHT."

The defendants declared against in the complaint were J. Hyatt, J. G. Johnson, L. G. Wright, J. Dasey, J. Lewis, Wm. Watkeys, H. Benning, C. Currieux, B. Fales, T. Roper, — Hayner, Wm. Dasey, D. Mahoney, P. Connor, John Doe,

Argument for Appellants.

ard. Roe, *et al.*, composing the Red Star Co. There was allegation in the complaint that any of the defendants were by fictitious names, or that their real names were not known. The summons followed the complaint in giving the names of the defendants. The Sheriff served the summons on Anna Hohner, Charles Killingelhoven, M. Welch, and Catharine Miller, persons not named in the complaint, in addition to those named. The Sheriff certified in his return that all the persons served were members of the Red Star Company. There was no appearance on the part of any of the defendants. The clerk rendered judgment by default against all the defendants served.

The following was the prayer of the complaint:

"Plaintiffs therefore pray that they may have judgment against said defendants for the full sum due on said note, which is five thousand three hundred and five dollars."

The summons stated that if defendants failed to appear and answer, plaintiffs would take judgment against them by default for the sum of five thousand three hundred and five dollars, together with interest and costs.

The suit was commenced August 15th, 1863, and judgment was rendered September 28th, 1863, for the sum of five thousand three hundred and five dollars, and interest on said sum at three per cent per month from the 20th day of May, 1863, and that the same be collected and enforced in gold coin.

Williams & Johnson, for Appellants.

The judgment was by default, and the relief in such cases never exceeds that claimed. (See Practice Act, Sec. 147; Cal. 19; 20 Cal. 91; 20 Cal. 628.)

Plaintiffs do not claim interest after the 15th of August, and therefore we had a right to suppose they had waived their claim, which they had a right to do.

The Court certainly erred in giving plaintiff judgment for three per cent per month, when they did not ask it, or against defendants of any such claim; and also erred in giving judgment on interest.

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As the judgment now stands, defendants are damaged, in the way of interest, in the sum of one hundred and fifteen dollars per month, even allowing that the judgment should rightfully draw ten per cent per annum. Up to the present time, upon the last named error, we are damaged one thousand three hundred and eighty dollars; add thereto the sum of six hundred and seventy-nine dollars, for which judgment was taken over the correct sum, and we find ourselves damaged to the full sum of two thousand and fifty-nine dollars.

The notice in the summons not specifying any rate of interest, the judgment can only draw ten per cent per annum. (See 6 Cal. 268.)

Vanclef & Gear, for Respondents.

By the Court, SAWYER, J.

As suggested by respondents' counsel, there is no statement in the record that can be considered. But, on the other hand, none is required, for the errors appearing in the judgment roll, brief as it is, are manifest and manifold. There is no congruity between any two of the documents constituting the judgment roll.

The summons, in stating the relief demanded, goes beyond the prayer of the complaint; the officer's return shows a service on parties not mentioned in the complaint or summons either by real or fictitious names; the judgment is against all the parties served, and, as to the relief granted, goes even beyond the relief stated in the summons to be demanded, and exceeds that which the contract sued on would authorize, even had it been embraced within the terms of the prayer of the complaint or the summons.

The judgment is by default, and the Court was therefore not authorized to grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. (Practice Act, 147; *Roun v. Reynolds*, 11 Cal. 19; *Page v. Rogers*, 20 Cal. 91, 628.)

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prayer is, that plaintiffs "may have judgment against defendants for the full sum due on said note, for principal interest, which is five thousand three hundred and five dollars." This was the full amount, principal and interest, on the day the complaint was filed, August 15, 1863. It is the prayer for the specific sum named and no more. There is no prayer for interest to accrue from that time forth, and no rate of interest specified in the summons for which judgment may be taken. Had there been a prayer for "interest," without specifying the rate in the prayer or summons, the court would not even then have been authorized to enter judgment for a rate greater than ten per cent per annum. (*McCr v. Ryan*, 20 Cal. 633.) But the judgment is for five thousand three hundred and five dollars and interest on the sum at three per cent per month, from the 20th day of May A. D. 1863, until paid." May 20, 1863, is the date of the note. Yet the interest from May 20th to August 15th, the date when the suit was commenced, had already been added to the principal and formed a part of the said sum of five thousand three hundred and five dollars. So that the judgment calls for interest on the principal sum twice during the time between those dates, and interest on the interest during the same time in addition, as well as interest on the whole sum at three per cent per month for the future till paid. The judgment is erroneous as to the entire amount exceeding five thousand three hundred and five dollars and the costs.

The judgment is "to be enforced and collected in gold coin." In this respect also the judgment exceeds the relief prayed for. The prayer is simply for so much money without specifying the kind of money. Nor does the summons say that judgment will be taken in gold coin.

In this respect also, the relief exceeds that authorized by the contract, for there is no promise in the note to pay in gold coin.

The record furnishes the data for correcting the judgment, and if the respondent desire it, the judgment may be modified so as to be entered for the sum of five thousand three

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hundred and five dollars only, and costs of the Court below against such defendants as are mentioned in the complaint. It is therefore ordered, that the respondents have fifteen days in which to file their written consent that the judgment be modified in accordance with the views expressed in this opinion, and upon filing such written consent, it is ordered that the judgment be modified in pursuance thereof. In default of filing such written consent it is ordered that a judgment be entered reversing the judgment of the Court below and remanding the cause for further proceedings.

It is further ordered that the appellants recover their costs of appeal.

JAMES R. BOLTON v. JAMES LANDERS. (No. 1.)

ABATEMENT OF ACTION.—The pendency of an action to quiet title to land, will not abate a subsequent action between the same parties to recover possession of the same land, in which the same facts are litigated.

DENIAL OF LANDLORD'S TITLE BY TENANT.—If a tenant denies his landlord's title, the denial makes him a trespasser, and he is not entitled to notice to quit before the commencement of an action by the landlord to recover possession of the premises.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint was in the usual form in ejectment. The answer denied the allegations of the complaint, and set up in abatement of the suit the pendency of an action brought by defendant and his wife against plaintiff. The suit pleaded in abatement was brought by Landers and wife against Bolton, to quiet title to the same premises in controversy here. It was stipulated in this case that the statement in *Landers and Wife v. Bolton*, should be the statement in this case. The facts are found reported in the case of *Landers and Wife v. Bolton*, 26 Cal. 393.

Plaintiff recovered judgment, and defendant appealed.

Opinion of the Court on Petition for Rehearing.

ett & Love, for Appellant.

el Rogers, and *S. A. Sharp*, for Respondent.

the Court, **CURREY, J.**

action is brought to recover the lands described in the
nt in the case of *Landers and Wife v. Bolton*. It
the same questions decided in that case, and they
determined in the same way.

plea in abatement of the pendency of the action in the
Landers and Wife v. Bolton cannot defeat this action.
h the same questions are litigated in both, the relief
is different.

effect of the denial of plaintiff's title by defendant
make him a trespasser, and he was not entitled to notice
(*Smith v. Ogg Shaw*, 16 Cal. 88; *Ingraham v. Bald-*
Seld. 46, 47.)

ment affirmed.

Justice **SAWYER** expressed no opinion.

the Court, **SHAFTER, J.**, on petition for rehearing:

ion for rehearing. In the case of *Landers and Wife v.*
26 Cal. 393, which was a suit to quiet title, the de-
Bolton, claimed in his answer that he was the owner
premises and set forth a deraignment of his title. A
om French and Robinson to the defendant was the
k in the chain, and the making of the deed was not
by the replication. It was stipulated in *this case* that
"testimony given on the trial of *Landers v. Bolton*
be deemed as having been given in *Bolton v. Landers*;"
was further stipulated that "all the papers on file
Landers v. Bolton were in evidence in this case." The
nt in *Landers v. Bolton* was a "paper," and so were
wer and replication; and all these papers were on
in that case, and both papers were in evidence in this

Opinion of the Court.

case, according to the stipulation; and being in, they proved *prima facie* in this case, what the two taken in connection proved conclusively in the other, to wit: the conveyance by French and Robinson to Bolton.

Petition for rehearing denied.

Mr. Justice SAWYER delivered the following dissenting opinion, in which Mr. Chief Justice SANDERSON concurred.

We think a rehearing should be granted, on the ground that in this case there is no evidence of a conveyance from French and Robinson to Bolton. The pleadings in this case raise the issue. We do not think the stipulation authorizes the facts admitted by implication by the pleadings in the case of *Landers and Wife v. Bolton* to be taken as evidence in this action. Without so regarding the facts thus admitted, there is no evidence of a conveyance to Bolton.

JAMES R. BOLTON v. JAMES LANDERS. (No. 2.)

JURISDICTION OF SUPREME COURT.—The Supreme Court has no jurisdiction in an action to recover a money judgment where the amount of the judgment, exclusive of costs, is less than two hundred dollars.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Bennett & Love, for Appellant.

Robert C. & Daniel Rogers, for Respondent.

By the Court, SAWYER, J.

This was an action to recover two hundred dollars rent, commenced in the Court of a Justice of the Peace. The defendant set up title, and the case was transferred to the District

Opinion of the Court.

of the Fourth Judicial District for trial, in which Court judgment was rendered for two hundred dollars, and costs of mounting to thirty-eight dollars and twenty-five cents. Appellant appeals. Respondent moves to dismiss the appeal on the ground of jurisdiction, on the ground that the amount of the judgment does not exceed two hundred dollars, the limit prescribed by the old Constitution. Appellant insists that the judgment should be considered as a part of the amount in dispute, and that that portion of the costs which accrued in the Justice's Court. The costs, whether they accrued in the Justice's Court or in the District Court, stand upon the same footing. They are costs in whatever Court accrued—nothing more or less. The settled construction in this State that costs constitute a part of the matter in dispute within the meaning of section 1, Article VI, of the Constitution. They are merely incidental to the action. (*Dumphy v. Guindon et al.*, 13 Cal. 400; *Stan v. Reese*, 20 Cal. 90.)

The amount in dispute not exceeding two hundred dollars, the Court has no jurisdiction. The appeal is therefore dis-

HARPER, ADMINISTRATRIX, ETC., v. PETER O. MINOR, MARY ANN WILLIAMS, ISAAC BRANHAM, FREDERICK HALL, AND FREDERICK A. HEHN.

FROM A JUDGMENT.—On an appeal from a judgment, where there is a statement, the Supreme Court will only consider matters appearing in the judgment roll.

NOT PART OF JUDGMENT ROLL.—If the appellant desires to have intermediate orders, not forming a part of the judgment roll, reviewed on appeal from a judgment, he must bring them into the record by means of a statement, together with such facts forming the basis of the orders as are necessary to explain the action of the Court below.

MOTION FOR A NEW TRIAL.—The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of a trial, and constitute the basis of the motion under the sixth, seventh, and eighth subdivisions of section one hundred and ninety-one of the Practice Act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.

STATEMENT ON APPEAL.—The office of a statement on appeal is to bring into

Points decided.

the record those orders and rulings, together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, and not during the progress of the trial, and not contained in the judgment roll.

REVIEW OF QUESTIONS OF LAW ARISING DURING THE TRIAL.—An appellant who does not wish to raise any questions in the appellate Court as to the sufficiency of the evidence, may have questions of law arising in the progress of the trial reviewed, by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions, and in this way have them reviewed on appeal from the judgment.

WHAT EVIDENCE SHOULD BE CONTAINED IN STATEMENT.—If the appellant insists that the verdict is not supported by the evidence, the statement should state in what particulars it is insufficient, and contain all the evidence on the point or points relied on, but the evidence not bearing upon the point or points relied on is irrelevant.

ORDERS AND RULINGS IN STATEMENT.—The statement on appeal should contain only such orders and rulings as the appellant desires to have reviewed, and the facts necessary to explain the action of the Court below thereon.

COSTS OF IRRELEVANT MATTER IN RECORD.—When irrelevant matter to any considerable extent is introduced into the record on appeal, the Supreme Court will visit the party who insisted upon its introduction with the costs of that portion of the record, whether he succeeds upon the merits of the case or not.

TIME TO GIVE NOTICE OF MOTION FOR A NEW TRIAL.—The District Court has power, without the consent of the parties, upon the application of the party intending to move for a new trial, and upon good cause shown, to extend the time within which to give notice of such motion thirty days beyond the time prescribed by the one hundred and ninety-fifth section of the Practice Act.

TIME TO FILE STATEMENT ON MOTION FOR NEW TRIAL.—If the time for giving notice of motion for a new trial is extended by the Court, the party to whom the extension is given has five days from the time notice is given within which to file his statement, as an absolute right, and the Court has power to extend the time twenty days further.

STATEMENT ON APPEAL.—If the party who appeals from a judgment does not file and serve a statement on appeal within twenty days from the date of the judgment, his right to make a statement is waived.

RECORD ON APPEAL.—On an appeal from an order dismissing a motion for a new trial, when the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself in the record.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

J. B. Hart, for Appellants.

Patterson, Wallace & Stow, for Respondents.

Opinion of the Court.

By the Court, SAWYER, J.

There are three appeals embraced in this record:

Firstly — An appeal from the judgment.

Secondly — An appeal from an order subsequent to judgment dismissing plaintiffs' motion for new trial.

Thirdly — An appeal from an order subsequent to judgment, striking from the files of the Court plaintiffs' statement on appeal.

On an appeal from the judgment, where there is no statement, we can only consider matters appearing in the judgment roll. This has been so often held, and so long settled, that there ought to be no further occasion to repeat it. The Practice Act states explicitly what papers shall constitute the judgment roll. They are, in a case where an answer has been filed, "the summons, pleadings, verdict of the jury, or finding of the Court, and all bills of exceptions taken and filed in said action; and a copy of the judgment, and any orders relating to a change of the parties." (Sec. 203.) The statute also defines a bill of exceptions.

The finding filed January 13, 1864, is the finding upon which the judgment appealed from is based. All between that and the pleadings drop out of the case, and have no place in the transcript on appeal from the judgment, unless brought in by a statement on appeal. The report of the referee is simply a report of the testimony upon which the Judge based his findings. It forms no part of the judgment roll. Neither do the minutes of the Clerk, nor the intermediate orders of the Court, except "orders relating to a change of parties," form any part of the judgment roll. If an appellant desires to have any intermediate orders affecting the judgment appealed from, and not forming a part of the judgment roll, reviewed, he must, by means of a statement on appeal, bring them into the record, together with such facts forming the basis of the orders, as are necessary to explain the action of the Court below. It is for this very purpose that the party is authorized by law to have a statement on appeal annexed to the record of the judgment, or the order from which the appeal is taken.

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The office of a statement on motion for new trial, is, to bring into the record those matters only, which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth and seventh subdivisions of section one hundred and ninety-three of the Practice Act, and which the party desires to have reviewed on appeal from the order granting or refusing a new trial; that of a statement on appeal, those orders and rulings together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, and not during the progress of the trial, and not contained in the judgment roll. A party, however, who does not wish to raise any question as to the sufficiency of the evidence in this Court on an appeal from an order granting or refusing a new trial, but only desires to have rulings upon questions of law arising in the progress of the trial reviewed, may introduce such rulings upon questions of law, with sufficient evidence to point them, into his statement on appeal, or make a bill of exceptions as he proceeds, and in this manner have them reviewed on appeal from the judgment, thus obviating the expense of bringing up the evidence in a statement on motion for new trial. And, as it has long been the settled doctrine of this Court, that it will not balance conflicting evidence, or reverse a judgment on the ground of insufficiency of evidence, unless it is very clearly manifest that the evidence does not justify the verdict or findings, it is rarely useful to bring up the evidence, and the mode here suggested is ordinarily the better practice. Under the law as it now stands, it is still more rarely necessary, or proper, to bring up all the evidence, or even introduce all into a statement on motion for new trial. In a great majority of cases in which it is claimed, that the evidence is insufficient to support the verdict, the insufficiency relied on is confined to one or two points at most. The only contest in such cases is as to those points, and the statement should "specify the particulars in which such evidence is alleged to be insufficient" (Practice Act, Sec. 195), and the testimony introduced into

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the statement should be confined to those points alone. "The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points specified, and no more." (Ib.) All testimony not bearing upon, illustrating, or obviating the objection specified, is irrelevant to the case made, and worse than a useless incumbrance of the record.

So, also, only such orders and rulings, and the facts necessary to explain the action of the Court below thereon, as the appellant desires to have reviewed, should be brought into the statement on appeal. Much less should a transcript be incumbered with them, when the appeal is from the judgment, where there is no statement on appeal. The practice often pursued by parties, or clerks—wherever the fault may be—of copying into the transcript all the orders and minutes of the Court below, is reprehensible in the extreme. It only involves parties in enormous expenses which are utterly useless, and imposes great labor on the appellate Court in endeavoring to ascertain what part of the transcript is really before it. The record now before us contains several hundred folios, at least, that should have no place in the transcript. We cannot consider it, now it is here. And the real question raised on the merits in the appellant's brief arises on that portion of the transcript, which, for reasons already stated, is not properly before us; and, judging from the size of the printed book constituting the transcript, the cost of this useless matter must have amounted to several hundred dollars, for all which the persons having the matter in charge, and not the law, are responsible.

Sometimes the party opposing a new trial, or the respondent on appeal, insists upon introducing a large amount of irrelevant matter into the record. In all cases of abuses of the kind referred to, when it is clearly manifest that irrelevant matter to any considerable extent has been introduced into the record upon the instance of either party, and the question is properly presented, we shall not hesitate to visit the party who insisted upon its introduction with the cost of that por-

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tion of the transcript, whether he succeeds upon the merits of the case or not.

In the case of *Hutton v. Reed*, 25 Cal. 478, the case of *The Estate of James Boyd*, 25 Cal. 511, and in the present case, as well as some others, we have endeavored to indicate distinctly what we deem to be the correct practice in respect to new trials and appeals, in hopes that at no distant day a practice conforming in some degree to the spirit of our Practice Act may be attained. The general system prescribed seems to us to be simple, and we can see no reason for a practice so loose and diverse, as appears to prevail in many portions of the State.

Upon the judgment roll we find no error. The facts found are fully sufficient to support the judgment. It must, therefore, be affirmed.

Upon the second branch of the appeal, the question is, to the power of the Court to extend the time to give notice of intention to move for a new trial. Due notice of the filing of the findings was given to appellant's counsel on the 18th of January, 1864. On the next day—January 19th—on application of appellant's counsel, made in open Court, in presence of defendant's counsel, the Court entered an order providing—among other things—that plaintiffs “have thirty days from date to prepare, serve and file the notice of motion to move for a new trial.” This order, therefore, extends the time for serving and filing notice of motion till the 18th of February. On the 17th of February—within the time—the notice was served. The statement was served on the 20th, and filed on the 24th of the same month.

Section one hundred and ninety-five of the Practice Act, as amended in 1861, provides, that “The party intending to move for a new trial shall give notice of the same * * * where the action has been tried by the Court, * * * within ten days after receiving written notice of the filing of the findings of the Judge.” (Laws 1861, page 590, Sec.1.)

Section two of the same Act amends section five hundred and thirty of the Practice Act, relating to the time with

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which an act is to be done, whereby it is—among other things—provided, that “When the act to be done relates to the pleadings in the action * * * or the service of notices other than of appeals, or the preparation of statements, or bill of exceptions or of amendments thereto, the time allowed by this Act may be extended upon good cause shown by the Court in which the action is pending; * * * but such extension shall not exceed thirty days beyond the time prescribed by this Act without the consent of the adverse party.” (Ib., page 591, Section 2.)

These two amendments were made by the same Act. Section one hundred and ninety-five, as thus amended, gives the party, as an absolute right, ten days after receiving written notice of the filing of the findings by the Court, within which to serve his notice of intention to move for a new trial. And section five hundred and thirty authorizes the Court, upon good cause shown, to extend “the time allowed by this Act” for “the service of notices *other than of appeal*,” provided that “such extension shall not exceed thirty days.” There can be no doubt that this provision covers notices of intention to move for a new trial. “The time allowed by this Act” for “the service of notices” may be extended, and a special exception is made of notices “of appeal” only. *Expressio unius est exclusio alterius*. We can see no good reason, we confess, why this authority to extend the time for giving notice of intention to move for a new trial should be given, for it would in most, if not in all cases, be less trouble and inconvenience to give the notice than to procure an extension of time. But there can be no doubt that the power is given. Section one hundred and ninety-five was again amended in 1863, but in no respect affecting the question under consideration. Section five hundred and thirty has not been amended or expressly repealed. As it was not repugnant to section one hundred and ninety-five of the Act of 1861, it is not repugnant to that section as amended in 1863, and is, therefore, still in force. It follows that the Court did not exceed its authority in extending the time.

Opinion of the Court.

The law itself gave plaintiffs five days within which to file statement, after the service of notice of intention to move. On the 19th, before the expiration of five days after the service of notice, defendants' counsel stipulated, that plaintiff might have ten days from the 19th to prepare and file statement, reserving the right, however, to raise the objection that the lawful time had already expired. The statement was filed within this time. As, according to these views, the time for filing statement had not then expired, it follows that the subsequent filing was in time, and that the order dismissing plaintiffs' motion for new trial is erroneous and must be reversed.

In order to guard against a misconstruction of our opinion we deem it proper to state here, that, we do not intend to be understood as intimating that the Court has authority under section five hundred and thirty to extend the time for filing statements on motion for new trial thirty days after giving the notice. The general terms of the section are, perhaps, broad enough to bear that construction, if that section contained the only restriction upon the subject; but it does not. Section one hundred and ninety-five, as amended in 1861, and also as amended in 1863, gives the party five days after giving notice as an absolute right within which to file statement, and then adds, "or within such further time, *not exceeding twenty days* as the Court or Judge thereof may by order grant," etc. This is an express limitation as to the power of the Court, or Judge in a section relating exclusively to a motion for new trial, and must prevail rather than the general provision in section five hundred and thirty. The general provision in section five hundred and thirty would have effect by referring it to statements on appeals, the exception in that section being limited to notices of appeal, and the reason of that exception, doubtless, was that to allow an extension of time to file a notice of appeal would be virtually to allow the Court the power to extend the time for taking an appeal.

As to the third branch of the appeal, the judgment was entered on the 13th day of January, 1864. No statement on appeal was filed or served till the 12th and 15th of April, and

Opinion of the Court.

no order or stipulation for an extension of time was obtained. More than twenty days after the entry of judgment having elapsed before the filing of the statement, the plaintiffs must "be deemed to have waived their right thereto," under section three hundred and thirty-nine of the Practice Act. There was then no error in striking out the statement, and the order must be affirmed.

The only papers necessary to bring up for the purposes of the second appeal, were, the affidavit of Minor, notice, exhibits A, B, C, affidavit of Hart, order dismissing the motion, and exception thereon, extending from folio nine hundred and ten to nine hundred and thirty-nine, inclusive. These presented the entire question. There was no occasion to bring up the statement itself, as the only question, was, not as to *the sufficiency or character of the statement*, but as to whether or not *it was filed in time*.

It is ordered that the judgment appealed from be affirmed; that the order dismissing plaintiffs' motion for a new trial, dated April 5, 1864, be reversed, and the cause be remanded for further proceedings on the motion for new trial; and that the order striking from the files of the Court plaintiffs' statement on appeal made April 26, 1864, be affirmed. And it is further ordered that plaintiffs recover their costs of the order reversed, including the costs incurred for that portion of the transcript relating to the appeal from said order dismissing motion for new trial in the foregoing opinion specified, and extending from folio nine hundred and ten to folio nine hundred and thirty-nine, inclusive, and no more; and that the several parties pay their own costs accruing in this Court.

Mr. Justice RHODES, having been of counsel, did not participate in the decision of this case.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1865.

THOMAS W. MILLARD *v.* CHARLES W. HATHAWAY,
AND EDMUND V. HATHAWAY.

APPEAL FROM JUDGMENT.—On an appeal from a judgment, if no errors are assigned in the record, the appellate Court will only review the judgment roll.

WAIVER OF FAILURE TO FILE STATEMENT AND SERVE NOTICE.—If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavits by consent of the respective attorneys, the respondent is precluded in the appellate Court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served.

WHEN TRUST CREATED, AND HOW.—When, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, a resulting or presumptive trust immediately arises, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

PLEADINGS, FINDINGS, AND JUDGMENT.—If the findings of fact follow the issues raised by the pleadings, and a demurrer would not be sustained to the complaint, the judgment will not be arrested upon the findings.

FINDINGS OF THE COURT.—The findings of a Court cannot be altogether detached from each other and considered separately. If a particular finding be doubtful or obscure, reference may be had to the others to ascertain its true meaning.

IMPLIED TRUST — PROOF OF.—The facts constituting an implied trust can be proved by parol testimony.

Statement of Facts.

RECITAL IN A DEED.—The recital in a deed that the purchase money of the property thereby conveyed was paid by the grantee, is not conclusive that such was the fact in an action brought by an alleged *cestui que trust* against the grantee as trustee to establish the trust. The recital may be explained or contradicted by parol testimony.

PROOFS IN ACTION TO ESTABLISH IMPLIED TRUST.—In an action brought to establish an implied trust, on the ground that the deed was executed to one party and the purchase money furnished by another, the party alleging the implied trust must prove clearly that the money belonged to him; and if the testimony is merely parol, it will be received with great caution.

STIPULATION OF *Cestui Que* TO REPAY MONEY TO TRUSTEE.—Where one pays the purchase money, and the deed is executed to another, the law implies a trust, to be executed by a conveyance to the *cestui que*, on demand; and this implied trust is not destroyed because the beneficiary stipulates, in writing, to repay the money, with interest, until paid; and the trust is not to be executed until the money is paid.

PROOF OF RELEASE OF EQUITABLE ESTATE IN LAND.—A release of an equitable estate in land can only be proved by a deed or conveyance, in writing, subscribed by the party granting the same, or by his lawful agent thereunto authorized by writing.

STATUTE OF LIMITATIONS IN CASES OF TRUSTS.—If one holds the legal title to land in trust for another, and there is a stipulation that the trustee shall deed the land to the beneficiary upon the payment of the purchase money and interest to the trustee, a cause of action does not accrue to compel the execution of the trust until the money is paid, nor does the Statute of Limitations commence running until this time.

VOLUNTARY ACCEPTANCE OF MONEY DUE TRUSTEE AFTER IT HAS BEEN DUE FOUR YEARS.—If one holds the legal title to land as security for a sum of money due him by the one having the equitable estate, although the trustee, after the lapse of four years from the time the money falls due, cannot be compelled to accept the money and execute a conveyance, yet, if he voluntarily receives the money when tendered, he is not discharged by the Statute of Limitations from executing the trust and giving a deed to the beneficiary.

APPEAL from the District Court, Third Judicial District, Alameda County.

The Court below found the following facts:

1. That in the year 1855, the plaintiff, for the joint and equal benefit of himself and one Joseph Scott, and one Theodore H. Scribner, negotiated for and purchased of Fulgencio Higuera and Celia Feliz de Higuera, his wife, the tract of land in said complaint referred to, situate in the county and State aforesaid, for the agreed sum and price of eight thousand dollars; the same being part of the Agua Caliente Rancho, then and there the property of said Higuera and wife, and estimated to contain two thousand seven hundred acres; but the actual

Statement of Facts.

quantity, on survey, was two thousand eight hundred and three acres.

2. That being unable to pay said sum of eight thousand dollars, plaintiff applied to defendant, Charles W. Hathaway, and requested him to lend him the money to complete the purchase, which said Hathaway agreed to do.

3. That thereupon the purchase was concluded, and for security for the said sum so loaned, the deed from said Higuera and wife for the said land was made directly to said Hathaway, and it was expressly agreed by parol that said Hathaway should hold the same until said sum of eight thousand dollars was repaid, and should then convey the land to said plaintiff, Scribner and Scott; and in pursuance thereof, said Hathaway did loan and advance said eight thousand dollars on the terms aforesaid, on the 25th day of August, A. D. 1855, and on the same day did take and receive a deed of that date, duly executed and acknowledged by said Higuera and wife, to himself for said land.

4. That all the negotiations in relation to the purchase of said property were had and made by plaintiff, and that said Hathaway knew nothing about them and had nothing to do with them, except that at the request of plaintiff he paid the money and received the deed as above stated, and thereafter plaintiff, and said Scott and Scribner, entered into the possession of said land and occupied and cultivated the same.

5. That said purchase was made for the joint benefit of said plaintiff, Scott and Scribner; they, said Scott and Scribner, to have one third part each of said premises upon payment of their proportionable part of the consideration therefor to said Hathaway, to apply in reduction of said loan; in pursuance whereof a survey was made of said land, and the same was divided into three equal parts; and the said Hathaway, in pursuance of his agreement with said Scott and Scribner, did, by deed dated on the 13th day of October, 1855, convey to said Scott the southerly one third part of said lands as divided, the same being nine hundred and thirty-four and sixty-seven one-hundredths acres; that in like manner, and in fulfilment

Statement of Facts.

of his agreement with said Scribner, said Hathaway did, by deed dated December 15, 1855, convey to said Scribner one third part of said land, viz: nine hundred and thirty-four and sixty-seven one-hundredths acres.

6. That the remaining nine hundred and thirty-four and sixty-seven one-hundredths acres was set off to plaintiff on a partition thereof theretofore made between him and said Scribner, the same being in two parcels, viz.: two hundred and thirty-one and fifty-three one-hundredths acres was set off to him from the northerly end of said tract, and was bounded southerly by the share so conveyed to Scribner as aforesaid, and that the residue of one third, being four hundred and three and fourteen one-hundredths acres, was set off to plaintiff between the two shares of Scott and Scribner.

7. That the said plaintiff immediately after said purchase entered into possession of the parcels so set off to him, and cultivated and controlled the same, and still resides upon said parcel of five hundred and thirty-one and fifty-three one hundredths acres.

8. That in the year 1861 plaintiff negotiated the sale of said four hundred and three and fourteen one-hundredths acres to one Valpy, and in pursuance thereof defendant Edmund V. Hathaway conveyed the same by deed to said Valpy for the sum of six thousand five hundred dollars, paid by said Valpy to him on March 5th, 1861, and which sum was received by said defendant upon the money so advanced and loaned for the purchase thereof and for the interest therein, and that afterwards and before the commencement of this action the whole of the one third remaining unpaid of the said eight thousand five hundred dollars, with interest thereon from August 25, 1855, at the rate of three per cent per month, had been paid to said defendant E. V. Hathaway; the other two thirds thereof, with interest, having been before paid by said Scott and Scribner, as hereinbefore stated.

9. That said defendant, Edmund V. Hathaway, took the conveyance of said land from Charles W. Hathaway, with full

Argument for Appellant.

knowledge of the trust, and without any consideration by him paid.

10. That more than four years have not elapsed since any cause of action has accrued against said defendants, on the agreement with defendants for the conveyance of said land.

11. That said contract to reconvey said land to plaintiff remains yet in full force and effect, and never has been cancelled, abrogated or impaired by any subsequent contract or agreement between plaintiff and defendant, or either of them, and that no sum is due from plaintiff to defendants, or either of them, on account of any money or property advanced to him by them, or either of them.

12. And as a conclusion of law, the Court finds and determines that the said plaintiff is entitled to a conveyance from defendant, Edmund V. Hathaway, in whom the legal title of said tract of five hundred and thirty-one and fifty-three one-hundredths acres is now vested of said tract of land, as the same is particularly described by metes and bounds in the complaint, and a decree of this Court is ordered to be entered accordingly.

The other facts are stated in the opinion of the Court.

John T. Doyle, and W. W. Crane, Jr., for Appellant.

Did or did not the facts in law constitute a loan from Hathaway to Millard and his associates? This is purely a legal question; and as a legal question, does it admit of serious doubt or argument? Millard applied for what, in popular phraseology, he terms a loan. What he really wants is to find a man to advance the necessary sum to make the purchase of which he is to have the benefit. While yet *in fieri*, it is talked of between the parties as a loan—but that does not make it such. The legal character of the transaction does not depend on the preliminary negotiations, or the language employed in them, but on the actual contract into which they ultimately merged and were absorbed.

That contract was all put in writing. It consisted of the deed from Higuera to Hathaway, which conveyed the land,

Argument for Appellant.

and the agreement, Exhibit No. 1, signed by Millard, Scott, and Scribner, reciting that he had purchased and paid for it in his own name, but for their account, and promising repayment. To vary it by parol, was of course incompetent for either of the parties. It expresses, of necessity, the truth, and the whole truth about the matter. And it expresses, as clearly as language can, money paid, laid out, and expended by Hathaway, to and for the use of Millard and his companions, and at their request.

If Hathaway had sued them for the money, he should have sued for money paid, laid out, and expended. (Comyn on Contracts, 4th Am. edit. p. 451.) If Higuera, after receiving the money, had declined delivering the deed, Hathaway, not Millard, could have recovered it back from him as money had and received. If, before paying the money to Higuera, it had been stolen from Hathaway, he would have had no claim for it against Millard, Scott, and Scribner, for he brought them under no obligation to him till he had actually paid for the land for their account. And in such case an indictment against the thief would necessarily have charged the money as Hathaway's money.

It is plain, therefore, that there was no loan from Hathaway to Millard, Scott, and Scribner, and hence that it was Hathaway's money, not theirs, which paid for the land. In a word, the distinct declaration in the written contract, Exhibit No. 1, that Hathaway *had purchased the land and paid the money to Higuera for the account of Millard, Scott, and Scribner*, precludes them in any action (save a bill in equity to reform the contract) from giving any parol evidence to vary or explain it. When one man purchases and pays for land, and takes the title in the name of another, the law ordinarily implies a trust for the benefit of the one who purchased and paid, *because it presumes such to have been the intent of the parties*. But if their actual intent is shown to have been different, the presumption is destroyed, and no trust is then to be implied. (*Sidmouth v. Sidmouth*, 2 Beavan, 447; *Scawin v. Scawin*, 1 Young & Collyer, 65.)

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An express contract being proved, the law will not raise any implied one, for that would be to presume against the fact as proved. *Expressum facit cessare tacitum.* (Broom's Legal Maxims, Am. Ed. 414.)

Now, in this case the proof was perfectly conclusive and uncontradicted; it is found by the Judge below, and is, in fact, the very corner stone of the plaintiff's whole case, that C. W. Hathaway was not to convey to Millard, Scott, and Scribner, until he had been repaid his purchase money. He made the purchase and payment "for their account" and benefit, and took the title, not on any implied trust for them, but on an express parol contract that he was to hold it on his own security. It is not claimed or pretended that he was under any obligation to convey till his advance was repaid him.

In conclusion, then, the trust which the plaintiff has here attempted to set up, is one required by the Statute of Frauds to be evidenced by the deed of the parties creating or declaring the trust. It is not a trust implied by law, for it rests on no implication whatever, but on the *express* contract of the parties. Such a contract is not only within the letter of the statute, but most obviously within the very mischief intended to be prevented by it.

But supposing C. W. Hathaway took a trust estate in the land for the benefit of Millard, there is an insuperable objection to the plaintiff's recovery in the plea of the Statute of Limitations.

It must be borne in mind that the object of the action is to compel E. V. Hathaway to convey the land on the ground that he took the title from C. W. Hathaway with notice of the trust. The plaintiff claims that E. V. Hathaway paid nothing for the land, and had notice of the trust. He, on the other hand, insists that he paid a valuable consideration for it, and that there was no trust in fact, so that it was not possible he could have notice of it.

The truth appears to be, that E. V. Hathaway paid C. W. Hathaway forty-five thousand dollars for his business, including his claim against the Millards and this land, and that he

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had actual notice of the original transaction with Millard, Scott and Scribner, whatever it was. If it created a resulting trust, he took the land with notice of the facts from which that trust resulted. We assume then, for the purposes of this branch of the argument, that the original transaction gave rise to a trust. E. V. Hathaway has bought the land from the trustee with notice of the trust. He can be charged as a trustee by the plaintiff, but it is of necessity *in invitum*. It is not a trust resting in contract either express or implied, but arises purely and simply by *operation of law* and against the will of the trustee. In such case the Statute of Limitations begins to run from the moment of conveyance to E. V. Hathaway. (*Murdock v. Hughes*, 7 Smedes & Marshall, 219; *Williams v. The First Presbyterian Society of Cincinnati*, 1 Ohio, 488.)

A. M. Crane, and Edward Tompkins, for Respondents.

In October, 1861, Hathaway held as a mere naked trustee. Every dollar of his loan, principal and interest, had been repaid. Millard owned the entire land. Hathaway's mortgage had been paid off, and he held the bare naked legal title. Millard had the whole interest in the land. It was his in equity, wholly and entirely.

Could his estate or interest in this land be conveyed or surrendered by parol, without writing? The sixth section of our Statute of Frauds (Wood's Dig. 106) would seem to be conclusive that it could not be done.

Plaintiff had a trust estate in the land, comprising its entire value. The words of the statute are very plain, viz.: "Nor any *trust* or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, *surrendered*, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party," etc.

It is argued by appellants that this trust, being created without writing, may be cancelled or surrendered in the same manner in which it was created. This we admit. But the trust was created by the "act or operation of law." Millard paid

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the purchase money, and Hathaway took the deed. Upon these facts the "operation of law" raised the resulting trust. This trust could no doubt be cancelled or "surrendered" in the same manner, i. e., "by act or operation of law"—namely, Millard's trust estate might be extinguished or passed to another by judicial sale of his interest. This would be by act of law.

Again: If Millard had stood by when C. W. Hathaway conveyed to E. V. Hathaway, and stated that he had no interest in or claim to the land, in such case his trust estate would have stood extinguished by estoppel.

Again: In case of Millard's death, intestate, the trust would "by operation of law," have passed to his heirs.

In these various ways, and others which might be named, the trust could be extinguished, assigned, or surrendered, "by act or operation of law." But we utterly deny the proposition that the trust could be surrendered by a parol contract—the land all the time, and even until now, remaining in the full and entire possession of the plaintiff. This trust could no more be conveyed by mere word of mouth than could a fee simple or freehold interest in the lands. It occupies the same dignity, and is classed in the same category, by statute, with those interests.

But, as if to clinch the matter and close all question as to the meaning of the sixth section above quoted, we have section twenty-five, (Wood's Digest, 108,) which defines the terms before used, and the enactment is "the terms 'estate and interest in lands,' shall be construed to embrace every estate and interest, present and future, vested and contingent."

The Court below, in its opinion, after showing how the loan had been repaid in 1861, says: "These payments satisfied in full the obligation of Thomas Millard, and from that time he was entitled to a conveyance." This is common sense as well as law. (*Sherwood v. Dunbar*, 6 Cal. 25.)

"Such trusts as are cognizable, and can only be enforced in equity, (our case) cannot, so long as they subsist, as between

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trustee and *cestui que trust*, be reached by the Statute of Limitations." (Angell on Limitations, 161; *Kane v. Bloodgood*, 7 Johns. Ch. R. 90.) "In general, lapse of time is no bar to a trust clearly established to have once existed." (*Prevost v. Gratz*, 6 Wheat. 481.) "But if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity." (7 Johns. Ch. R. 90.) "But it must be shown that an open denial of the existence of the trust has been brought home to plaintiff." (Angell on Limitations, 172, Sec. 9, last clause.)

To apply these principles to this case. So far from showing any denial of the trust on the part of defendants, we only propose to refer to a leading case, decided by Chancellor Kent nearly half a century ago, for the purpose of showing how entirely like, in its leading facts, that case was to this. We refer to *Boyd v. McLean*, 1 Johns. Ch. R. 582.

In that case, the Boyds contracted to buy the land of one Colden; in this case, plaintiff, Scott, and Scribner, contracted to buy of Higuera. In that case, the Boyds borrowed one thousand five hundred dollars of McLean to pay for the land; in this case, plaintiff and his associates borrowed eight thousand five hundred dollars of Hathaway for the same purpose. In that case, the deed was made directly from Colden, the vendor, to McLean, the money lender; in this case, the deed was made directly from Higuera, the vendor, to Hathaway, the money lender.

In that case, as in this, the defendant denied in his answer that he ever made any loan to plaintiff to enable him to pay for the land, but sets up, as in this case, that he bought the land with his own money, and on his own account, and that the deed to him was absolute, and not by way of security. The answer of defendant in that case, like that of E. V. Hathaway in this, (and the coincidence is remarkable,) sets up that about the time of the purchase he did make a verbal parol agreement with plaintiffs to sell them the land upon payment of one thousand five hundred dollars, and interest, in two

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years. In that case, as in this, the plaintiffs were in possession, and, as in this case, the answer sets up the Statute of Frauds. It perhaps would not be possible to find any two cases in all the reports more exactly resembling each other in all their leading facts.

Chancellor Kent decreed an accounting and conveyance. We cite, also, the following authorities: *Bottsford v. Burr*, 2 Johns. Ch. R. 582; *Livingston v. Livingston*, Id. 409; 2 Story's Eq. Juris. 1,201; *Osborn v. Endicott*, 6 Cal. 153; *Foot v. Colvin*, 3 J. R. 216; *Simson v. Eckstein*, 22 Cal. 580; *Bayless v. Baxter*, 22 Cal. 575.

The appellants, in their brief, appear to lay great stress upon the point that because there was a parol contract *defining the conditions of the trust*, or the *terms* upon which Hathaway was to convey the land, (*i. e.*, on the repayment of the loan and interest,) that, therefore, the transaction loses its character of an implied trust, and becomes an express trust, resting in parol, and hence void by statute.

But this case of *Boyd v. McLean* is a full answer to this objection also. On reading the case, it will be seen that the condition of the trust was that Boyd should repay the one thousand five hundred dollars, and interest, in four years, upon which the land was to be conveyed to him; *and this condition or agreement rested entirely in parol*. And also in the case of *Bayless v. Baxter*, 22 Cal. 580, above quoted, it was argued by counsel for appellants that because there was a verbal contract to reconvey, that therefore there could be no *implied* or resulting trust. In reply to this, Mr. Justice Crocker (Cope and Norton concurring) says: "The fact that defendant agreed by parol to do what the law would compel him to do, (*i. e.*, hold the title subject to the rights of the plaintiff, and convey to them on demand after a certain time,) makes the trust none the less a trust created by operation of law." The principle of both these cases is, that when a resulting or implied trust has been created, the *conditions or agreement* upon which the trust is to be executed may be shown by parol. (4 J. J. Marsh. 593.)

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By the Court, SHAFER, J.

This action is brought to compel a conveyance of certain real estate, and for an account.

The complaint charges: "That in the year 1855 the plaintiff purchased of Fulgencio Higuera, and Celia Feliz de Higuera, his wife, a certain tract of land in the County of Alameda, and State of California, for the sum of eight thousand dollars. That the same was a part of the rancho known as the Agua Caliente Ranch, and was then the property of said Higuera and wife. That it was called two thousand seven hundred acres, but was defined by metes and bounds, set forth in the deed hereinafter mentioned, and actually contained about two thousand eight hundred and three acres. That plaintiff, being unable to pay the sum of eight thousand dollars at the time himself, applied to the defendant, Charles W. Hathaway, then and since a resident of San Francisco, and requested him to lend the money to complete said purchase, which Hathaway agreed to do. That thereupon said purchase was concluded, and for the security of the said sum so loaned, and for no other purpose whatever, the deed from Higuera and wife for the said land was made directly to said Hathaway, and it was expressly agreed between him and said Hathaway that said Hathaway should hold the same until the said sum of eight thousand dollars was repaid, and that then he should convey the said land to the plaintiff. That the said deed to said Hathaway from said Higuera and wife was dated August 25, 1855, was duly acknowledged by them, and was recorded, at the request of the plaintiff, in Alameda County, on the 29th of August, 1855, in Liber D of Deeds, page 597, to which deed, or to a certified copy thereof, the plaintiff, for greater certainty, begs leave to refer. That all the negotiations in relation to the purchase of said property were had and made by the plaintiff. That said Hathaway knew nothing about them and had nothing to do with them, except that, at the request of the plaintiff, he paid the money and received the deed, as above stated. That plaintiff alone took charge of said land, except as is here

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inafter stated, and directed and controlled the same as the owner thereof. That said Hathaway did not interfere therewith, and that it was a matter of general notoriety, and well and publicly understood, that said plaintiff had become the owner of said premises; that about the time of making the said purchase the plaintiff agreed with Joseph Scott and Theodore H. Scribner that they might each share in the same to the extent of the one third part of said premises, they paying the consideration therefor to said Hathaway, to apply in the reduction of said loan; that he requested said Hathaway to convey to them the portions purchased by them; that a survey was made of said land, and the same was divided into equal parts, and the said Hathaway, at the request of plaintiff, and in fulfilment of his agreement with Scott and Scribner, did, by deed bearing date on the 13th of October, 1855, convey to said Scott the southerly one third of said land, so divided as aforesaid, the same being nine hundred and thirty-four and sixty-seven one-hundredths acres, more or less; that said deed was duly acknowledged by said Hathaway, and recorded in Alameda County, to which deed, for greater certainty, plaintiff refers; that in like manner, and at plaintiff's request, and in fulfilment of his agreement with said Scribner, said Hathaway did, by deed bearing date December 15, 1855, convey to said Scribner the one third part of said land; that on such partition was assigned to him, the same being also nine hundred and thirty-four and sixty-seven one-hundredths acres, more or less; that said deed was duly acknowledged and recorded — to which deed plaintiff refers; that the remaining nine hundred and thirty-four and sixty-seven one-hundredths acres was set off to the plaintiff on such partition; that the same was in two parcels; that five hundred and thirty-one and sixty-three one-hundredths acres was set off to the plaintiff from the northerly end of said tract, and was bounded southerly by the share so conveyed to Scribner as aforesaid, and the residue of one third, being four hundred and three and fourteen one-hundredths acres, was set off to the plaintiff between the two shares that were conveyed to Scott

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and Scribner as aforesaid, and the two parcels — making together nine hundred and thirty-four and sixty-seven one-hundredths acres; that the plaintiff entered into possession thereof, and from that time to the commencement of this action has cultivated, occupied and enjoyed by himself or his tenants, the whole of the said northerly parcel of five hundred and thirty-one and sixty-three one-hundredths acres, and also the whole of the said four hundred and three and fourteen one-hundredths acres, until the same was sold by him, as is hereinafter stated. The said plaintiff further shows that the defendant, Edmund V. Hathaway, is the brother of and is and for many years has been, the partner in business of the said Charles W. Hathaway; that some time in the latter part of 1856, or early in 1857, said Charles proposed to leave the State of California and to be absent for a considerable time in the Eastern States; that he stated to the plaintiff that his absence might occasion inconvenience, in consequence of the title to the property being in him, and that to obviate the same, and to put it in a situation so that the same could be conveyed to the plaintiff in case he should wish to pay the balance of said original loan, then unpaid, he proposed to convey, and did convey to the said Edmund V. Hathaway, the said two parcels of land, so as aforesaid in said partition assigned to the plaintiff; that the deed thereof bears date on the 18th of November, 1856, and was recorded in said County of Alameda; that said Edmund well knew, at the time the said deed was given, that the title to said land was held by his brother in trust for the plaintiff; that no consideration was paid by him to said Charles therefor, to the knowledge or belief of the plaintiff; and the same was thenceforward held by him in the same manner, as it had before been held by the said Charles W. Hathaway, and the plaintiff remained in the possession and enjoyment of said premises in the same manner as he had been before said deed was given.

The said plaintiff further shows, that shortly prior to the 5th of March, 1861, he sold to Calvin Valpy the southerly parcel of said land, so as aforesaid assigned to him on the divi-

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sion of the said property, containing four hundred and three and fourteen one-hundredths acres. That such sale was made by this plaintiff without any action or agency therein by said defendants or either of them. That at the request of the plaintiff, said Edmund V. Hathaway conveyed the same to said Valpy, by deed dated March 5, 1861, and recorded in Alameda County, to which the said plaintiff refers.

The said plaintiff further shows, that all the consideration for the said sales to Scott, Scribner and Valpy, have been received by the said defendants, or by one of them. That the same amounts to much more than the eight thousand dollars originally loaned. That in addition thereto, one Richard Threfal, in or about the years 1860 and 1861, paid in to the defendants for account of plaintiff, different sums of money, amounting in the aggregate to over two thousand dollars. The plaintiff has trusted entirely to the said defendants to keep the accounts between them, and that he is therefore unable to state the precise sums that they have received from the said Scott, Scribner, Valpy and Threfal. That he has endeavored to obtain from them a statement of said accounts, but has been unable to do so, but he believes and charges the truth to be that they have been fully repaid the loan so made to him as aforesaid, and that the said account, if properly and justly made up, would show a large balance in his favor.

The said plaintiff further shows that the title to the remaining five hundred and thirty-one and sixty-three one-hundredths acres yet remains in the said defendants or one of them. That this plaintiff is yet in the full possession thereof, and that the following is a full description thereof according to the survey made at the time said land was divided as hereinbefore stated. [Description omitted.]

That the said plaintiff further shows that until within a few months he had well hoped that the defendants would give him a statement of said account, and would convey to him the said five hundred and thirty-one and sixty-three one-hundredths acres, as in justice and right they ought to do. That he has requested to have said account and to have said five hundred

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and thirty-one and sixty-three one-hundredths acres conveyed to him, and has offered and is now ready, in case the said account, when correctly made, shall show that any sum whatever is due from him to the defendants or either of them, upon the said loan for which the said land was conveyed as security as aforesaid, to pay the same. That said account has not been furnished him, and they have required from him the payment of the sum of fifteen thousand dollars as a condition precedent to the conveyance of said property to him. That no such sum, and as he is advised and believes no sums whatever remain unpaid of said loan, or is due from him to the defendants or either of them. That the said claim and the refusal to convey without the payment thereof, are inequitable and unjust, and a violation of the trust under which said land was conveyed to defendants as above stated. That said land has now become of the value of fifteen thousand dollars and upwards, and that said Edmund V. Hathaway, as plaintiff is informed and believes, has recently declared his intention to move on to the said land and to take possession thereof, and thus to exclude this plaintiff therefrom, and has pretended that the same belongs to him and that plaintiff has no right to the same, and that plaintiff is fearful that he will attempt to deprive him of his interest in the said property unless prevented by the interposition of this Court.

Wherefore the said plaintiff demands for relief in this action:

First— That an account may be taken of said loan, and of the sums that have been received by the said defendants or either of them, from or on account of the said land, and particularly of the sums that have been received from the said Scott, Scribner, Valpy and Threfal, or any or either of them, and the balance thereof, and to whom the same is due may be ascertained and declared.

Second — That the said defendants and each of them may be decreed to convey the said five hundred and thirty-one and sixty-three one-hundredths acres of land by a good and sufficient deed to the plaintiff, free and clear from any liens or incumbrances thereon, if any such there be, that have been

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or permitted by them, or either of them. In case it be ascertained that any part of such loan is yet due or owing by the plaintiff, such conveyance to be conditioned upon the payment thereof by the plaintiff. If the same shall not have been paid in full, then such decree to be set aside.

And — That any balance found due the plaintiff upon such account may be ordered to be paid to him, and that he may recover judgment therefor against the said defendants, or either of them, as shall be just.

And further — That he may have such other or further decree or order as herein as shall be agreeable to equity, with costs.

The defendants answered severally, denying all the allegations of the complaint, though they admit the plaintiff to be in possession of about twenty acres in the northeast portion of the tract.

In his further and separate answer the defendants allege that the purchase from Higuera and wife was made by Charles W. Hathaway for eight thousand dollars, and that the purchase money was paid by him. That at the date of the purchase, or a long time prior thereto, the plaintiff and his brother, John W. Millard, were jointly indebted to said Hathaway the sum of seven thousand five hundred dollars cash advances, that he thereafter, at the request of the two brothers, repaid with them verbally, but without consideration, that whenever they paid him what they owed him (seven thousand five hundred dollars,) and also one third of the purchase money for the land paid Higuera, and also any further advances which Hathaway might thereafter make to the said Millards, with interest on said several sums at the rate of two per cent per annum, payable monthly, and if not so paid then to compound, he would convey to them one third of the premises in controversy. That at the same time said Hathaway agreed orally with Scott and Scribner to convey to them certain portions of the premises, amounting to about two thirds thereof, upon payment of a certain stipulated price therefor, and that said Hathaway, upon payment of the price so agreed

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upon, duly conveyed such portions to said Scribner and Scott; but no agreement was ever had between plaintiff and said Hathaway that the sums of money so received should be applied in the reduction of the joint indebtedness of the Millards to him or towards the purchase price of said lands. That the Millards were let into possession of about one third of the premises upon a verbal agreement that they should pay said Hathaway interest upon the amount of said indebtedness (seven thousand five hundred dollars,) and upon one third of the sum of eight thousand dollars, and upon further advances in manner aforesaid. That the Millards continued to occupy under said agreement. That on the 18th of November, 1856, said C. W. Hathaway conveyed said lands to said E. V. Hathaway for ten thousand dollars paid, less what had been previously deeded to Scott and Scribner. That between the time of said verbal agreement and the conveyance to E. V. Hathaway, said C. W. Hathaway advanced large sums to the Millards and sold and delivered to them large amounts of goods, wares and merchandise, and at the time of the conveyance by C. W. to said E. V. Hathaway, the former assigned to the latter all the indebtedness due from the said Millards to the said assignor. That in January, 1860, Stephen W. Millard removed to Pajaro, and that the plaintiff at the same time abandoned all of the premises in controversy, except an orchard and a vineyard. containing about twenty acres, in the northeastern part of said tract. That immediately thereupon the said E. V. Hathaway leased the whole of the premises, except said twenty acres, to divers persons, and from year to year has leased the same, and collected and received the rents therefor. That the plaintiff herein continued in the occupation of said twenty acres until August, 1861, when he delivered the same to said E. V. Hathaway, and removed to Pajaro also, where he continued to reside until about the commencement of this action, when he returned and took forcible and unlawful possession from defendant, E. V. Hathaway, of said twenty acres. That at the time plaintiff removed to Pajaro an account was stated, in the premises, between him and said E. V. Hathaway,

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there was found due said Hathaway the sum of forty thousand six hundred and eighty-seven dollars and twelve hundred and twenty dollars whereof were cancelled by him, in consideration thereof the plaintiff released the said debt from the aforesaid verbal agreement with C. W. Hathaway, and of and from all claim, or right, title, or interest in said lands; that the sale to Valpy was made by E. V. Hathaway alone, and that the lands rented to Threfal were so on his behalf; that while said plaintiff was upon said lands the defendants forwarded to him monthly accounts, which were received by plaintiff and not objected to by him, and that they showed the aforesaid balance due to the said Hathaway.

In further answer, the defendants submit that the complaint is for a trust created by parol only.

Again, they allege that the agreement set out in the complaint was but a parol agreement for the sale of lands, and for that reason, null and void. And they also plead that more than four years have elapsed since the making of the complaint, and since any cause of action accrued thereon.

The finding was by the Court. The finding was for the plaintiff on all the issues, and judgment was duly entered thereon. The appeal is from the judgment and from an order denying the defendants' motion for a new trial.

— As to the appeal from the judgment, it must be determined upon the judgment roll alone, and as no errors therein have been either assigned in the record or suggested in the complaint, we must consider the judgment as free from objection.

— As to the appeal from the order overruling the defendants' motion for a new trial.

The counsel for respondent insist that the document contained in the transcript purporting to be a statement on new trial, should be recognized by us; and the first reason assigned is, that the statement and the exhibits annexed thereto, do not purport to have been filed in the Court below.

The statement on new trial was duly settled by the Judge,

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and the clerk certifies that the statement was filed, without however, stating the time when. But the respondent is precluded from saying that the statement was not filed in time for it appears by the order denying the motion for new trial that "the motion was submitted upon the foregoing statements and affidavits by consent of the respective attorneys herein." (*Reynolds v. Harris*, 14 Cal. 667; *Dickinson v. Van Horn*, 9 Cal. 207.)

It is further insisted that the transcript fails to show any order overruling the motion for a new trial. This objection is also founded upon a misapprehension of the effect of the clerk's certificate to the transcript.

It is further insisted that the notice of intention to move for a new trial does not appear ever to have been filed or served. This objection is met by the facts referred to in our answer to the first objection.

2. The motion for new trial, as appears by the statement, was made upon the ground: First, of irregularity in the proceedings; Second, accident and surprise; Third, newly discovered evidence; Fourth, insufficiency of the evidence to justify the findings, and that they are against law; Fifth, errors of law occurring at the trial and excepted to by the defendants. Under each of the last two heads, there is a specification of grounds, as required by the Act of 1864, and to them, or rather to such of them as counsel have relied upon in argument, our attention will be exclusively confined.

There are three questions raised by the appellants which relate to the case made by the plaintiff at the trial: First—What kind of trust did the plaintiff's evidence tend to prove? Second—Is the trust found by the Court identical with the one declared on and with the one which the evidence tended to prove? Third—Was that trust, and the fact that the plaintiff had discharged all his obligations under it so as to entitle himself to a deed, found upon legal and sufficient evidence?

The relation of trustee may be constituted not only by the express declaration of the parties but also by implication or

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tion of law. Trusts of this description are either implied or presumed, from the supposed intention of the parties to the nature of the transaction; when they are known as "resulting trusts;" or they are raised independently of any intention, and forced on the conscience of the trustee by the construction, and the operation of law; and such trusts are distinguished as "constructive trusts." (Sto. Eq. Juris., § 195.) These trusts are expressly exempted from the operation of the Statute of Frauds. (Wood's Dig., p. 106, § 1.) It is well settled as a general rule that when upon a conveyance of property the conveyance of the legal estate is taken in the name of one person, while the consideration is given by another, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the conveyance proceeds.

The complaint alleges, as the foundation of the trust upon which the plaintiff relies, that in the year 1855 he contracted with Higuera for the land in controversy for eight thousand dollars; that C. W. Hathaway, on being applied to, agreed to lend the plaintiff the money to enable him to complete the purchase; that Hathaway, "at plaintiff's request, paid the money," and by agreement took a conveyance from Higuera in his own name, "as security for the sum so loaned." The evidence presented by the plaintiff tended to prove the purchase as alleged—the purchase price of loan alleged—that the money was counted out by the plaintiff to one Smith, who had acted in the purchase from the plaintiff as the agent of both parties, and that Don Diego Higuera, "who had received the money from plaintiff, Scribner and Scott," jointly interested in the purchase and loan, paid the money to the vendor in the presence of Smith, Scribner and Scott. There is no substantial variance between the evidence and the complaint. The allegation is that the money was "loaned" to the plaintiff, which imports that the contract to loan was fully completed by a delivery, in legal effect, of the money by Hathaway to the plaintiff; and the subsequent averment that Hathaway "paid the money to Higuera at plaintiff's request," is

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but an averment that after the relation of debtor and creditor had been established between the two, or contemporaneously therewith, that Hathaway performed the mere manual service of delivering the money to the vendor. Passing the question of variance, the facts of the transaction which the plaintiff's testimony tended to prove, were a loan of eight thousand dollars, consummated by a formal delivery of the money by the lender to the borrower, and a payment by him to the vendor of the land, he conveying the land to the lender of the money as security for the payment of the loan. These facts being assumed, or given, a trust resulted at once in favor of the plaintiff by implication of law, to be executed according to the stipulation of the parties. The evidence of the plaintiff went to the very facts upon which that class of trusts is raised. We do not think it important to examine the question at length upon authority, for upon the proofs of the plaintiff the case is plainly one of implied trust upon principle. In support of our conclusion, however, we cite *Boyd v. McLean et ux.* 1 John Ch. 582. The facts of that case are, substantially, the facts of this, and there is a like resemblance between this and the case of *Page v. Page*, 8 N. H. 187, and of *Cameron v. Ward*, 8 Geo. 245.

We further consider that the findings follow the issues raised upon the complaint, and as a demurrer would not lie to the one, so judgment could not be arrested upon the other. It is urged that the findings contradict each other as to whose money paid for the land. The findings are not irreconcilable with each other on that point. It is true that the third finding states that Hathaway paid the money to Higuera, still, it is further found that it was after the eight thousand dollars had been "loaned" by Hathaway to the plaintiff on the security of the title. It is of no consequence, in our judgment, who paid—or, rather, who "paid over" the money to Higuera—so that the relation of lender and borrower arose between Hathaway and the plaintiff before the payment, or *eo instanti* it was made. The findings of a Court cannot be altogether detached from each other, and considered piece

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If a particular finding be doubtful or obscure, reference should be had to the context for the purpose of ascertaining the meaning.

We further urged that the finding of the trust was against us, first, for the reason that the finding was upon parol evidence; and, second, for the reason that it is against written evidence introduced, by which the plaintiff is estopped.

The question of whether the facts of an implied trust can be proved by parol, requires no discussion.

The written document referred to was executed on the same day as the deed from Higuera to Hathaway, and is as follows:

“SAN FRANCISCO, August 25, 1855.

Whereas, Charles W. Hathaway has paid the sum of eight thousand dollars for the purchase of a piece of land, situated in Alameda County, and the satisfaction of a mortgage thereon, and being known as the Augua Caliente Rancho, and has delivered our draft in favor of Henry C. Smith for five hundred dollars, said purchase, payment and acceptance being for the benefit of the undersigned, T. H. Scribner, Joseph Scott and T. W. Millard, jointly and severally interested one third each; therefore, we T. H. Scribner, Joseph Scott and T. W. Millard, hereby agree to repay to the said Charles W. Hathaway the above named sums of eight thousand dollars and five hundred dollars, with interest at the rate of three per cent per annum until paid, together with any expense he may incur in connection with the purchase, and do also warrant and defend him against all suits, claims and demands, of whatever name or nature, made against the said property or made against him in consequence of this purchase as aforesaid.

“JOSEPH SCOTT,

“T. H. SCRIBNER,

“T. W. MILLARD.”

It is said, in the first place, that the payment of the money by Charles W. Hathaway is established as a fact by this paper. The pur-

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port of the document is that the money was paid by Hathaway for and on account of the persons who signed it, and who bind themselves to pay interest on the money until they shall have repaid the amount. These facts cannot be reconciled with the hypothesis that Hathaway bought and paid for the lands on his own account, and with a view to a resale to the plaintiff. The agreement to repay, and to repay with interest, is decisive that plaintiff and Hathaway, by the advance of the money, were, in their understanding of the matter, brought presently into the relation of creditor and debtor. (*Hickox v. Lowe*, 10 Cal. 197.) Nor is the fact that the deed from Higuera to Hathaway recites that the purchase money was paid by Hathaway conclusive upon the question. The recital may be explained or contradicted by parol. The point has heretofore been greatly controverted, but it is now settled by a weight of authority that at once precludes us from regarding the question as an open one, and relieves us from the necessity of doing anything more than referring to an accredited text-book in which the cases are collected. (*Hill on Trustees*, 130-133.)

But it is further contended that the facts of the trust alleged were found upon insufficient evidence, even if the whole of the evidence should be assumed or be admitted to be lawful.

In a case like the present the party alleging the implied trust must prove clearly that the purchase money belonged to him; and if the evidence is merely parol it will be received with great caution, and the Court will look anxiously for some corroborating circumstances to support it. (*Levich v. Levich*, 10 Ves. 517.) We are not prepared to say that the finding of the Court here, does not rest on a basis of proof as broad as the rule contemplates. The fact that the land was paid for with money loaned by Hathaway to the plaintiff for that purpose was the governing question to be investigated; and the particular manner in which the money was manipulated, was, comparatively, of little concern. On the main question as thus stated, there was, on the one hand, the recital in the deed of Higuera that the money had been paid by Hathaway,

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therein, and on the other it was confronted by the testimony of Millard, Scott, Smith, Higuera, Davis, Beard and written contract of August 25th, already copied into this case, showing that the land was paid for with money borrowed by the plaintiff of Hathaway, resulting in establishing a relation of creditor and debtor between them. It is not proper to argue this point at length upon the evidence. There was other evidence introduced by the parties respecting which bore with greater or less directness and force upon the question. We have examined the whole of it, and the weight thrown upon it by the searching analysis to which it has been subjected on both sides have subjected it, and we are satisfied that the rule of evidence before stated, was not overlooked or disregarded by the Court in the conclusion to which it has arrived: viz: that, to a legal intent, the plaintiff and the plaintiff's money paid for the land.

It is further contended on the part of the appellants, that the purchase money was in fact paid by the plaintiff, and could be no trust by implication as against Hathaway, on the reason that it was expressly stipulated that that which was to be conveyed otherwise have been Hathaway's duty to do on demand—convey the land to the plaintiff—might be deferred, as a matter of right, until his loan should be repaid. In support of this position counsel cite the maxim *Expressum facit cessare tacitum*. The principle contended for seems to be that the law will not imply at all if parties presume to narrow the implication by stipulation; but the maxim relied upon states no such doctrine as that. In strictness, all that was required to the case of the plaintiff, was to show that he had paid the purchase money. That fact being established, the law could imply a trust, to be executed by a conveyance to the plaintiff or his beneficiary on request. As against this conclusion the appellants allege, or, what amounts to the same thing, the appellants admit, that it was expressly stipulated that the execution of the trust should be postponed for the benefit of the plaintiff until a certain event should happen; and the argument is that the controlling fact that the purchase money was paid

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by the plaintiff, was thereby at once divested of all significance, and became so utterly obsolete, that after the event stipulated had transpired, the fact that the plaintiff paid the purchase money, could not be brought forward and put to use. The difficulty, however, if there be one, is overcome by *Page v. Page*, 8 N. H. 187; *Boyd v. McLean*, 1 John. Ch. 582; *Cameron v. Ward*, 8 Geo. 245, and by the maxim *Expressum facit cessare tacitum* in the true reading of it. (Broom's Maxims, p. 414.) There is nothing in the stipulation going to the "creation" of the trust, and the loan named in it having been repaid, the case stands as though the stipulation had never been made.

The questions remaining to be considered relate to the case made for the defense.

It is alleged in the answer that after the conveyance by C. W. to E. V. Hathaway, the plaintiff "released and discharged him (E. V. Hathaway) from all claim, right, title in and to said described lands." This defense presupposes that the trust laid in the complaint once existed, and seeks to avoid it on the ground of the new matter stated. The burden of proving the defense was with the party alleging it. The Court has found against the allegation directly, and when specially moved to amend its conclusions of fact by finding that the release was at least proved by parol, the motion was denied. We have attentively examined the parol proofs as they stand related to the question. Parol evidence was freely introduced on both sides, and we are satisfied that the preponderance is with the result that the Court arrived at. But if the Court refused to find the release or discharge alleged on the ground that the fact could be proved by written evidence only, as is claimed by the appellants, still we consider that the Court did not in that particular mistake the law. As already remarked, the defense went upon the supposal that the plaintiff had originally an equitable estate in the land, but maintained that the estate had become extinct by release or surrender to the holder of the legal title. A release is not "by act or operation of law," but by the act of the party releasing,

Therefore the act can be proved only "by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (Wood's Dig. 106, 107; 107, Sec. 21; 108, Sec. 25.) It is to be observed that the object of the defendants' averment was not that the character of the event upon the happening of which the obligation of the trustee to convey was originally to mature, had been altered or shifted; for that might well have been, and the estate might have survived, but that the estate itself had been destroyed.

The plea of the Statute of Limitations raised the question whether more than four years had elapsed since the plaintiff's cause of action accrued and before the suit was brought. By assignment of the debt, incurred by reason of the loan, and by the conveyance of the land by C. W. to E. V. Hathaway, who took with notice, the latter was placed in the shoes of the assignor and grantor. The rights of the plaintiff were neither increased nor diminished by reason of the transfer. If the transfer had not been made, the plaintiff could have had no cause of action against C. W. Hathaway until after repayment of the borrowed money, and the same is true as to his assignee. The debt incurred by the loan was not fully paid off until the 1st of March, 1861, and the action was commenced January 9, 1863. To this it may be added, that there was no evidence in the case tending to prove that E. V. Hathaway repudiated the trust in repeated instances in 1860-'61, and that he never disavowed it until after the debt had been fully paid. As to the possession of the land, the tendency of the evidence was that it had been in Millard or his tenants in 1855.

As to the objection that all of the plaintiff's interest in the land trust had passed to his assignee in insolvency before the action was commenced, it is sufficient to say that in the creation of grounds to be relied on in support of the

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motion for new trial, the point is not made, and therefore it cannot be considered.

Judgment affirmed.

By the Court, SHAFER, J., on petition for rehearing.

It is insisted that the decision is opposed to *Cunningham v. Hawkins*, 24 Cal. 406, so far as the defense of the Statute of Limitations is concerned. It was held in that case that the mortgagor, after the lapse of four years, lost the right to pay or tender the mortgage debt in exoneration of the land mortgaged. But it does not follow from that, that a mortgagee loses either the power or right to accept payment of the debt after the statute has run upon it; and should he do so, then, the debt being extinguished by the payment, the land would be disencumbered by the direct force of the fact, and no bill to redeem would be either necessary or possible. In this case it may be admitted that Hathaway could not have compelled a repayment of the borrowed money after the four years had run, and that after that date the plaintiff had no power to make an effective tender. But the defendant was at liberty to accept payment in full, and having chosen to do so, he cannot relieve himself of liability to execute the trust according to its terms, on the ground that he might have refused to take the money. By force of the stipulation of August 25, 1855, no action could accrue to the plaintiff to compel a conveyance until the whole of the borrowed money had been repaid. After the lapse of four years it rested with Hathaway to say whether that event should ever happen or not. By his own voluntary action he allowed it to happen, and then, for the first time, Millard was clothed with a right of action against him. This is an answer to the objection that Hathaway never promised in writing to execute the trust. No written renewal is necessary to save a claim from the bar of the statute, in case the statute has not run upon it at the time when an action is brought to enforce it.

We have not overlooked the point made for the appellant,

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C. W. Hathaway by conveying to E. V. Hathaway "as a right in himself adverse to his *cestui que trust*, and the latter came in as a stranger asserting a right in himself also adverse in its character." The proposition was fully considered, and was replied to, not directly, to be sure, but by raising another proposition presenting the law of the facts as understood by us. In the pressure of business we find it necessary to meet views presented by counsel by a direct exposition of our own.

The expression "that the tendency of the evidence was to the possession of the land had been in Millard or his tenancy since 1855," we would be understood to mean that there was evidence in the case tending to prove the fact, and that we would not readjudge the question upon the testimony. But we do not consider that it is a matter of any moment whether E. V. Hathaway was or was not in possession after the conveyance of the land and the assignment of the debt to him, for there is no plea that E. V. Hathaway had been in adverse possession of the land for five years.

It is urged that "a parol discharge of a written contract is repugnant in equity to repel a claim upon that contract." We do not find time to enter upon a critical examination of the authorities bearing upon that question; nor do we consider it material to do so. In the first place, we are not dealing with a contract "within the Statute of Frauds," but with a contract confessedly without it; and, in the second place, our Statute expressly provides that the trusts to which it belongs are to be surrendered only by act and operation of law, or by assignment by the party, or by his agent thereunto duly authorized in writing. This provision, in our judgment, settles the question.

The Court below has found directly, that the borrowed money had all been repaid with interest at the rate of three per cent per month, as stipulated in the contract of loan. There was a conflict of evidence upon the point, and we are satisfied with the result at which the Court arrived; and if we were not entirely satisfied with it, we could not, as the bar is

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fully advised, readjudge the question upon the testimony. In a large proportion of the cases that come to this Court, we are invited and urged to reverse judgments on the ground that the conclusions of fact arrived at are not justified by the evidence; but under the settled practice of this Court, such attempts must always prove abortive, except in extreme cases.

In the opinion delivered, we said nothing about the newly discovered evidence as a ground of new trial, for the reason that the counsel of the appellants made no allusion to it in either of their briefs. In the first place it is admitted in both answers, in effect, that the eight thousand five hundred dollars and interest was paid and received on account of the land contract; and assuming that to have been the fact, we do not consider the general business relations of the two Millards to have been a material question. And in the second place, the evidence alleged to be newly discovered, is merely cumulative, and does not fall within any of the exceptions to the general rule prohibiting the granting of new trials on the ground of newly discovered evidence of that character.

Rehearing denied.

THE PEOPLE *ex rel.* STEPHEN R. HARRIS v. HENRY M. HALE, AUDITOR OF THE CITY AND COUNTY OF SAN FRANCISCO.

SALARY OF CORONER OF SAN FRANCISCO.—The Act of 1864, entitled "An Act concerning the salary and fees of the Coroner of the City and County of San Francisco," reduces the salary of the Coroner of said city and county from four thousand to two thousand dollars per annum. The fifth section provides that "this Act shall not affect the salary of the present incumbent during the term for which he is elected." *Held*, that the fifth section did not apply to a successor of the then incumbent, appointed after his death to fill his unexpired term.

PETITION for mandamus.

On the 18th day of May, 1863, B. A. Sheldon was elected Coroner of the City and County of San Francisco for the term of two years from and after the first day of July, 1863, and

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the time he qualified and entered upon the discharge of the duties of said office. On the 8th day of April, 1862, the Legislature passed an Act providing that the salary of the Coroner of the City and County of San Francisco should be two thousand dollars per annum. This Act was in force when the relator entered upon the discharge of the duties of said

On the 12th day of March, 1864, the Legislature passed an Act, by section one whereof it was provided that the salary of the Coroner of the City and County of San Francisco "shall be two thousand dollars per annum," and by section two whereof it was provided, that "this Act shall not apply to the salary of the present incumbent during the term for which he is elected."

On the 10th day of September, 1864, Sheldon, the incumbent, died.

On the 19th day of September, 1864, the Board of Supervisors appointed Stephen R. Harris, the relator, to fill the unexpired term of his predecessor. The relator qualified and entered upon the discharge of his duties.

The law made it the duty of the defendant, Henry M. Hale, as Auditor of the City and County of San Francisco, on the first day of each and every month, to audit and certify the salary of the Coroner for the preceding month, and to issue his warrant upon the Treasurer for the amount. The relator claimed that his salary was four thousand dollars per annum for the unexpired term of his predecessor, and asked the Auditor to draw his monthly warrant at that rate. The Auditor refused to do so, claiming that the relator was entitled only to two thousand dollars per annum.

Thereupon a proceeding commenced in the Supreme Court to issue a writ of mandate, requiring the Auditor to audit and certify the relator's salary at the rate of four thousand dollars per annum, and draw his warrant on the Treasurer for that amount.

W. Winans, for Relator.

John H. Saunders, for Respondent.

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By the Court, SANDERSON, C. J.

We think the meaning and intent of the Legislature, as expressed in the Act concerning the salary and fees of the Coroner of the City and County of San Francisco, (Statutes of 1863-4, p. 161,) is too obvious to admit of doubt. The evident design was to reduce the salary of the office as to any and all incumbents, except the then present incumbent. The fifth section performs the office of a proviso and excepts the "present incumbent" from the operation of the Act for a certain time, to wit, his present term of office. The effect of the exception is as much confined to Dr. Sheldon by the use of the words "present incumbent" as if his name had been directly employed. Had the Legislature said "This Act shall not affect the salary of the present incumbent (Dr. Sheldon) during the term for which he is (now) elected," it would hardly be contended that any other person than Dr. Sheldon was included in the exception; yet, although such language might have been more pointed perhaps, the meaning would scarcely have been more obvious.

The words "present incumbent" refer to the individual then holding the office, and not to his term of office. Had the Legislature intended, as counsel for the relator contends, to except the present term from the operation of the Act, they would have hardly employed the language which they did. They would have said, "This Act shall not take effect until after the expiration of the present term of office."

Some stress is laid upon the words, "during the term for which he is elected," and from their use it is argued that the term rather than the person is the object of the exception. We do not so read them. Had the section stopped with the word "incumbent," a question of construction would have been presented as to whether the "present incumbent" was not perpetually excepted from the operation of the Act and therefore entitled to the former salary if re-elected. This question of construction, though of obvious solution, was actually made in the case of *The People ex rel. Johnson v. Duden*,

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al. 696. There the Act stopped with the word "incumbent" and Johnson the relator insisted that he was perpetually excepted from its operation and entitled to the former salary so long as he might hold the office. It was held, however, that the exception did not extend beyond his then present term.

The words in question were obviously used for the purpose of more precisely defining the exception made and thus affording no occasion for a resort to judicial construction. The meaning of the section finds full expression in the following phrase: "This act shall not affect the salary of the present incumbent, Dr. Sheldon, but this exception in his favor shall continue longer than his present term of office." It is true that in its absence judicial construction would have supplied the latter clause, but the Legislature saw proper to supply it for themselves and leave nothing to construction.

Respondent denied.

PEOPLE *ex rel.* H. A. WRIGHT *et als.* v. THE
COUNTY JUDGE OF PLACER COUNTY.

ON OF AN INJUNCTION.—The District Court alone has jurisdiction to grant and punish for a contempt for the violation of an injunction issued by the District Court.

PRAYER for writ of prohibition.

There was an original proceeding commenced in the Supreme Court to obtain a writ of prohibition, to prevent the County Judge of Placer County from proceeding to try and punish for contempt the relators, who were charged for violating an injunction issued out of the District Court.

H. Hartley, for Relators.

vs. A. Tuttle, for Respondent.

Opinion of the Court.

By the Court, SHAFER, J.

This is a petition for a writ of prohibition. The petition represents that on the 15th day of June, 1864, Griffith Griffith exhibited his bill of complaint in the District Court of the Fourteenth Judicial District, against J. P. Robinson and others, and in said action prayed for the issuance of a writ of injunction. That after the filing of the bill in the District Court, Griffith made an *ex parte* application to the defendant, County Judge, etc., for the writ, to be issued out of the said District Court, and that it was thereafter so issued by the order of said Judge. That subsequently proceedings in contempt against relators were commenced, and are now pending in the County Court of Placer County, wherein they, the relators, are charged with a violation of the injunction. The petition charges that the County Court has no jurisdiction in the matter of those proceedings.

A County Judge in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and exercises a power auxiliary to the jurisdiction of the District Court. The effect of the order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved by the District Judge, the same as if issued by his order in the first instance. (*Crandall v. Woods*, 6 Cal. 449; *Borland v. Thornton*, 12 Cal. 440.)

The contempt complained of was neither a contempt of the County Court nor of the County Judge, but of the District Court in which the action was pending, and by whose authority, in legal contemplation, the writ of injunction was issued; and it follows, if the relators were guilty of disobeying the writ, that the injunction to try and punish them for the contempt is in the District Court alone.

Rule made absolute.

Mr. Chief Justice SANDERSON expressed no opinion.

Argument for Appellant.

**X B. HIGGINS, TRUSTEE, ETC. v. THE BEAR RIVER
AND AUBURN WATER AND MINING COMPANY.**

STATES LEGAL TENDER NOTES.—United States notes issued under and authority of the Act of Congress of February 25th, 1862, entitled "An Act to authorize the issue of United States notes," etc., and the Act of March 3d, 1863, entitled "An Act to provide ways and means for the support of the Government," are lawful money and a legal tender in payment of private debts contracted before the passage of said Acts, unless by the terms of the contract creating the debt the debtor promised to pay in gold or silver coin.

MAKING UNITED STATES NOTES LAWFUL MONEY.—The Acts of Congress making United States notes lawful money and a legal tender in payment of debts are not laws operating retrospectively, but *in present* and prospectively.

PROMISE TO PAY MONEY GENERALLY SATISFIED.—A promise to pay money generally, can be satisfied by a payment in any kind of currency that becomes lawful money and a legal tender during the interval through which the relation of debtor and creditor shall be extended.

DISCRIMINATION BETWEEN KINDS OF MONEY.—Courts cannot discriminate between one kind of money and another in cases where neither the parties contracting nor the laws have made any such discrimination.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellant.

H. Haight, also for Appellant.

The Act of Congress making Treasury notes a legal tender is not retrospective by its terms. It is not declared that the notes shall be a tender in payment of "all debts, public and private," contracted before the passage of the Act. The term "all debts, public and private," has no express reference to public or debts, and involves no idea of time, but is used as a comprehensive phrase to include all classes or kinds of debtors and creditors. It must, therefore, upon well settled principles, be considered as referring exclusively to debts contracted after the passage.

The rule of interpretation is stated by all the authors, that laws are not to be construed retrospectively, or to have a retroactive effect, unless that intention is expressed in terms,

Argument for Respondent.

and not even then, if by such a construction the Act would divest vested rights. (Sedgwick on Stat. 184, 188, 189, 407, etc.; Smith's Com. 679, Sec. 533, and cases cited in Notes; Bacon's Abr. Tit. Statutes, [C]; 2 Exchequer R. 22; 7 Johnson, 477, 499, etc.; 2 Modern R. 310; 4 Serg. & Rawle, 401; 4 Burrow, 2,460; 3 Shepley, 134; 1 Scammon, 335; 2 Scammon, 499; 3 Call R. 278; 1 Blackstone's Com. 46; 3 Serg. & Rawle, 597, 598; 1 Kent's Com. 408, marg. 455; 3 Dallas, 390, 391; 2 Hill, N. Y. 239; 2 Paine's C. C. R. 504, 516, 517; 54 Eng. Com. L. R. 549; 3 Edwards' Ch. R. 464; 12 Johnson, 174; 10 Wendell, 114; 4 Denio, 376; 2 Comst. 184; 8 Wendell, 663; 1 Cal. 65; 4 Cal. 131; *Sanford v. Bennett*, 24 N. Y. 20.)

There is no expression in the statute which lays the foundation for an exception to the rule, nor any consideration growing out of the subject — no motive of patriotism, justice, or public policy, favors a different rule. On the contrary, the natural repugnance of every just mind to fraud, injustice, and oppression, unite with regard for the honor of the Government, to urge adherence to a rule established in sound wisdom, sanctioned by an unbroken current of judicial decisions, and approved by the experience of all past ages.

Well known rules in the construction of statutes ought not to be departed from. (*Douglas v. Howland*, 24 Wend. 45-7.)

Tweed & Craig, for Respondent.

The rule of construction is not correctly stated by appellant, viz.: "That statutes are not to be construed retrospectively or to have a retroactive effect, unless that intention is expressed in terms, and not even then, if by such a construction the Act would divest vested rights."

Two classes of cases are cited as supporting this proposition, of which only one class is founded upon *mere rules of construction*. In the other class the decisions are founded upon the *fact* that the Legislature in passing the particular Act in question, attempted to legislate upon a subject or in a manner for-

Argument for Respondent.

by it by some superior or constitutional law, or in other
manner, in a manner beyond its *power*.

This class of cases has no application here, as we understand
it to be admitted that Congress had ample *power* to make the

Tender Acts retrospective, the only question being
whether it has done so.

And the other class which bears upon the question of con-
dition does not sustain the proposition of appellant, stated
precisely as it is.

The Acts in question are purely remedial. The Legal Ten-
der Acts, both as to metallic and paper currency, create, de-
fine and prescribe the ultimate of all remedies, (excepting
the performance, ejectment, etc.,) and the process of
execution are merely auxiliary, and designed to secure this ulti-

The substances declared to be a legal tender, and thus
the ultimate remedy, are so only by virtue of the law, and not
on account of their intrinsic value; no matter what the influ-
ence of their intrinsic value in determining their selection.

The only office of the Treasury Note Acts is to add another
remedy to this ultimate legal remedy. They are not objec-
tionable as even slightly impairing any vested rights of appel-

McM. Shafter, also for Respondent.

Ing v. John de Lindsay et als. 1 Dyer, 822, and note, is an
authority to show that the debasement of the currency is at the
expense of the creditor.

In the case of a contract made in one country, to be executed
in another, as to interest, mode of execution, breach, form of
action, rules of evidence and defense, the law of the place of
execution, that being the forum, governs.

This is because the parties are presumed to submit their con-
troversy to the solution of the foreign law.

Why should not the parties be presumed to have made their
contract in this case with the intention of submitting its con-
struction to the law of the *time* of its execution. The analogy
is mainly entitled to some weight.

Argument for Respondent.

That Congress must have meant all *existing* debts as well as all subsequently accruing, is involved in the simple expression they use—"debts."

The language is the same as that in the Bankrupt Act of 1841. U. S. S. at Large, Vol. 2, p. 19, and *post*, Secs. 1, 2, 6, use the words "debt" and "debtor," "due and owing." Section thirty-four provides that the bankrupt shall be discharged from "all debts."

All the decisions under this Act interpret this language as covering past debts. Why should not the same term have the same resolution in the statutes creating legal tenders?

Chap. 52, 5 U. S. S. at Large, p. 9, provides that no bank bills less than twenty dollars shall be paid on account of pensions. So undoubted was the power of Congress to make such bills legal tenders that a proviso forbids anything but gold or silver being a legal tender. This provision as to the size of the bills was changed. (Chap. 8, p. 440.)

The distinction in the descriptive phrases and the legal uses of "legal tenders" and notes issued by the national banks, is important. (12 Statutes at Large, p. 670, Sec. 20.) Bank paper may be issued and circulated *as money*, and shall be received at par, and with certain exceptions shall be received and paid out by the United States upon all debts and demands.

But this kind of money is not made a tender for private debts, nor does the Government retain the right "in terms" to tender it.

It is deemed unnecessary to collate the language or sections, further than to say the legal tender statutes speak of the debt as a fact existing at the time of their passage; of the relation of debtor, and the obligation involved in the terms "due" and "owing" as one "past and existing," and having no relation to the future but the simple one as to the manner of its discharge.

Opinion of the Court.

the Court, CURREY, J.

In the years 1858 and 1859, the Bear River and Auburn and Mining Company—a corporation—became indebted to the plaintiff as trustee for certain owners and holders of bonds issued by the company, amounting, in the aggregate, to the sum of thirty thousand dollars. These bonds were issued and issued by the company at different times during the years mentioned. Each of the bonds was in the sum of five hundred dollars. These bonds were drawn and made payable in three installments: One third in twelve months, one third in eighteen months, and one third in twenty-four months from the time they were issued, with interest thereon at the rate of two and a half per cent per month, payable quarterly. The debts thus incurred were secured by a deed of mortgage, executed and delivered on behalf of the corporation to the plaintiff, in trust for the owners and holders of the bonds. The mortgage was recorded.

The plaintiff commenced an action in December, 1861, in the District Court of the Eleventh Judicial District, in and through Placer County, to recover judgment for the amount due on the bonds and to obtain a decree for the foreclosure of the mortgage and for the sale of the mortgaged property, and, in April following, the Court made a decree and judgment in the cause, by which it was ascertained and determined that the sum due was due from the defendant to the plaintiff, as trustee, on the bonds set forth in the complaint, the sum of twenty thousand two hundred and seventy-seven dollars and fifty cents, and adjudged that the amount due should carry interest at the rate of two and a half per cent per month from the date of the judgment; and also decreed a foreclosure of the mortgage, and that the mortgaged property be sold according to the practice of the Court in such cases, for the payment of the sum due and the interest to accrue thereon. In April, 1864, the plaintiff caused process—an order of sale of the mortgaged property—to be issued, and placed in the hands of the Sheriff to enforce payment of the amount then

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due on the judgment. After the order of sale had come to the hands of the Sheriff, the defendants tendered to him the amount due on the judgment, and also the interest due thereon, and all costs that had accrued. The kind of money tendered was United States notes, issued under and by authority of the Act of the Congress of the United States, passed on the 25th day of February, 1862, entitled "An Act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States;" and the Act passed on the 3d day of March, 1863, entitled "An Act to provide ways and means for the support of the Government." The Sheriff refused to receive the money tendered, whereupon the defendant paid it into Court for the plaintiff, and then moved the Court that the judgment be declared satisfied, and that the Sheriff be required to return the order of sale then in his hands. The Court thereupon made an order, reciting the facts and directing satisfaction to be entered of judgment and decree, and that the Sheriff return the order of sale. Upon this the Sheriff made his return, as directed, and the same was filed in the office of the Clerk of the Court, and satisfaction of the judgment and decree was entered of record. From the order so made the plaintiff has appealed.

The question to be determined is whether or not United States notes issued under and by authority of the Acts of Congress mentioned, were at the time the tender and payment into Court were made, a legal tender in the payment of debts which were created and became due before the passage of those Acts, when the written instrument, which is the evidence of the indebtedness, does not provide in what kind of money the debt shall be paid, otherwise than in dollars generally.

The plaintiff does not question the validity of the Acts of Congress making United States notes lawful money and a legal tender in the payment of debts, but he maintains that this kind of money, by a fair construction of the Acts of Congress, has never constituted a legal tender in the payment of debts contracted before the passage of the Act of the 25th of Feb-

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ry, 1862, and in support of this position is invoked the general doctrine that a statute ought not to be so construed as to give it a retrospective operation so as to affect contracts entered into previous to its enactment, if it will bear any other interpretation. That such is the doctrine of the law, having its basis principles and reasons which cannot be set aside without at the same time holding that the obligation of contracts may be impaired and even destroyed, is not to be denied.

A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective. (2 Gallison, 105, 139; Sedgwick on Stat. and Const. Law, 188; Smith's Com. on Stat. and Const. Law, Sec. 1.)

It is a rule never to apply a statute retrospectively by construction. (*Jarvis v. Jarvis*, 3 Ed. Ch. R. 464.) It was held by Mr. Justice Spencer in *Dash v. Van Kleeck*, 7 John.

that all laws are to be construed according to the intention of the Legislature, and in getting at that intention Courts must presume a prospective and not a retrospective operation unless such presumption is repelled by express words; and in *Hackley v. Sprague*, 10 Wend. 113, Mr. Chief Justice Savage said all statutes are to be construed prospectively and not retrospectively unless they are otherwise incapable of a reasonable construction. (*Jackson v. Van Zandt*, 7 John. 174; *Palmer v. Conley*, 4 Den. 376, and 2 Com. 184; *Gre v. Wisner*, 8 Wend. 663; *Johnson v. Burrell*, 2 Hill, 373; *Berley v. Rampacher*, 5 Duer, 183; *Wood v. Oakley*, 11 Wend. 403; *Sandford v. Bennett*, 24 N. Y. 20; *Terrett v. Taylor*, 9 Cranch, 43; *Thompson v. Lack*, 54 E. C. L. 540.)

The rule of construction stated, and which is sustained by an unbroken current of decisions, is one that should be adhered to with undeviating exactness.

The Acts of Congress under consideration making United States notes lawful money and a legal tender in the payment of debts are not laws operating retrospectively but *in presenti* prospectively. No new obligations are created nor new

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duties imposed by them; neither do they attach new disabilities in respect to transactions or considerations which had transpired before their passage. They simply provide that the notes issued by their authority shall be lawful money, and that such money shall be a legal tender in the payment of debts. What debts? The answer is, all debts public and private within the United States, except duties on imports and interest on the bonds and notes of the United States. The Acts of Congress, so far as they declare that treasury notes shall be a legal tender in the payment of debts, make no reference to the time when the obligation had its inception. They operate directly upon subsisting debts, recognizing the existing relations of debtors and creditors, and declare that a certain kind of money, which is made lawful money by the sovereign authority, shall be a legal tender as well as other kinds of money, in the payment of debts then due, or to become due thereafter while such money may be a lawful currency and a legal tender in the payment of debts. Do they impair the obligations of contracts made or rights acquired and vested under previously existing laws? If such was their effect we are free to say we should not regard ourselves obliged to lead in upholding them. But is such their effect? To answer this inquiry it is only necessary to refer to the contract in question, made long before the passage of these Acts of Congress, and to understand its import. It is simply an agreement to pay certain sums of money at an appointed time. This was not a contract to pay any particular kind of money other than such as might be a legal tender in the payment of debts at the time thereafter when the debt created should be due and unpaid. Such was the promise or undertaking of the defendant in the case before us, and nothing beyond this; and such being the contract, was it not competent for the defendant to perform it by a literal compliance with its terms? The defendant's promise, which the plaintiff accepted, we repeat, was not to pay in any particular kind of money, but in effect to pay a certain number of dollars in any kind of currency that should be or become lawful money and legal tender during the interval

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which the relation of debtor and creditor should be
and; and when the debtor tendered and paid into Court
amount due, in money which, by the law of the land, was
tender in the payment of debts, all that the creditor
exact and enforce under the contract was performed. We
say any contract obligation was violated by holding that
tender made was valid and effective, without
deciding that United States treasury notes are not what
Congress declares them to be. In *Lick v. Faulkner*,
Cal. 404, and other cases, we held the Acts of Con-
gress making United States notes lawful money and a legal
tender in the payment of debts, to be constitutionally valid
and binding. If such notes are money in the sense declared
in *Lick v. Faulkner*, the judicial department of the country
cannot say a dollar of such currency is worth more or less
than a dollar of any other kind of money. Were we to under-
stand otherwise, we should discriminate between one kind of lawful money and
another, in cases where neither the parties contracting nor the
people of the country have made any distinction between them,
and would be involved in an inextricable absurdity, besides
that our judgment would not be an exposition of the laws
made by Congress, but would be an exercise of legislative power
in violation of the Acts of Congress.

When the tender was made, United States notes were a legal
tender, and the obligation of the defendant, by the terms
of the contract, was to pay a certain number of dollars gen-
erally. In *United States v. Robertson*, 5 Peters, 660, Mr. Chief
Justice Marshall said that an obligation to pay money in gen-
eral terms may be discharged by payment in legal currency.
In *Faw v. Marsteller*, 2 Cranch, 26, the same Judge in an
opinion analogous to the one before us, in answer to a question
posed and maintained by counsel in that case, said: "The
standard by which the value of money at the time of the considera-
tion of the contract is to be measured, is the standard by
which it was to be paid was received, is the standard by
which the contract is to be measured, is not the correct one."
In the case of *Metropolitan Bank v. Van Dike*, decided by the
New York Court of Appeals in 1863, (27 N. Y. 401,) the identical

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question involved in this case was very elaborately and ably discussed at the bar and considered by the Court, and it was held that United States notes issued under the Act of the 25th of February, 1862, were a valid tender in payment of a debt contracted and due long before the passage of the Act.

If it were admissible in judicial proceedings to open the door to evidence to show, for instance, that at a particular date a hundred dollars in United States notes were worth only forty dollars in gold coin, not only would the laws of Congress making these notes lawful money and a legal tender be annulled and held for naught, but consequences of a most preposterous and disastrous character would be likely to follow. In after years, when the notes issued under these Acts of Congress may become absorbed, and gold and silver coins shall be the only lawful money in the land, the inquiry would be, what was the difference in the value between the two kinds of money when the contract was made? Then, if it should appear that at the date of the contract, a hundred dollars in United States notes was worth only forty dollars in gold coin, the creditor would be entitled to recover only forty dollars, though his debtor's promise was to pay him one hundred dollars. It is needless to add illustrations of the confusions and mischiefs that would result were the Courts to hold that one kind of money is worth more or less than another kind, notwithstanding by sovereign behest there is no difference between them. The laws of Congress place the two kinds of money on an equality, so far as the case at bar is concerned, and therefore it results from existing conditions that the money tendered and paid into Court was as effectual to the discharge of the defendant's obligation as the same amount of United States gold coin would have been had the payment been tendered in that kind of money.

The conclusion to which we are forced by the conditions of the subject matter involved is, that the tender of United States notes constituted a legal tender for the payment of the amount

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and therefore the order made by the Court was correct
should be affirmed.
er affirmed.

CHARLES D. SEMPLE v. GEORGE HAGAR et als.

RIGHT FOR RELIEF ON GROUND OF FRAUD.—In an action brought to
vacate a patent for land on the ground that its issuance was procured from
the Government by false suggestions, fraudulent concealments, and by mis-
representations, the acts of fraud and misrepresentation on which the gen-
eral charge is based must be specified in the complaint, or it will not state
facts sufficient to constitute a cause of action.

LEGAL NOTICE OF PROCEEDINGS TO OBTAIN PATENT.—The Supreme Court
will take judicial notice of the fact, that the claimant of land under a
Mexican or Spanish grant, presented his petition to the Board of Land
Commissioners for the confirmation of his title, and that the same was
confirmed by said Board, or the District or Supreme Court of the United
States, before the patent was issued.

FOUND BEFORE CONFIRMATION OF GRANT.—The Board of Land Com-
missioners, or the United States Court, in passing upon and confirming a
Mexican or Spanish grant of land, must necessarily find, not only that the
alleged grantee was in fact the grantee of the Mexican or Spanish Govern-
ment, but also that he was competent to take the grant.

GRANT CONFIRMING A GRANT OF LAND.—A decree of the Board of Land
Commissioners or of a Court of the United States, confirming a Mexican or
Spanish grant of land, cannot be attacked in another action, on the ground
that the grantee was not competent to take the grant, by reason of having
received a grant of more than eleven square leagues of land before he
obtained the grant confirmed.

TO VACATE A PATENT FOR LAND.—A patent issued by the United States
Court for a confirmed Mexican or Spanish grant will not be vacated by a State
Court because the grantee had received a donation of more than eleven
square leagues of land from Mexico or Spain before he received the grant
confirmed.

RIGHTS OF FEDERAL COURTS.—State Courts cannot set aside or indirectly
review the judgments of the Federal Courts made in matters of which the
Federal Courts have jurisdiction.

APPEAL from the District Court, Tenth Judicial District,
La Brea County.

Plaintiff appealed from the judgment of the Court below
reversing the action.

The other facts are stated in the opinion of the Court.

Semple, and *Edwards*, for Appellant.

The State Courts have jurisdiction of patents issued by the

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United States for land within the State. (See *Sarpy v. Papin*, 7 Missouri, 503; *Allison v. Hunter*, 9 Ib. 741; *Barry v. Gamble*, 8 Ib. 88; *Wright v. Rutgers*, 14 Ib. 585; *Gorman v. Johnson*, 20 Ib. 108, etc.; *Arnold v. Grimes & Chipman*, 2 Iowa, 1; *Waterman v. Smith*, 13 Cal. 416; *Doll v. Meador*, 16 Cal. 330.)

The demurrers admit all the obligations of the bill; therefore, for the purposes of this trial, it is true that twelve square leagues of land in the Californias were granted to Manuel Jimeno Casarin prior to the date of the grant in question.

The Supreme Court of the United States, in the case of the *United States v. Hartnell's Executors*, 22 Howard, 286, having declared, in unequivocal terms, that such grant was void—there being no power in the California Governors to make grants except as directed in the law of 1824—(see *United States v. Vallejo*, 1 Blaskstone, 541)—the only question is, whether a valid patent can be issued on a void grant? Has a void thing any life, or a germ in it out of which a living thing can be reared? Can the adjudication under the Act of 1851 create a grant? The Governors of California had already exhausted all the official power given them by law, in favor of Jimeno, by granting him twelve leagues of land, and by inevitable sequence the act of issuing this grant was merely the act of an individual, and could have no more force than if a paper of the same purport had been signed and delivered by any other citizen of the Californias.

On this point we are sustained by the leading cases of *Jackson v. Lawton*, 10 Johnson, 25; and *Patterson v. Winn*, 11 Wheaton, 380, re-affirmed in *Doll v. Meador*, 16 Cal. 330.

A. C. Whitcomb, for Respondent Hagar.

The object of this action is "to repeal and vacate a patent issued by the United States;" and it has been held by this Court over and over again, (see *Leese v. Clark*, 18 Cal. 571, 572, 575; *Leese v. Clark*, 20 Cal. 423,) that a patent is a record of the Government, showing its action

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judgment upon the title of the patentees; and "upon all matters of fact and law essential to authorize its issuance supports absolute verity; and it can only be vacated and set aside by direct proceedings instituted by the Government, or parties acting in the name and by the authority of the Government." (18 Cal. 572.) As the vacating and setting aside of a patent is, therefore, a proceeding to which the United States must be a party, and as the Federal Courts have exclusive jurisdiction of actions to which the United States is a party, there is no escape from the conclusion that the District Court of the Fifteenth Judicial District of this State had jurisdiction over the question of repealing and vacating the patent.

the Court, RHODES, J.

The appellant denominates this action "a bill in equity, to have the right to repeal and vacate a patent issued by the United States, to Thomas O. Larkin and John S. Misroon for the Colus grant," or, as he states in another portion of his brief, "a bill to have the title to the Colus grant confirmed," which amounts to the same thing in substance, a bill "to have the title to the Colus grant by vacating the Jimeno patent confirmed."

The appellant states in his complaint that the Colus grant was granted to John Bidwell; that Bidwell conveyed the grant to the appellant; that in 1855 the title was finally confirmed to him; that the survey of the grant was approved by the United States District Court in January, 1860; that he has sold divers portions and tracts of the grant, and that he now is in possession of the unsold part of the grant. He further states that prior to November, 1844, certain Governors of the Californias granted to Manuel Jimeno Casarin two ranchos—called "San Luis Potosi" and "Santa Paula y Saticoy"—containing in the aggregate twelve Spanish leagues of land; that "the said Manuel Jimeno Casarin, well knowing that he had actually received, as donations from the Mexican nation, twelve square leagues of land within the Californias, and, well knowing that

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it was in violation of the laws of Mexico for any one individual to own or hold more than eleven square leagues of land, yet contriving to deceive and defraud the Mexican nation, did fraudulently and unlawfully, on the 4th of November, 1844, petition for, and Manuel Micheltorena, then Governor of the Californias, did fraudulently and unlawfully and upon false suggestions grant to the said Manuel Jimeno Casarin another rancho, commonly called 'Jimeno Rancho,' containing eleven leagues of land," etc.; that Manuel Jimeno Casarin then held the two ranchos formerly granted to him; that he transferred the Jimeno grant to Larkin and Missroon; that "some proceedings in some suit or controversy" were had between them and the United States; that in 1862 a patent founded on the grant was issued to them for the Jimeno Rancho, and that they procured the patent to be issued "by false suggestions, fraudulent concealments and misrepresentations." He further states that the Jimeno grant overlaps a portion of the Colus grant—that it is a cloud upon his title in the Colus grant, and that Hagar, one of the respondents, claims that portion of the Jimeno grant that overlaps the Colus grant.

The respondents demurred to the complaint on several grounds, two of which were that the Court had no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action, and the demurrers were sustained, and the plaintiff failing to amend, judgment was rendered dismissing the action.

The object of the action is to impeach and set aside the patent for the Jimeno grant, or to avoid so much of it as covers lands within the Colus grant, and the ground of invalidity alleged against the patent is, that Larkin and Missroon procured it to be issued by "false suggestions, fraudulent concealments and by misrepresentations;" but the acts of fraud and misrepresentation on which the general charge is based, are not specified, and for that reason the complaint is defective in not stating the requisite facts. But we do not intend to rest our decision on that ground. It is charged that Jimeno committed a fraud upon the Mexican Government in procuring

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the Jimeno grant, while he was the grantee and the owner of two other grants containing over eleven leagues of land, and that is the fraud upon which the appellant relies, and which he claims tainted all the subsequent proceedings down to and including the patent. It may be admitted, for the purposes of the case, that Larkin and Missroon had a knowledge of this fraud—though it is not so stated in the complaint—and that they not only did not inform the Courts before which the proceedings were had for final confirmation, or the executive officers who issued the patent, of the facts constituting the fraud, but that they studiously misrepresented the facts to those tribunals and officers. We deem it unnecessary in the present aspect of the case to determine the points argued by counsel, whether the United States are proper parties, or whether the appellant, not having received a patent for his lands, occupies such a position, as the assignee or grantee of the Government, that he can sue either in the name of the United States or in his own name. But conceding that he is the proper party, the inquiry arises whether the facts as stated, and as we have admitted for the purposes of the case, constitute such a cause of action as would authorize the Court to order the patent vacated.

The Court will take judicial notice that, according to the provisions of the Act of Congress of March 3, 1851, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican Government, should present his petition for the confirmation of his title to the Board of Land Commissioners, and that such proceedings must be had thereupon, before said Board or the District or Supreme Court of the United States, that a final decree confirming the title of the claimant to the land must be entered before the patent for the land could be issued. A patent could not be issued for the land claimed under a Mexican grant, unless such proceedings were first had for the confirmation; and it is not pretended that they were not had in respect to the Jimeno grant. The patent was issued only in pursuance of the decree of confirmation, and for the purpose of carrying it into effect.

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In the language of Mr. Chief Justice Field, in speaking of the operation and effect of such a patent: "It is the last act of a series of proceedings taken for the recognition and confirmation of the claim of the patentees to the land it embraces, the first of which was the petition to the Board of Land Commissioners." (*Leese v. Clark*, 18 Cal. 535.) The decree of final confirmation was essential to the patent as a judgment to an execution. The appellant says that "some proceedings were had in some suit or controversy between said Larkin and Missroon and the United States, and that, on the — day of —, 1862, the United States Government issued a patent founded on said fraudulent grant to said Larkin and Missroon," and, as before remarked, it is not pretended that the proceedings required by the Act of Congress were not had.

The Board or the Court, in passing upon the claim and confirming it, must of necessity have found as a fact, not only that Jimeno was the grantee of the Mexican Government, but also that he was competent to take the grant. True, this may not have been done in direct terms, as in the case of *United States v. Reading*, 18 How. 1, and *United States v. Harrell's Executors*, 22 How. 286, and other cases; but the fact must have been ascertained, at least by implication. The fact is as necessary to the confirmation of the grant as the fact that the land granted was situated within California, and must have been and was judicially determined by the Court that pronounced the decree; otherwise, we would have the case of a grant without a grantee. The only forum in which this fact can be found, or the questions relating to it investigated, during the series of proceedings that end with the patent, is the Board of Land Commissioners or the United States District or Supreme Court. Their jurisdiction of all the matters touching the claim of the petitioner to the land and of proceedings for final confirmation is plenary and exclusive. The appellant seeks to set aside the patent on the ground that the decree, in pursuance of which it was issued, was rendered in confirmation of a grant that had no legal existence—that was made by the Governor of California contrary to law; and the

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suit is in effect a proceeding in a Court of this State to set aside the decree of final confirmation, entered in the proper Court of the United States; for the facts alleged in the complaint do not tend to show that the patent was improperly issued upon a valid decree, but that it was issued upon a decree that ought not to have been rendered, if the true state of the facts respecting the grant had been before the Court pronouncing the decree—a decree that was procured by the fraudulent concealment and misrepresentation of the claimants in respect to a fact that was material to the issues in the case.

The old and very general rule on this subject is stated by Mr. Chief Justice de Grey in *Duchess of Kingston's Case*, 11 Har. State Trials, 262: "But if it (the judgment) was a direct and decisive sentence upon the point, and as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within, yet like all other acts of the highest judicial authority, it is impeached from without. Although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice." Although the strictness of the rule has been in many cases modified, and parties have been permitted to obtain relief in equity against judgments and decrees obtained by fraud and imposition, yet if it appear that the defendant had knowledge of the fraud in time to have availed himself of it in his defense, and neglected to do so, or if by reasonable diligence he could have ascertained and proven the true state of the facts, in respect to which the fraud is alleged, and neglected to make the proof, the Court will not grant him relief. (*Le Guen v. Gouverneur and Kemble*, 1 J. Cases, 465; *Marine Ins. Company v. Hodgson*, 7 Cranch, 332; Will. Eq. 160.) It not only does not appear that the United States did not know of the grants made to Jimeno prior to the making of the Jimeno grant, but from the fact that they succeeded the Mexican Government in California, and came into possession of the archives of the former Government, every presumption is in favor of their having knowledge of the prior grants, and no fact is stated to

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rebut that presumption. The Government having neglected to avail itself of the prior grants to Jimeno as a defense, no one will be permitted after the final decree, to set up the same facts, as an independent ground for relief.

Admitting that relief might be granted in a proper case with the proper parties, can the Courts of this State set aside, or indirectly review the decisions of the Federal Courts? This is not an open question. In *Peck et al. v. Jenness et al.*, 7 How. 624, Mr. Justice Grier, in delivering the opinion of the Court, says: "It is a doctrine of the law too long established to require citation of authorities that when a Court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every Court; and when the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it have once attached, the right cannot be arrested or taken away by proceedings in another Court." (See also *United States v. Peters*, 5 Cranch, 115; *Freeman v. Howe*, 24 How. 450; *United States v. Booth*, 21 How. 506; *Mott v. Smith*, 16 Cal. 533.)

The decision in this case does not in any degree impair the jurisdiction of the State Courts to pass upon and determine the rights of parties claiming under conflicting patents issued by the General Government in pursuance of decrees of confirmation, but the jurisdiction is denied to them to attack or collaterally review the decisions of the Courts of the United States, made in matters of which they have the acknowledged jurisdiction.

Judgment affirmed.

SAWYER, J., concurring specially:

I concur in the judgment.

Argument for Appellant.

LELAND STANFORD, GOVERNOR, JOHN F. CHELLIS, LIEUTENANT-GOVERNOR, AND WILLIAM H. WEEKS, SECRETARY OF STATE, AND *ex officio* MEMBERS OF THE BOARD OF STATE PRISON DIRECTORS OF THE STATE OF CALIFORNIA v. GEORGE A. WORN, *et al.*

PROCEEDINGS TO CONDEMN LAND.—In order to render proceedings for the condemnation of land for the use of the State effectual for any purpose, the provisions of the statute by which they are authorized must be strictly followed.

PLAINTIFF IN PROCEEDINGS TO CONDEMN LAND.—If the Act authorizing proceedings for the condemnation of land directs them to be commenced in the name of the People of the State, and they are commenced in the name of the Governor, Lieutenant-Governor, and Secretary of State, this renders the whole proceeding a nullity.

TIME OF PUBLICATION OF NOTICE.—If the Act authorizing proceedings for the condemnation of land directs a notice to claimants to be published for four weeks, and only twenty-four days elapse from the day of the first publication to the day the defendants are notified to appear, the Court acquires no jurisdiction over parties who do not voluntarily appear in the action.

CONTROL OF COURT OVER PROCEEDINGS TO CONDEMN LAND.—The Court does not lose its control over proceedings for the condemnation of land by reason of its adjournments at any time, but it continues as unfinished business until the deed is made and money paid over under the order of the Court.

WHEN PROCEEDINGS CONDEMNING LAND ARE VOID.—If, after proceedings have been taken to condemn land for the use of the State, the damages have been assessed, and a decree of condemnation entered, it shall appear that the State has acquired no title by the decree, the Court should, on motion of the Attorney-General, quash all the proceedings, and order the money to be refunded to the State.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

The motion of the Attorney-General to quash said proceedings, and to permit the State to withdraw the moneys from the custody of the Court, should have been granted.

First—The proceedings were irregular and void, and the State wished to dismiss them. It removed a cloud from claimants' title. (*Bensley v. The Mount. L. W. Co.*, 13 Cal. 314.)

Second—The moneys belonged to the State. They were

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taken from her Treasury. No other had a vested right to the money until she had a vested right to the land. Getting no title to the latter, she had not lost title to the former. It is not the case of abandoning lands after they have been *legally* condemned, and thus making the former owner buy back the land or the easement. (*Hawkins v. The Trustees of Rochester*, 1 Wend. 53; *People v. Supervisors of Westchester*, 4 Barb. S. C. 64, 76; *Smart v. Portsmouth & C. R. R.*, 20 N. H. 233, 239; *Hampton v. Com'th*, 7 Harris, 19 Pa. 329, 334.)

Patterson, Wallace & Stow, for Respondents.

By the Court, SANDERSON, C. J.

This is an action to condemn certain lands at Point San Quentin for State Prison purposes, under the provisions of an Act of the Legislature passed for that purpose, as amended in 1863. (Statutes of 1863, p. 224.) That Act authorizes the Attorney-General "in the name of the People of the State of California," to bring an action in one of the District Courts of any county adjoining the County of Marin, for the condemnation of all such lands as the State Prison Directors may deem necessary for the convenience of the Prison and the use of the State, and prescribes the mode and manner in which the action shall be prosecuted. It directs that the action shall be brought by filing a petition or declaration and publishing the same at least once a week for four weeks in some newspaper in the county where the suit is brought, and prescribes what matters shall be set forth therein, including a notice requiring all persons interested in the lands to come into Court, on a day to be specified in said notice, and file their objections in writing, if any they have, against the proposed condemnation. At the time specified in the notice, or as soon thereafter as is convenient, the Court is required to impanel a jury to assess the value of the lands. The Board of State Examiners are directed to audit the amount so assessed, together with such expenses as the Attorney-General may certify, and the

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Controller is directed to draw his warrant for such amount in favor of the Attorney-General, payable on the 15th of December, 1863, who is required to pay the same into court for the benefit of all the parties interested in the proceedings. Upon the payment of the warrant or the money into Court the clerk is required to execute a deed of the land in question to the State of California in due form of law, reciting the proceedings in the case, and thereupon it is declared that the State shall thereafter be the owner in fee simple absolute of said lands.

Under this Act these proceedings were instituted on the 1st day of May, 1863, and thereafter the value of the lands was assessed and the money paid into Court pursuant to an order of the Court made on the 29th of February, 1864. This order reserved to the parties the right to take any further steps they might deem proper until the 12th of March following, on which day the Attorney-General moved the Court to refund the money to the State, and to quash all the proceedings upon the ground that they were null and void by reason of a non-compliance with the provisions of the Act under which they had been instituted. This motion was denied, and thereupon the Attorney-General took an appeal to this Court from all the judgments and orders in the case.

It appears from the record that the petition was filed in the names of Leland Stanford, Governor; John F. Chellis, Lieutenant-Governor; William H. Weeks, Secretary of State, and *ex officio* members of the Board of State Prison Directors of the State of California, instead of the People of the State of California, as directed by the Act in question. It further appears that the notice required by the Act was not published for four weeks, as therein directed prior to the day upon which the owners were required to appear in Court and answer the petition, but for twenty-four days only. There are other grounds upon which it is claimed that these proceedings are null and void, which we omit for the reason that the two already stated are sufficient to establish their invalidity.

In order to render proceedings of this character effectual for

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any purpose the provisions of the statute by which they are authorized must be strictly followed. The power must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings. (Sedgwick on Statutes, 319.) In *Bensley v. Mountain Lake Water Company*, 13 Cal. 306, the Court said: "All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, express or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues." (See *Curran v. Shattuck*, 24 Cal. 427.)

The institution of this action in the names of the Board of State Prison Directors is wholly unauthorized by the Act in question; on the contrary, the Act directs it to be brought in the name of the People of the State of California. This alone is sufficient to render the whole proceeding a nullity. But had the action been commenced in the name of the proper party, the Court failed to acquire any jurisdiction over the owners of the land (except such as voluntarily appeared), for the want of a sufficient publication of the notice required by the Act in question. A publication for four weeks is required, yet the notice in this case directed the owners to appear on the 2d of June, and its first publication was on the 9th of May, less than four weeks before the day appointed for their appearance in Court.

The District Court did not lose its power or control over the case by reason of its adjournments at any time. It was unfinished business, and necessarily continued in Court until the deed was made and the money paid over under the order of the Court. It being apparent that the State would have acquired no title to the land in question by virtue of the proceedings in this case, it was the duty of the Attorney-General to quash the whole case before the money was paid out by the Court, and his motion to that end ought to have been sustained.

Points decided.

The proceedings being void, the State acquired no right to a deed, nor did the owners of the land acquire any right to the money. The order denying the motion is reversed, and upon the return of the case to the Court below, that Court is directed to enter an order quashing the entire proceedings, and directing the money now in Court to be refunded to the State.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* J. G. McCULLOUGH, ATTORNEY-GENERAL, v. ROMUALDO PACHECO, TREASURER OF SAID STATE, AND THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA.

POWER OF THE LEGISLATURE OVER TAXATION AND APPROPRIATIONS.—By the Constitution of California, the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; and there is no restriction upon this power as to the objects to which, or the time for which appropriations may be made, except that "no appropriations for a standing army shall be for a longer time than two years."

APPROPRIATIONS — WHEN DO NOT CREATE STATE DEBT.—There being no limitation in the Constitution in respect to the time over which legislative appropriations may extend, a law which appropriates a sum or sums of money for the future, and directs certain payments to be made out of the same at designated periods, from year to year thereafter, and which also imposes a special tax and sets apart the proceeds thereof to constitute a fund sufficient to meet the sums so appropriated and directed to be paid, as the same become payable, does not create a debt within the meaning of the prohibitory clause in Article VIII of the Constitution of the State of California.

CREATION OF STATE DEBT IN CASE OF WAR.—The legislative department of the State Government has the exclusive right to determine when such a state of war exists as will authorize it to create a debt to repel invasion or suppress insurrection, without submitting the law creating the debt to the people; and its determination upon this subject is not subject to review, or liable to be controlled by the judicial department.

LEGISLATIVE DETERMINATION WHEN WAR EXISTS.—The passage by the Legislature of an Act creating a debt for the purpose of repelling invasion or suppressing a rebellion, without a submission of the question to a vote of the people, which Act recites in its preamble the existence of war, and refers in the body of the Act to such recital for the reasons which operated upon that body to induce the passage of the Act, is evidence of a determination by the Legislature that the exigency justifying its action in creating the debt has arisen.

AID TO A RAILROAD CORPORATION BY THE STATE.—Section ten of Article XI

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of the Constitution, prohibiting the State from giving or loaning its credit to or in aid of a corporation, does not prohibit the State from appropriating its funds, in time of war, to aid a corporation in the construction of a railroad to be used by the State for military purposes.

GIFT OR LOAN OF THE CREDIT OF THE STATE TO A CORPORATION.—The imposition of a special tax, and an appropriation of the proceeds of the same to be paid, when collected, to a railroad company, or its creditors, to aid in building the railroad, in consideration of valuable services to be rendered thereafter to the State by the corporation, is not a gift or loan of the credit of the State to or in aid of a corporation, within the meaning of section ten of Article XI of the Constitution.

FINAL JUDGMENT ON BILL TO OBTAIN INJUNCTION.—Where a bill is filed by the people on the relation of the Attorney-General to enjoin the State Treasurer from paying money out of the Treasury, on the ground of the unconstitutionality of the Act directing the Treasurer to make the payment, and the Court on the final trial deny the injunction, the judgment denying the injunction should not contain a clause adjudging and decreeing that the Treasurer pay over the money as required by the law.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The following are copies of the complaint, answers, judgment, and stipulation in this cause:

The People of the State of California, on the relation of John G. McCullough, Attorney-General of said State, complain of the defendants, Romualdo Pacheco, Treasurer of said State, and the Central Pacific Railroad Company of California, a corporation duly incorporated under the laws of and doing business within said State, and for cause of complaint aver and show and cause this Court to be informed, that the said railroad company, defendant, assuming to act under a pretended statute of the Legislature of said State, approved April 4th, 1864, and entitled "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto," have executed and issued, or are about to issue, fifteen hundred bonds, numbering from one to fifteen hundred inclusive, for the sum of one thousand dollars each, with forty interest coupons, each for thirty-five dollars, attached to each of said bonds, and that the following is the form and copy of one of said bonds, viz:

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"UNITED STATES OF AMERICA.

"No. —.

"The Central Pacific Railroad Company of California acknowledge themselves to owe to Oakes Ames, of North Easton, in the State of Massachusetts, or to the holder hereof, the sum of one thousand dollars, which sum they promise to pay to the holder hereof, in the City of New York, on the 1st day of July, 1884, with interest thereon at the rate of seven per cent per annum from the first day of July, 1864, payable semi-annually, on the first day of January, 1865, and on the first days of July and January of each year thereafter, at the State Treasury of the State of California, in the City of Sacramento, in said State, upon the surrender of the annexed coupons to the Treasurer of said State, both principal and interest payable in *United States gold coin*, at par dollar for dollar—this bond being one of fifteen hundred, numbering from one to fifteen hundred inclusive, of the same tenor, amount, and date, issued under and in pursuance of an Act entitled 'An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto,' approved April 4th, 1864, and by the provisions of said Act, the interest thereon is to be paid by the State of California. The payment of the principal and interest of this and said other bonds is also secured by a mortgage executed by the said company upon the whole of their railroad from the City of Sacramento to the eastern boundary line of the State of California, and all the rolling stock, fixtures, and franchises thereof, to Edgar Mills, of Sacramento, State of California, and Joseph A. Donohoe, San Francisco, State of California, as trustees for the holders of such bonds and coupons. The payment of said bonds is also secured by a sinking fund, provided by setting apart in the year 1870, and each year thereafter, from the net earnings and income of the railroad of said company, the sum of fifty thousand dollars in trust, to be loaned out on interest, which sums, with the accumulating interest thereon, are irrevocably pledged to the holders of said bonds for the final payment and

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redemption thereof. And it is hereby stipulated and conditioned that the City and County of San Francisco, and the Counties of Sacramento and Placer, in the State of California, shall not be liable for any of the debts or liabilities of said company to an amount beyond or exceeding the amount of the capital stock of said company subscribed, or which may hereafter be subscribed by them, or either of them, upon the books of said company.

"In testimony whereof, the said company have caused their corporate seal to be hereunto affixed, and the same to be signed by their President and Secretary, this first day of July, 1864.

"L. STANFORD, President.

[SEAL] "E. H. MILLER, Jr., Secretary."

And said plaintiffs further complain, and cause this Court to be informed, that said defendant Pacheco, assuming to act solely by virtue of the provisions of said pretended statute, and pretending to act in his official capacity as Treasurer of said State, and to bind the people thereof, has signed or is about to sign each of said forty interest coupons attached to each of said fifteen hundred bonds, and that the form of one of said coupons attached as aforesaid, being the coupon first falling due thereon, and the other thirty-nine coupons being of like tenor, except that they fall due in regular order every six months after the first day of January, A. D. 1865, and also that the form of the indorsement on the back of said coupons signed by said Pacheco as said Treasurer, is as follows, viz:

"\$35. Central Pacific R. R. Co. of California.

"Coupon No. 1.

"For thirty-five dollars in U. S. gold coin, due January 1, 1865, payable by the State of California, at the State Treasury.

"For Bond No. —.

"E. H. MILLER, Jr., Secretary.

"This coupon is payable by the State of California," under an Act entitled 'An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this

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State for military and other purposes, and other matters relating thereto,' approved April 4th, 1864.

"R. PACHECO, State Treasurer."

And the Attorney-General, further informing on behalf of the People aforesaid, avers that it is the intention of said railroad company, defendant, still assuming to act under the provisions of said pretended statute, and they so declare it openly to be their intention to demand of and from the defendant Pacheco, as Treasurer aforesaid, the payment in pursuance of the tenor thereof, of the said fifteen hundred coupons attached to said bonds which fall due on the said first day of January, 1865, amounting in all to fifty-two thousand five hundred dollars, in the gold coin of the United States, and to demand of said Treasurer and his successors in office the payment of the said other coupons attached to said fifteen hundred bonds as they severally fall due, amounting in all, together with said first coupons, to the sum of two million one hundred thousand dollars, in said gold coin.

And further informing on behalf of the People aforesaid, the Attorney-General avers, that defendant Pacheco, pretending to act in his capacity as Treasurer as aforesaid, threatens and declares it to be his intention to pay out of the State Treasury, in said United States gold coin, on the 1st day of January, 1865, the said amount claimed by said railroad company as aforesaid, to be then due as interest on said fifteen hundred bonds, and also in like manner while he remains in office, he declares it to be his intention to pay said other coupons out of the State Treasury as they severally fall due as aforesaid, claiming and pretending to make such payments, and that the same are authorized, and the said company defendant, claiming and pretending to receive said moneys, under the provisions of said pretended Act of the Legislature.

And the Attorney-General, in behalf of the People aforesaid, avers and charges, that said Pacheco, as such State Treasurer, will carry out his threats and continue to sign said coupons, and will pay said coupons out of the moneys in the State

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Treasury now under his control as such Treasurer, and the said company defendant will receive said payments from said moneys, unless they and each of them are restrained and enjoined from so doing by the order and injunction of this Court. .

And the said Attorney-General further informs the Court that he is advised and so charges the fact to be, that the said pretended Act of the Legislature (by virtue of which solely said defendants are now assuming and claiming to act and intend further to act under its provisions,) is wholly unconstitutional and void, and utterly and entirely inoperative and of no valid force so as to authorize or empower said defendant company to execute and issue said fifteen hundred bonds with the coupons attached in the form aforesaid, or to authorize or empower them or any other parties to receive payment of said coupons or any part thereof out of any moneys now or that may hereafter be in the State Treasury, and that said pretended Act confers no valid power or right to exercise the duties or authority in the same attempted to be created and delegated to the said defendants as aforesaid by reason of this:

That notwithstanding long before, and at the time, and ever since the passage of said pretended Act, the State of California was and is indebted in a sum greatly exceeding the sum of three hundred thousand dollars upon debts and liabilities created by the Legislature thereof, no sufficient ways or means, exclusive of loans, were provided by said Act for the payment of the debt and liabilities therein attempted to be created as the same falls due and for the full discharge thereof within the next twenty years.

And for this: That though the public debt of the State before, at the time, and ever since April 4th, 1864, over and exclusive of the amount sought to be appropriated by said pretended Act, was far exceeding three hundred thousand dollars, yet the said pretended Act did not provide for its submission to the people of the State, nor has the same in fact been submitted nor attempted nor pretended to be submitted to said people, nor has said pretended Act ever received at any general elec-

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tion a majority of all the votes cast for or against it by the people as such general election.

And for this: That though upon April 4th, 1864, and since the indebtedness of the State as aforesaid exceeded three hundred thousand dollars, yet said pretended Act was not passed, nor the liability upon the State therein contemplated was not nor is attempted to be contracted during a time or in the case of war to repel invasion or suppress insurrection — that in fact neither then nor since, were or have the people of this State been engaged in any war for repelling any invasion or suppressing any insurrection against its authority.

And for this: That said pretended Act attempts to give and to loan the credit of this State in some manner to and in aid of said Central Pacific Railroad Company of California, a corporation duly organized under the laws of said State.

Wherefore, the said Attorney-General avers, that all the acts already performed by said Pacheco, Treasurer as aforesaid, in behalf of the people and intended to be hereafter performed by the defendants under the said provisions of said pretended Act, were and are and will be wrongful and illegal, and utterly in violation of law, and all liabilities and payments contracted and made, or to be contracted and made, and all moneys paid or to be paid out by said Pacheco, or received or to be received by said company defendant, or any holder of said coupons, under the said provisions of said pretended Act, are and will be illegal, wrongful, and fraudulent against the people of the State of California.

And the Attorney-General further informing, gives the Court to know, that if the defendant Pacheco is permitted to continue to sign and issue said coupons or pay out of the State Treasury said moneys, and the defendant company to negotiate said coupons or to receive said moneys, the said people must suffer great, serious, and irreparable injury and loss thereby.

Wherefore, inasmuch as the said people have no speedy, adequate, nor complete remedy by the course of the common law for the injuries committed and threatened to be committed by the said defendants and others hereinbefore set forth, they

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pray this Court by the final judgment thereof, and in the meantime until the rendition of such final judgment, that said R. Pacheco, Treasurer of said State of California, and the said Central Pacific Railroad Company of California, their and each of their counsel, solicitors, agents, attorneys, and employes, may be restrained by the order and writ of injunction of this Court from doing any act or acts under the said provisions of said pretended statute, and especially that said defendant company be restrained from executing and issuing the said fifteen hundred bonds with the coupons attached in the form above recited, and if already executed, that the same may be cancelled, and the defendant company restrained from proceeding any further in the issuance or negotiation thereof,) and that said defendant Pacheco be restrained from signing said coupons (and if any or all are already signed, that the same may be cancelled and he be restrained from delivering them to said company or to any other,) and especially that said Pacheco be perpetually restrained and enjoined from paying out any of the moneys of the State Treasury under his control, in liquidation of said coupons to said company or to any other, under the provisions of said pretended Act of the Legislature, and that said company be forever restrained and enjoined from collecting or receiving any of said moneys on said coupons or otherwise—and be forever restrained from enforcing or attempting to enforce the payment of said coupons, or any of them, or any part thereof, from the State Treasury, or any moneys therein—and that such other orders and decrees, interlocutory and final, may be made herein, as to equity may pertain, and that such other relief as is proper may be granted.

JOHN G. McCULLOUGH,
Attorney-General.

The said defendants, the Central Pacific Railroad Company of California, a corporation duly organized under the laws of the State of California, for answer to the complaint filed in said action, deny that the said statute described and referred to in said complaint is unconstitutional or void, but on the

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contrary they aver that the same is a valid statute, and does not violate any provision of the Constitution of the State of California, or of the United States, and the said statute fully authorizes the execution and issue of the said bonds and coupons described in said complaint, and also authorizes and requires the payment of said coupons by the Treasurer of said State of California, out of the moneys in the State Treasury, and in his hands as such State Treasurer; that it was not necessary, nor does the Constitution of the State of California require, that said statute should be submitted to the people of said State at any election held in said State; and they further aver that said statute was passed in a time of war, to repel invasion, and suppress insurrection, as set forth in said Act and the preamble thereof; that at that time, and ever since, the United States were and have been engaged in a war with certain persons who have rebelled against the authority of the Government of the United States, of which the State of California forms a part, and the National Government was at said time and ever since has been engaged in suppressing a gigantic insurrection of a portion of the people of the United States against its authority, and the said Act was passed by the State of California "to repel invasion, suppress insurrection, and defend the State against its enemies," and the Legislature of said State had full power and authority to enact said law, and it is the duty of the officers of said State to enforce the same, and give full effect to all its provisions.

The said defendants further say, that they have fully and faithfully complied, in all respects, with the provisions, requirements, and conditions of the said Act, on their part therein provided to be performed; that within ninety days after the passage of said Act, to wit: on the 4th day of May, 1864, the said defendants duly filed in the office of the Secretary of State, a contract and agreement, duly signed by the President and Secretary of said company, and sealed with the corporate seal thereof, therein and thereby agreeing to faithfully do and perform, and fully comply, on the part of said company, with all the terms and conditions set forth in said Act, and the fourth

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section thereof, and therein also releasing all claim to the warrants provided to be issued by the Act entitled an Act to aid the construction of the Central Pacific Railroad in the State of California, and other matters relating thereto, approved April 25, 1863, and also agreeing therein that said company should, within ninety days after the receipt of a patent therefor from the United States, execute, acknowledge, and deliver to the State of California, a deed in fee simple for the conveyance of the south half of section nineteen, in Township Eleven north, of Range Seven east, Mount Diablo meridian, situated in Placer County, on said railroad, and about twenty-two miles from Sacramento, with all the granite and granite quarries thereon, excepting and reserving therefrom, however, a tract or strip of land four hundred feet wide, and running across said half section, each one half thereof lying on each side of the line running along the centre of the main railroad track of said company, and the said company has never received a patent for said tract of land.

And the said Central Pacific Railroad Company of California further aver, that the passage of said Act by the Legislature of said State, and the acceptance of the terms, conditions, and provisions thereof by these defendants, by filing said contract and agreement in the office of the Secretary of State, as provided by said Act, constituted and made a valid, legal, and binding contract between the State of California and these defendants, and the payment of said interest coupons of the said fifteen hundred bonds, described in said complaint, by the State Treasurer, out of moneys in the State Treasury, is and will be but the payment and discharge of a just, valid, and binding liability of the State of California, arising under a valid, subsisting obligation and contract, on the part of said State, as a just, proper, and agreed compensation for the services and transportation of property done and performed, and agreed to be hereafter done and performed, by these defendants, for the use and benefit of said State of California.

Wherefore, these defendants have good right to demand and receive the payment of said interest coupons on the said fifteen

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hundred bonds described in said complaint, from time to time, as the same shall fall due, to be paid by the said Pacheco as such State Treasurer, and his successors in said office, out of moneys in the State Treasury, and the said State Treasurer and his successors in said office, has full power and authority, and it is his and their duty to pay the same, as they shall from time to time become due, under and in accordance with the provisions of the said statute.

Wherefore, these defendants pray judgment that the said defendant, R. Pacheco, as such State Treasurer, and his successors in said office, be ordered and directed to pay to the holders thereof, the said forty interest coupons attached to each of the said fifteen hundred bonds described in said complaint, as the same shall respectively fall due, out of moneys in the State Treasury, as provided in the said statute described and referred to in said complaint, and for their costs herein expended, and for such other and further relief as may be just and proper.

E. B. CROCKER,

Attorney for Central Pacific R. R. Co. of Cal.

The said defendant, Pacheco, for answer to the complaint filed in said action, denies generally and specifically each and all the allegations in said complaint, except that he admits that he is State Treasurer, and that, as he is informed and believes, the said Act of the State of California described and referred to in said complaint, is a valid and binding statute, and the same authorizes and requires this defendant, as such State Treasurer, to pay the said coupons attached to said bonds described in said complaint.

Wherefore, he prays for judgment, etc.

E. B. CROCKER,

Attorney for Pacheco.

October Term, A. D. 1864. Judgment, November 25th, 1864.

This cause, having been duly submitted to the Court for trial,

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upon the pleadings and stipulation filed, the Court now finds for said defendants, and that said Central Pacific Railroad Company is entitled to a judgment as prayed for in their answer.

It is therefore ordered, adjudged and decreed, that the injunction against said defendants prayed for in the complaint filed in said action be and the same is hereby denied.

And it is further ordered, adjudged, and decreed, that the said Romualdo Pacheco, State Treasurer of the State of California, and his successors in said office, be, and they are hereby ordered and directed to pay to the holders thereof, the said forty interest coupons attached to each of the said fifteen hundred bonds described in said complaint, and numbering from one to fifteen hundred, inclusive, said interest coupons being for thirty-five dollars each, payable in United States gold coin, the same to be paid from time to time as the said interest coupons shall respectively fall due, out of the State Treasury, and the moneys and funds therein, in accordance with the provisions of the Act entitled "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto," approved April 4, 1864.

It is hereby stipulated and agreed by and between the above named plaintiffs and defendants, that this case shall be heard and determined in the Supreme Court upon the pleadings, the judgment and this stipulation, and it is further agreed and admitted, that the facts stated in said complaint and not denied in the answer of the Central Pacific Railroad Company of California, are true; and further, it is admitted that the averment of facts in said answer of the said company are also true, except that it is not admitted as a matter of fact, that, at the time of the passage of the Act of April 4, 1864, mentioned in said pleadings, or since, the said State (though it is that the

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General Government) was engaged in any war, or repelling any invasion, or suppressing any insurrection.

(Signed,)

J. G. McCULLOUGH,

Att'y-Gen'l and for Plaintiffs and Appel'ts.

(Signed,)

E. B. CROCKER,

Attorney for Defendants and Respondents.

The other facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

The Act in question violates Article VIII of the State Constitution. The Legislature have attempted to create an unconstitutional debt.

It is admitted that the Act was never submitted, nor is there any provision in the Act itself for its submission, to a vote of the people. It is admitted that the debt of the State, upon April 4th, 1864, and ever since, has and does greatly exceed three hundred thousand dollars.

We maintain, first, that the law attempts to create a debt; and, second, that it does not come within the exception of the Article. And preliminarily we remark that the doctrine that this Article is merely directory or advisory, and addressed solely to the legislative conscience, and not mandatory upon the Legislature, has long since been abandoned. (*People v. Johnson*, 6 Cal. 504; *Nougues v. Douglass*, 7 Cal. 68, 76.)

First—The Act assumes to authorize the creation of a State debt or liability.

The VIIIth Article of the Constitution is plain, and clear to the obscurest understanding. The terms are general and comprehensive. The Legislature is forbidden to create "any debt." A debt may be contingent or absolute, created by statute expressly or by contract, by appropriation when there is no money to meet it, (at least within the current fiscal year,) by drawing against a fund when none such exists, and in various other ways. But lest a narrow construction should be placed upon the word "debt," and an attempt made to except from its meaning some kind of a State obligation, the

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Legislature is forbidden to create "any liability," direct or indirect, present or future, express or implied. And that there might be no possible evasion, the Legislature is forbidden to create any debt or debts, liability or liabilities, "*in any manner.*"

But it is said that this Article was not intended to include the necessary and ordinary expenses of the Government. Such a construction is negated by the debates in the Constitutional Convention, by the very words of the Article, by the exception in cases of war, and by the sixteenth section of Article XII. The debates in the Convention show (and surely the framers should know what they meant) that the Article was intended to cover governmental expenses. It was the very subject discussed, some contending for one hundred thousand dollars, some for five hundred thousand dollars, and finally the Convention settled on three hundred thousand dollars as the full limit the Legislature was permitted to go in the creation of a State debt, unless the same was submitted to a vote of the people. The three hundred thousand dollars was intended as a margin, after the State Government was fairly put in operation under the sixteenth section of Article XII, to meet any deficit occasioned by the miscalculations of subsequent Legislatures in framing their tax and appropriation bills, in the failure of the usual sources of revenue, etc. (Debates in the Convention, p. 165; *People v. Johnson*, 6 Cal. 501; *State v. Medbery*, 7 Ohio, 532.) Nor do the words of the Article warrant any such exception; and nothing but a forced and strained reading can draw such a construction from the terms.

But the exception in cases of war, invasion, and insurrection, shows also that the framers thought that unless the exception was made the words would include such expenses; and if one exception be expressly made, why not make others, if such were intended? "If the general limit would not include these ordinary expenses of the State, why should the same general rule include the more pressing demand in time of war?" (*Nouques v. Douglass*, 7 Cal. 67.)

And again, Article XII, section 16, answers this objection.

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The Convention, acknowledging the force of such an objection when applied to the first Legislature, which was to put the Government in operation, which would be without any means in the Treasury to defray the expenses, and before any revenue could be collected, which must therefore borrow to obtain the means; and, judging that the power to borrow only three hundred thousand dollars might not be ample enough to meet all the governmental expenses, expressly provided that the limitation contained in the VIIIth Article should not extend to that Legislature, but it was authorized to "negotiate for such amount as might be necessary to pay the expenses of the State Government."

We urge, then, that this Article is not simply a limitation upon the power to borrow money, but that it includes liabilities of every nature which may be "in any manner" created by the Legislature; and that the powers of taxation and appropriation are incident to the power of creating a debt or liability.

But grant that this construction is too broad, (for it is not necessary in its full scope to sustain our case,) we particularly present another view. The Constitution establishes a State Government; machinery is provided for its organization; its powers are divided into three separate departments; these departments are to be filled with officers to exercise the powers and functions appertaining to them; salaries are provided to be paid to them; executive, judicial, and legislative officers are to receive compensation; (Art. V, Sec. 21; Art. VI, Sec. 15; Art. XII, Sec. 15, of the Const. ;) other strictly governmental expenses are provided to be incurred.

The VIIIth Article prohibits the *Legislature* from creating any debt or liability. But the foregoing liabilities are created by the *Constitution*, not by the Legislature. They are created by the very instrument that creates the VIIIth Article itself.

These provisions must stand and be construed together. Each must have its effect. The Convention that framed, the people who adopted the VIIIth Article, framed and adopted the Vth, VIth, and XIIth Articles. The "debt or liability"

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inhibited by that Convention and the people, to be created against the State by only *one* of the departments of the proposed government was created by the Convention and the people themselves, at the same time, and by the same act, for the purpose of the successful organization and subsequent operation of *all* the departments of that proposed Government. In other words, the debts or liabilities inhibited in the VIIIth Article must have their sources not within, but outside of and beyond, the Constitution. With the former that Article has nothing to do. To use the words in a peculiar sense, it forbids the creation of *legislative*, but not *constitutional* debts.

But, though it be true that the Constitution creates liabilities of a character above enumerated, it nowhere provides that the State shall go into a system of internal improvements, or launch out into any scheme of financial speculation. (*State v. Medbery*, 7 Ohio, 536.)

And if it be said, as it was in *The State of California v. McCauley*, 15 Cal. 455, that any or all of the considerations mentioned in section four of the Act in question, viz: the transportation of convicts to the State Prison, of lunatics to the Insane Asylum, the conveyance of public messengers, of articles to the fairs of the State Agricultural Society, of materials for the construction of the State Capitol Building, of troops and munitions of war belonging to the State, etc., etc., are to be as much provided for, and it is as much the duty of the State to see to that provision as it is to provide for the salaries of her officers; and that the obligation of the State to pay the expenses of such conveyance and transportation exists with equal force and to the same extent, without as with the Act and so-called contract thereunder—it is answered: That a subsisting contract entered into by the State to pay for such conveyance and transportation, creating a present liability to pay specific sums of money semi-annually for the next twenty years, and a mere abstract constitutional obligation to perform said acts, and to pay the expenses of such conveyance and transportation, are obviously two different things: the one creates a direct liability for a specific sum of money

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to individuals; the other is a simple enunciation of one of the duties of a Legislature; the one creates a debt, the other is merely the announcement of a moral obligation addressed to the legislative conscience. (*State v. Medbery*, 7 Ohio, 537.)

It is argued that the Act is a contract between the State and the company, by which the former, in consideration of things performed and to be performed by the latter, to pay the interest on these bonds for the next twenty

Because the Act may have the effect of a contract, does it any the less assume to create a debt? If A. contracts with B. to perform certain services, does or may not that contract create a debt against A.? The Legislature, not being prohibited, has the power to make contracts, and we will assume contracts of this character, but it must make them in compliance with and in subordination to the provisions of the Constitution. The power to contract is an incident to, if not inherent in, the power to create a debt or liability. Can there be any creation of a debt except by words of contract? If the power to do the former is limited, must not the power to do the latter necessarily be? And if a contract be entered into by which an individual advances money or services, or promises to advance either to the State, and the latter in return promises to advance money in satisfaction, is the consideration of the State any the less an inhibited liability under the VIIIth Article because of the different nature of the consideration advanced by the individual? There is no magic in the word "contract." The State being free from debt, the Legislature may, by contract, borrow from an individual three hundred thousand dollars, or contract to pay to him three hundred thousand dollars for certain services; but it cannot, therefore, borrow four hundred thousand dollars, or contract to pay four hundred thousand dollars for those services. Then, though the Act in question is in the form of a contract, and though the company thus far have complied with the conditions on their part, does it not assume to create an unconstitutional liability?

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Now the words "debt or liability," as used in the VIIIth Article, are general. A debt, as said before, may be absolute or contingent, express or implied, statutory or conventional, funded or unfunded. A debt exists where the State agrees to pay money in return for services or for money borrowed. It may exist though the principal is never to be paid. (3 Selden, 20; 1 Peters U. S. 216.) In a popular sense it includes all that is due to a party under any form of obligation or promise; (3 Metcalf, 526; 2 Blackstone's Commentaries, 464; Jacob's Law Dictionary, "Debt;" 20 Cal. 324;) any kind of a just demand; (4 Sergeant & Rawle, 506;) it may exist though there be no personal but only property liability; (*People ex rel. Mulford v. Mayhew*, 26 Cal. 665;) it may exist against the State, though it cannot be sued; (3 Selden, 93, 128;) in the meaning of this Article it is said to exist when a sum of money is due from the State by contract, express or implied. (20 Cal. 350.) Either of these definitions would embrace the liability created by the Act under consideration. The conditions fulfilled, the State agrees to pay absolutely fifty-two thousand five hundred dollars on January and July first of each year. And on the theory of the defendants, though the company should fail to perform its part of the contract hereafter, still this sum is due at stated times to the coupon holders, and the State must sue the company to recover back. There is, then, not only a contract to pay money for necessary expenses at a future day, on certain conditions, for services to be rendered or materials furnished, but there is an absolute agreement to pay money *in any event*, with an *immediate and a fixed liability* on the part of the State to pay it; and it is clearly, within even the argument of McCauley's counsel, in 15 Cal. 445, an inhibited liability. The sum is certain, the time is definite, the money is payable at all events. If the State was suable she would be liable to an action. In the words of section two, these "coupons for interest on said fifteen hundred bonds hereinbefore described shall be paid as they may fall due, from time to time, for said period of twenty years." Unlike warrants, which are merely a part of the

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machinery adopted by the Government in the settlement of its accounts, and upon which no action can be maintained, (*People v. Gray*, 23 Cal. 125,) these coupons are evidences of indebtedness, binding obligations, negotiable instruments, floating from hand to hand, separated from the bond, and upon which the bearer may sue. (*American Law Register* for Aug. 1863, 595; *Jackson v. Y. & C. R. R. Co.*, Note; *County of Beaver v. Armstrong*, 44 Penn. 63.) They are just as much liabilities against the State as are the bonds against the company. Warrants are payable out of "moneys not otherwise appropriated," and there is no obligation on the State to pay until there is money in the Treasury. In the State Prison case, "the appropriations were to take effect and the services to be rendered in future." "The State only became indebted as the services were each month performed," says Mr. Justice Field. But here the State is indebted, upon the issuance of these coupons, two million one hundred thousand dollars, and she promises to pay it in instalments, whether the eight cent tax yields enough or not, and service or no service on the company's part, say the respondents. The State is just as much indebted as would be an individual who had issued his promissory notes for that amount payable every six months for the next twenty years.

And even granting that the services rendered by section four are as much a part of the State's duty as to support her convicts, (which they are not,) the Legislature has no right to support convicts or pay Judges of the State by the issuance of bonds in this way.

Assume that the next Legislature should, in this same way, contract for building a Capitol, State Prison, etc., etc., and issue State obligations like these coupons to the amount of other millions of dollars. We are told it is not a State debt, because a tax is levied and an appropriation made — and tax of eight cents on the one hundred dollars for one purpose, five for another, ten for another, and so on. And respondents say these are *irrepealable*. If the Legislature can do this for twenty years, it can do it for all time; thus one Legislature may farm out the whole public revenue to these different purposes, and

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bind the people forever. For if a contract is thus created, a subsequent Legislature cannot repeal the law to affect the contract, nor can the people in Convention abolish their Constitution to affect it, as it is prohibited by the Constitution of the United States. (21 N. Y. 9; 22 N. Y. 9.) And yet we are told that a State debt is not created. Did not the national debt of England commence, and has it not grown in this very way; farming out first one and then another source of the public revenue? (*Newell v. People*, 3 Selden, 102, 115, 124; 13 Barb. S. C. 63, 188.)

The Act does not come within the exception of the Article which reads "except in case of war to repel invasion or suppress insurrection."

It is claimed that under this Article the Legislature is the exclusive judge when the contingency of war has arisen, and that by this law they have passed their judgment.

Is the Legislature the exclusive judge? May it enact war in time of profound peace? The actual existence of public war, and also of civil war, though never publicly proclaimed *eo nomine*, is a fact in our domestic history which this Court is bound to notice and to know. The Court does know judicially that the National Government is engaged in a civil war to suppress a gigantic insurrection against its authority. (2 Black, S. C., U. S., 667, Prize Cases.)

And does this Court not know judicially that upon April 4th last, or since, no war has existed in this State, no invasion to repel, no insurrection to suppress? Is it in the power of the Legislature to assume a state of war when, confessedly, none exists? This Article applies to a case of war wherein the State is engaged — to repel an invasion against its authority, to suppress an insurrection within its borders; not to repel the invasion of an enemy into Virginia, not to suppress an insurrection in South Carolina.

But granting that the Legislature is the sole and exclusive judge of the existence of the exigency; (*Martin v. Mott*, 12 Wheaton, 29; *Luther v. Borden*, 7 Howard, 44;) that it may incur an unlimited debt in case of existing war, and provide

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for a probable or even a possible contingency of war at any time in future, the debt must be incurred to meet a *case of war*, and of *war only*. How is it with this Act? The debt is incurred for peace as well as for war purposes.

The preamble is no part of this statute. Where the words are clear, the preamble, like the title, is resorted to for no purpose. It is only to be looked at when the words are ambiguous. It cannot confer any powers *per se*. It can neither enlarge nor restrict the body of the Act. (*Edwards v. Pope*, 3 Scammon, 470; Dwarris on Statutes, *655; Sedg. Con. and Stat. Law, 55, etc.; 1 Story on Con., Secs. 459, 462.)

The history of this provision and of Article VIIIth is well known. They have been incorporated in most of the new, and the amendments to the old Constitutions of many of our sister States. They were intended to check that wild spirit of speculation that was bringing financial ruin on the country. They were, in part, intended to prevent our State from launching out into a system of internal improvements that had almost engulfed many of the older States in pecuniary embarrassments. Towns, cities, counties, and States, had felt the baneful effects of the universal rage for speculation. Everywhere in the Eastern States, examples of bankruptcy and repudiation could be seen; the legitimate result of loaning the public credit and contracting public debts to commence and carry on the construction of canals and railroads. States that had attempted to carry on these works in their own name, were forced to suspend, injuriously affecting State credit, depreciating all kinds of property, and bringing general stagnation in all departments of business. Other States sold out their public works, as a choice of evils, at an enormous sacrifice.

The State is prohibited from giving or loaning her credit, or directly or indirectly from becoming a stockholder in any corporation. Does she do either by the Act under consideration? We find little authority upon this question. A similar clause to that in our Constitution is incorporated in the Constitutions of Maine, New York, Pennsylvania, Maryland, Kentucky, Ohio, Indiana, Louisiana, Michigan, Iowa, Wisconsin, Minne-

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sota, and West Virginia, but we find no direct decision in the Courts of those States upon the construction of this provision. It has been, doubtless, thought by their respective Legislatures that the terms of the section were so broad as to defy legislative evasion, and the clause has been accepted and acted upon in its natural and comprehensive signification.

But it is argued that this Act is a contract, and that the State is but doing by this contract what she is constitutionally bound to do, viz: providing for transporting her convicts.

Again we answer, that if this section is violated in the creation of a contract, the Act is none the less unconstitutional, and the State must enter into contracts in such a manner as not to loan or give her credit. And if it be a constitutional duty and a part of the legitimate functions of the Government to provide for carrying her lunatics, etc., that duty and function must be performed also in such a way as not to use the State credit. And again we urge, that there is a great difference between a mere abstract constitutional obligation addressed to the Legislature and an absolute and specific loan or gift of the State credit.

And so, too, it is said no credit is loaned, that appropriations are made to pay for services as rendered; and we again answer, ordinary appropriations are met by warrants payable only as money may come into the Treasury; but under this Act coupons are issued payable at all events at specified times—the one represents cash, the other credit.

Credit is defined to be "the selling of goods, 'or services,' or the transfer of property, in exchange for a written or implied promise of payment at a future time"—Worcester; to be "faith reposed, conferred, or bestowed; trust, confidence in, reliance on the honor or fidelity; reputed integrity or fidelity"—1 Richardson's Dic.; "the debt due in consequence of a contract, is also called a credit"—Bouvier's Law Dic. (See, also Mill's "Principles of Political Economy," Vol. 2, Ch. 11; Colwell's "Ways and Means of Payment," 2d Ed. Ch. 7.)

Now it is the confidence, the trust reposed in the State's fidelity and ability to pay these coupons every six months dur-

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ing the next twenty years, that makes them salable. It is the credit of the State which this company is authorized to make use of to render its obligations more valuable. The credit of the State is represented by these coupons just as though she were to issue her bonds and put them upon the market to pay the debts of this company. The State is bound to redeem these coupons, to pay this interest, as the same falls due.

Suppose this company, at any time in the future, fails in the performance of the conditions imposed on it by the fourth section, the respondents claim that the State must still go on and pay these coupons; and under the last clause of that section must sue to recover back the moneys paid. Then, is not the State made a guarantor? She is pledged to pay what are really and virtually the debts of this company. The contract is broken by the company in June—she has no right to look to the State to pay these coupons in July; they are a debt of the company, but the company refuse to pay; the holders present their coupons on July 1st, at the Treasury, and claim payment, as the State has guaranteed their payment in any event, and it was a reliance upon that guaranty—a faith in the credit of the State—that influenced them to purchase these obligations. And can the State deny that she is a guarantor? She must pay the fifty-two thousand five hundred dollars on July 1st, though she sue on July 2d to recover it back; and so she must continue to pay these coupons every six months for the next twenty years, though, confessedly, the company shall not pretend to fulfil any of the statutory conditions on her part. The State has guaranteed the payment of the company's debt—the principal fails to meet its obligations—the guarantor pays. (*The People v. Denniston*, 23 N. Y. 251.)

And so here the company claim that in any event these coupons have a valid existence, and that the holders are legal creditors of the State, and if so, we claim that the credit of the State is virtually loaned, and should the State fail to recover back anything from the company, the State's credit is given away. And it may have been for the very object of

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preventing such schemes as this that this clause was incorporated in the Constitution. Fearing lest the VIIIth Article might not fully accomplish their purpose, lest legal ingenuity might by some device attempt the creation of some kind of a contingent liability in substance though not in form, by the State guaranteeing the obligation of others, the framers inserted this section absolutely prohibiting a loan or gift of State credit in any manner. And if written Constitutions can be construed away and be evaded in the manner attempted by this Act, there is little use of them. It is worse than an open attack, for beside producing the same injurious results upon the State, such insidious and ingenious subterfuges are deadening to the moral sense of the Legislature and the people.

And, finally, we insist that this law is contrary to the spirit, intent, and policy of the Constitution; for, though it may be questioned, we think a Constitution may have a declared policy; (*Patterson v. Board of Supervisors, etc.*, 13 Cal. 182; *Chase v. Miller*, 41 Penn. 426); and that it is a policy of our Constitution, as gathered from Article VIII, and Article XI, tenth section, and other provisions, to keep the State free from debt, to keep it away from the schemes of internal improvement which have nearly wrecked sister States, to keep its people from being a tax-ridden and a debt-burdened people, to keep the Government within its legitimate sphere and to the performance of purely governmental functions.

Speaking of these clauses, Mr. Justice Baldwin says: "The intent is plain enough; they were designed as a check on legislation, and such legislation as might create a charge upon the property of the entire State." (13 Cal. 183.) They were intended to put it out of the power of the Legislature to burden the people with debt and taxation, as had been the case with other States; to protect them from the delusions, embarrassments, and onerous charges to which others or they in other States had been subjected. It was not merely the terms "debt" and "credit," not merely the shadow, but the substance, that were contending and providing against. It was not the particular form in which the liability might be incurred,

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nor whether it took the shape of coupons or bonds, whether payable as interest or principal, in instalments or at one time, under one guise or another; it was designed to give every citizen a broad guaranty in the fundamental law that no debt was to be contracted beyond the prescribed limit in any way; that the State credit was not to be loaned or given in any manner which might either presently or ultimately involve taxation, and to secure them, until in their sovereign capacity they saw proper to revoke it, a sure and certain constitutional protection against the unwelcome visits of the tax gatherer, calling for money to pay such liabilities and to redeem the plighted faith of the State, that these provisions were written in the organic law. And as it has been said, if the Legislature may so easily evade these wholesome restrictions by such and similar laws as that under consideration, a debt to any amount may be contracted for a prohibited purpose, the credit of the State without limit may be pledged under its authority, and the consequent burdens imposed upon all the property and people of the State, subjecting them to the same oppressive taxation and exacting charges as though Article VIII and section ten of Article XI were stricken from the Constitution.

This is but the first evasion; it is attempted to be sustained under the guise of a contract purporting to be supported by a consideration which it is sheer nonsense to pretend is or was thought to be adequate, or that it was introduced by its author for any other purpose than to leap over or crawl under the barriers of the Constitution. This bill is but the entering wedge, and if permitted to be driven in by this Court, it will be followed by others that will eventually rive open the saving clauses of the Constitution. The public records of the State show that a sister scheme to this received its death at the veto of the Governor, while this was only wounded. Heal it, and it will be prolific of legislative progeny. These provisions will thus fail wholly to effectuate their manifest and substantial objects, and all their boasted protection be reduced to a mere myth.

It is, then, from the history of the times, and from the occa-

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sion which brought about these limitations of power, from the plain intent as well as from the text, that we would read the Constitution to arrive at their true import; and in conclusion, we adopt the words of Mr. Justice Denio, *arguendo*, in *Newell v. The People*: "If the plausible language in which this Act is clothed is but a disguise too transparent to deceive the organs of legal vision—if, in substance and effect, distinct and clearly expressed constitutional provisions of great importance have been disregarded and set at naught, then this Court has no choice, no alternative, but to pronounce the measure null and void. Responsibility for consequences belongs to those who passed the bill. The Constitution was their commission, equally as it is yours, and if the same care and skill had been employed to discover the sense and follow the mandates of that instrument, which appear to have been exercised in order to evade it, no public interest would have been for a moment in jeopardy," and no unjust and illegal taxation levied upon the people of the State; and the people will learn that the limitations in the Constitution are a shield for their protection, and not a snare for their oppression.

E. B. Crocker, for Respondent.

The Act provides for the issue of the bonds of the company, and not of the State, and the bonds in question are company, and not State bonds.

The law merely provides for the payment of the *interest* of these bonds, by the officers at the State Treasury, from a special fund raised by a special tax for that purpose. Properly speaking, therefore, *no State debt is created* by the law, but provision is made merely for the payment of the interest *on a debt of the company*. There is a levy of a tax and an appropriation of money, but no creation of a State debt.

A case very similar in many points to the present, involving the same questions raised here, has already been passed upon by the Supreme Court of this State, and the validity of a contract entered into with the State, fully sustained in long and

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able opinions. We refer to the cases of *The State v. McCauley*, 15 Cal. 454; *McCauley v. Brooks*, 16 Cal. 12.

In the first case, it was contended that the contract, which provided for monthly payments to be made as the services were rendered, created a State debt, and was therefore unconstitutional.

But the Court say: "The appropriations are to take effect, and the services are to be rendered in future. *Until the services are rendered, there can be no debt on the part of the State.*"

But the Act is also within the exception of the Eighth Article.

It was passed in a time of war, as a war measure. The preamble states fully the reasons of its passage. The Legislature state explicitly that the exigency had arisen which was provided for by the exception to Article VIII. They were the sole judges of the question whether this exigency had arisen or not, as was decided by the Court in *Franklin v. Board of Examiners*, 23 Cal. 174; *Luther v. Borden*, 7 How. U. S. R. 1; *Martin v. Mott*, 12 Wheaton, 19.

The Legislature having thus decided that the case had arisen which called for the exercise of the power to create a State debt, within the exception to Article VIII, they had the clear and undoubted right to add to the State debt if they saw proper. The restriction upon the power being removed, by the existence of war in fact, the Legislature was free to act as its judgment might dictate, being responsible only to the people.

But the fact that war existed, does not depend entirely upon the preamble to the Act. It is shown by the public history of the times, by various Acts of Congress, and the proclamations of the President, of all which this Court takes judicial notice. (*Franklin v. Board of Examiners*, 23 Cal. 176.)

We think the conclusion is clearly established, that the law in question does not violate the Eighth Article of the State Constitution.

It is further urged that the Act violates the following portion of section ten of Article II of the State Constitution, to wit: "*The credit of the State shall not in any manner be given*

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or loaned to or in aid of any individual, association, or corporation."

The word "*credit*" is evidently here used as the opposite of *debt*. The passage means that no debt shall be created to make a gift or loan to or in aid of any individual, association, or corporation. If no *debt* is created, no *credit* is used. I have already shown that no debt is created, and therefore no *credit* is used. As was said by the Court, in *Patterson v. Supervisors of Yuba County*, 13 Cal. 183: "The same argument which denies force to this proposition, that this is a State debt, equally refutes the idea that it is a loan of State credit."

As already shown, the Act is a *contract* between the State and the company. The provision for making the payments under the contract is merely an appropriation of money to be paid in future, out of the Treasury, like any other expenditure for purposes necessary for all Governments. It is an appropriation of money for the payment of a liability arising under a contract, which accrues from time to time. No credit is given or used, but merely payments made.

It is evident that this clause does not mean that the Legislature may not *give* away or *loan* the money or property of the State. If it does, then a large portion of heretofore unquestioned legislation is void. The numerous relief bills, donations to charitable societies, and meritorious individuals, would all be void.

The Constitution leaves the Legislature free to use and dispose of the public money and property as they please, but they must not use the *credit* of the State, or incur a *debt* in so doing. Such bills merely appropriate the public money after it is received into the public Treasury, and therefore they are not void. So the law under consideration merely appropriates the public money after its receipt into the Treasury.

A law providing for raising money and appropriating the same to build a State Capitol, or any other law of like character, would be equally liable to this objection as the present Act.

Under the Act, not only no *credit*, but no money is *given* or

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loaned to the company. Money is paid to them for services rendered, under a valid contract.

The mere fact that the payments made under the contract afford incidental *aid* to a great work of internal improvement, renders it none the less a valid contract. Nor does it render it liable to any constitutional objection which does not lie equally against all contracts made by the State.

By the Court, SAWYER, J.

At the last session of the Legislature, an Act was passed, which was approved on the 14th of April, 1864, entitled, "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto." (Laws 1864, p. 344.)

The preamble to said Act is as follows, viz:

"Whereas, War now exists and is in immediate and vigorous prosecution between the Government of the United States and certain States which have revolted against its authority; and, whereas, the Congress of the United States has, for military and other purposes, granted aid for the construction of the Central Pacific Railroad, which aid is insufficient to complete the work as speedily as is necessary; and whereas, it is important, in view of the present state of war and the further (future) danger thereof, that the said railroad be constructed as soon as possible to repel invasion, suppress insurrection, and defend the State against its enemies; therefore," etc.

Section one authorizes the corporation known as "The Central Pacific Railroad Company of California," to issue its bonds "in sums of one thousand dollars each, bearing interest at a rate not exceeding seven per cent per annum, commencing on the first day of July, 1864, and payable on the first day of January, 1865, and on the first days of July and January of each year thereafter; the interest on the first fifteen hundred of said bonds, numbering from one to fifteen hundred, inclusive, to be made payable at the State Treasury; * * * said

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bonds to be executed and issued to an amount not exceeding twelve millions of dollars, payable not exceeding twenty years from the first day of January, A. D. 1865, and said bonds to be secured by one or more mortgages on the railroad," etc.

Section two is as follows, viz:

"SEC. 2. To expedite the construction of said railroad for the reasons set forth in the preamble to this Act, there shall be levied and collected in the year 1864, and annually thereafter, until the expiration of the time for the payment of said bonds, in the same manner as other State revenue is or may be collected, a tax of eight cents on each one hundred dollars of the taxable property in the State, in addition to other taxes, the same to be paid in the gold and silver coin of the United States, and the moneys to be derived from such tax shall be and is hereby appropriated and set aside to constitute a separate fund, to be known as the 'Pacific Railroad Fund,' out of which fund the coupons for interest on said fifteen hundred bonds hereinbefore described shall be paid as they may fall due and be presented for payment from time to time for said period of twenty years, and on payment thereof said coupons shall be taken up and cancelled by the State Treasurer; and if at any time there should not be a sufficient sum of money in said fund to pay said interest when due, then an amount sufficient to make up such deficiency shall be taken from the General Fund for that purpose, or the State Treasurer shall make such other contracts and arrangements as may be necessary to make up such deficiency; and whenever on the first day of July of any year there shall remain a surplus in said fund after the payment of the interest on said bonds as hereinbefore provided, such surplus shall be paid into the General Fund."

Section four provides, that: "The said grant to said company is made upon the express condition and consideration that said company shall and do at all times when required from and after the passage of this Act, transport and convey over their said railroad all public messengers, convicts going

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to the State Prison, lunatics going to the State Insane Asylum, materials for the construction of the State Capitol building, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion, or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the State of California, free of charge, and without any other compensation than as herein provided, and shall also construct and equip, in running order, at a rate of not less than twenty consecutive miles of their said railroad each year hereafter, including that portion of said railroad now partially completed, until the same is fully completed and equipped." It also required the corporation to file with the Secretary of State an agreement under the seal of the corporation to perform all the conditions of the Act, and imposed other onerous conditions, among which was its consent to a repeal of a former Act providing for aid to said corporation, and a relinquishment of all rights accrued thereunder. It is further provided, that if the company fails to perform the conditions imposed on its part, "the said company shall be liable to repay to the State the amount which shall have been paid by the State under this Act."

Section five is as follows, viz: "SEC. 5. The several sums of money necessary for the payment required to be made under the provisions of this Act are hereby appropriated from the said funds and from the State Treasury for said several purposes, and the State Treasurer is hereby directed to pay the same as provided by this Act; and this Act, and the appropriations under the same, shall not be subject to the provisions of an Act entitled an Act to create a Board of Examiners, to define their powers and duties, and to impose certain duties upon the Controller and Treasurer, approved April 21, 1858."

The former Act referred to is repealed. These are the only provisions in any way creating any liability on the part of the State, or bearing upon the questions at issue in this action.

This suit was instituted in the name of the People of the

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State of California on the relation of the Attorney-General, to restrain the "Central Pacific Railroad Company" from executing, or issuing under said Act, any of the said first fifteen hundred bonds with interest payable at the Treasury of the State not already issued, and, if any have been issued, to procure a cancellation thereof, and to restrain the State Treasurer from paying, and the said company from receiving, any of the interest payable on the first day of January next, upon the first coupons falling due, or any interest that may thereafter accrue, or from in any manner proceeding further under said Act, on the ground that said Act is repugnant to the Constitution of the State, and is, therefore, void. The injunction was denied, and defendants had judgment, from which plaintiffs have taken this appeal.

The provisions of the Constitution supposed to have been violated in the passage of the Act in question, are, Article VIII, which is as follows:

"The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection, unless the same shall be authorized by some law for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years from the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each Judicial District, if one be published therein throughout the State, for

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three months next preceding the election at which it is submitted to the people."

And Article XI, section ten, which is in the following words, viz:

"The credit of the State shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation; nor shall the State, directly or indirectly, become a stockholder in any association or corporation."

It is conceded in the record, that, at the time of the passage of the Act in question, the amount of indebtedness on the part of the State exceeded the limit of three hundred thousand dollars, and that the Act was not submitted to a vote of the people.

The questions to be determined, are:

Firstly—Does the appropriation made by the Act for the payment by the State semi-annually during the next twenty years of the interest on the first fifteen hundred bonds create a debt, or liability, within the meaning of these terms, as used in Article VIII of the Constitution.

Secondly—If so, does such debt or liability fall within the exception specified in said Article, of a debt created "in case of war, to repel invasion or suppress insurrection?"

Thirdly—Does it constitute the giving, or loaning of the credit of the State in aid of an individual, association or corporation, within the meaning of the prohibitory clause of Article XI, section ten?

The first question appears to us to have been determined in the negative by our predecessors in the cases of *The State of California v. McCauley*, 15 Cal. 455; *McCauley v. Brooks*, 16 Cal. 24, and *Koppikus v. State Capitol Commissioners*, 16 Cal. 249. In each of these cases, the construction of Article VIII of the Constitution upon the point now before the Court, was elaborately discussed by counsel, and determined by the Court. In the first case, the question arose upon a contract between the State and McCauley's assignor, entered into under the Act of March 21, 1856, whereby the State agreed to pay one Estell, lessee of the State Prison, the sum of ten thousand dol-

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lars per month during a period of five years, for taking care of the State prisoners, the Controller to draw his warrant monthly for said amount, which warrant was to be paid on the last day of each month, "out of money in the Treasury not otherwise appropriated." Mr. Chief Justice Field in delivering the opinion of the Court, said: "The Eighth Article was intended to prevent the State from running into debt and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the Treasury. The appropriation of the moneys when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. This appropriation accompanying the services operates, in fact, in the nature of a cash payment." (15 Cal. 455.) In *McCauley v. Brooks*, (16 Cal. 11), the question arose upon the same contract, and the Court say: "It is not essential to its validity (the validity of an appropriation), that funds to meet the same should be at the time in the Treasury. As a matter of fact, there has seldom been in the Treasury the necessary funds to meet the several appropriation Acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenue." (16 Cal. 28.)

The question in *Koppikus v. State Capitol Commissioners*, 16 Cal. 248, arose upon a contract for erecting a State Capitol, made in pursuance of the Act of March 29, 1860. The Act authorized the Commissioners to contract to the extent of one hundred thousand dollars. It provides, that, "the sum of one hundred thousand dollars is hereby appropriated out of any money in the Treasury, not otherwise appropriated, to carry this Act into effect." (Stat. 1860, 131, Sec. 12.) This Act was held not to be repugnant to the Eighth Article of the Constitution, upon the same grounds as stated in *State v. McCauley*, (15 Cal., 429). The Court citing that case say: "For the liabilities which may be thus incurred the Act makes provision; it appropriates, for that purpose, the requisite sum, thus anticipating their existence, and discharging them as they arise." (16 Cal. 253.)

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The principle of these cases may be further illustrated. The power of taxation is vested in the Legislature, and that power is unlimited. Says Mr. Chief Justice Field, in *McCawley v. Brooks*: "We admit that the Legislature possesses the entire control and management of the financial affairs of the State; that it may levy such taxes as it may deem expedient, subject only to the constitutional requirements of equality and uniformity, and devote the proceeds of the taxation to such specific objects as it may think proper." (16 Cal. 34.) And, again (Ib. p. 56): "So it (the Legislature) has the power to impose a tax amounting to the entire value of the property upon which it is levied; but the possession of the power does not justify the supposition that it will be arbitrarily and tyrannically exercised."

The Legislature may not only determine the extent to which it will exercise the taxing power, but also for what objects of public interest it shall be exercised, and it may appropriate the moneys raised to such objects. The Court of Appeals of New York, in the *Town of Guilford v. Supervisors of Chenango County*, say: "The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude, or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good." (13 N. Y. 149; see also *Contra Costa County v. Board of Supervisors of Alameda County*, 26 Cal. 641; and *Blanding v. Burr*, 18 Cal. 347.)

There is in the Constitution of California no limitation on the power of the Legislature to appropriate moneys, either as to the amounts to be appropriated, or the objects for which they may be made, and only one limitation as to the time over which the appropriations may extend. Section twelve, of Article I, provides, that "no standing army shall be kept up by this State

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in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years." This is the only limitation upon appropriations, either as to the object, amount, or time over which it may extend.

The Constitutions of some States — as New York and Ohio — have a provision like the Eighth Article in ours, and a further restrictive provision limiting all prospective appropriations to two years. Under this latter restriction, and the consequent want of power in the Legislature to raise the revenue, and make the necessary appropriations to meet the payments accruing after two years, a contract to repair the canals in Ohio for a period of five years, was held by the Supreme Court of that State to create a debt. And the debt thus created, exceeding the constitutional limit, the law authorizing the contract was declared unconstitutional. (*State v. Medbery*, 7 Ohio St. R. 526.) The effect of this additional restriction upon the question now under discussion, and the distinction between those contracts which *do*, and those which *do not, create a debt* within the meaning of the constitutional restriction, are so clearly and forcibly stated by the Court in discussing the question in *The State v. Medbery*, that we do not hesitate to quote largely from the very able opinion delivered by Mr. Justice Swan in that case.

The Board of Public Works undertook to bind the State by present obligation upon contracts for repairs of canals, etc., to pay plaintiffs and others, in instalments running through five years, the gross sum of one million three hundred and seventy-five thousand dollars. Article VIII of the Constitution of Ohio is substantially the same as the same Article in ours, except that the amount to which the debt is limited is seven hundred and fifty thousand dollars instead of three hundred thousand dollars. Article II, section twenty-two, of the Constitution of Ohio provides, that "No money shall be drawn from the Treasury except in pursuance of a specific appropriation made by law, and no appropriation shall be made for a longer period than two years." The question was whether these contracts created a debt within the meaning of the con-

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stitutional prohibition. The Court say (7 Ohio St. R. 528): "Before proceeding to state the scope and operation of these provisions of the Constitution, it may be proper to allude to the general working of the financial system of the State in respect of the payment of current expenses and the creation of a debt.

"The sole power of making appropriations of the public revenue is vested in the General Assembly. It is the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued. No claim against the State can be paid, no matter how just or how long it may have remained over due, unless there has been a specific appropriation made by law to meet it. (Article II, Section 22.)

"By virtue of this power of appropriation, the General Assembly exercise their discretion in determining, not only what claims against or debts of the State shall be paid, but the amount of expenses which may be incurred. If they authorize expenses or debts to be incurred, without an appropriation to pay them, and the expenses are incurred, those expenses create a debt against the State, and it must remain such, until payment under an appropriation afterward made.

"The General Assembly usually, however, provide for the current expenses for a period not exceeding two years, out of the incoming revenues, by making appropriations of a sufficient amount of money to pay the expenses during that period, and provide by law for the raising of revenue sufficient to meet the appropriations.

"The discretion of each General Assembly for the period of two years in respect to the amount of expenditures, except in some special cases relating to salaries, is without limit, and without control; but each must provide revenue and set apart a sufficient amount, by law operative within the same two years, to pay all expenses and claims.

"This is the general system provided by the Constitution; (Article II, Sec. 22; Article XII, Sec. 4.) Under it, all the claims which are authorized, or which can accrue within each

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of the two years, and their payment, form one governmental and financial transaction; so that, at the end of each of the two fiscal years, the expenditures authorized and liabilities incurred have been provided for by revenues previously set apart and appropriated are paid.

"So long as this financial system is carried out in accordance with the requirements of the Constitution, unless there is a failure or deficit of revenue, or the General Assembly have failed from some cause to provide revenue sufficient to meet the claims against the State, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue, there is undoubtedly, after the accruing of the claim, and before its actual presentation and payment, a period of time intervening in which the claim exists unpaid; but to hold that for this reason a debt is created would be the misapplication of the term debt, and substituting for the fiscal period a point of time between the accruing of a claim and its payment, for the purpose of finding a debt; but appropriations having been previously made and revenue provided for payment as prescribed by the Constitution, such debts, if they may be so called, are, in fact, in respect of the fiscal year, provided for, with a view to immediate adjustment and payment. Such financial transactions are not, therefore, to be deemed debts.

"But if the General Assembly should authorize liabilities to be incurred and make no appropriations to meet them, but let each citizen who performed service or furnished materials to carry on the Government, hold his claim against the State unpaid, debts to the amount of these claims against the State would at once be created, and remain debts at the end of two years and until an appropriation was made to meet them, whatever public revenue might be on hand, inasmuch as every executive officer is forbidden by the Constitution to pay any claim unless there has been a specific appropriation for that purpose made by law.

"And for the same reason, if, without appropriations or revenue provided, the General Assembly should authorize con-

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tracts binding the State to pay specific sums of money to citizens within two years contingent upon their furnishing certain materials or labor, these contracts would at once create a contingent debt, and on performance would become an absolute debt. On the other hand, if appropriations were made, but the claims authorized to be paid could not be and were not paid, on account of there being no funds, such claims would also become debts.

"The general system in its practical workings has been described for the purpose of eliminating two or three propositions, which, however simple and obvious, cannot be lost sight of without rendering unintelligible the discussion of the questions before us. They are these:

"1. Providing revenue sufficient to meet either prospective or accruing debts authorized to be incurred, or to meet even debts over due, still leaves them unpaid, and they must remain debts contingent or absolute until a law is passed appropriating the public revenue to meet them and until they are afterward paid.

"2. *If, however, the constitutional provisions are complied with, and both revenue is provided and appropriations are made to meet expenses or claims, prospective or accruing, for the period of two years, such accruing liabilities, contingent, or absolute, are not deemed debts, public funds having been provided and set apart by appropriations for their immediate payment.*

"It will be seen at once, when these propositions are applied to the contracts before us, that this financial system and the contracts are wholly inconsistent with each other. While each General Assembly is required to provide revenue and make appropriations for the period of two years, leaving no debt or liability behind, the General Assembly existing when these contracts were made, and who it must be maintained had the constitutional power by law to authorize them, have undertaken by contracts in behalf of the State to bind the State by present obligation to pay specific amounts of money to certain citizens for services and materials, to be furnished as well during the above mentioned two years as also during

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the period of three years thereafter. It is the three years thereafter—the liability created against the State the moment these contracts were signed for the specific sums promised for the repairs of those three years—the volunteering on the part of that General Assembly to provide for the repairs of the canals *during those three years without the power of making appropriations to meet the liability thus authorized and entered into*—it is these peculiar characteristics of the contracts which render them inconsistent with the system of finance and expenditure provided by the Constitution. But we shall have occasion to recur to this subject again.

“The question before us is, whether a contract binding the State to pay specific sums of money at a future period, *without revenue provided or appropriations made to meet it*, is such a contingent liability as may be entered into under this financial system and the provisions of the Constitution relating to debt.

“I. And first as to these contracts coming within the inhibitions of the Constitution relating to debts. This question necessarily leads us to inquire as to the scope and operation of the Constitution relating to debts; what debts are inhibited; whether contingent debts are included in the inhibition; and whether these contracts create contingent debts.

“If the Constitution had contained simply the provision that ‘no debt whatever shall hereafter be created by or on behalf of the State,’ without any exception or reservation upon these sweeping terms, then, as we have already stated, no liability could have been created for money, material or services, no contract entered into, binding the State, without revenue actually raised, and appropriations therefrom made, to meet the liability during the fiscal year. And inasmuch as, by another provision of the Constitution, no appropriations can be made for a period beyond two years (Art. II, Sec. 22), it follows that if no debt whatever could be created, and no appropriation made beyond two years, then a present obligation and liability to pay at a period beyond two years could not be made, *because it could not be made on a footing of liabil-*

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ities which are provided for by appropriations, and would, therefore, be inhibited."

Again, in an answer to an argument that an absolute constitutional obligation rested upon the General Assembly to provide for the repairs of the canals, the Court further say, upon this point (page 538): "This line of argument assumes in the first place, that there is a constitutional obligation resting on the General Assembly to provide for the inherent and ordinary operations of the Government, and among others the repair of the canals; but the argument is silent both as to the period of time and the manner in which the Constitution requires each General Assembly to provide for these operations and pay for them. Instead of this obligation being an indefinite and theoretical duty as stated by counsel, it is practical and specific in manner and time, and is devolved, not on the General Assembly as a perpetual body, but upon each General Assembly, convening biennially and for the period of two years and no longer. *They must do it, too, by appropriations made and revenue provided, and consequently without creating any debt whatever.* And here their duty ends. The constitutional obligation passes over to their successors.

"If the General Assembly, existing when these contracts were made, and who are supposed to have authorized them, had undertaken by appropriations beyond two years (and that is the only mode in which they could authorize expenditures without creating debt, absolute or contingent), to provide for the repair of the canals, their law would have been unconstitutional and void. If this be not deemed an answer to the foundation of this whole line of argument, then we say further, that as to the fact that repairs beyond two years would probably be needed, and expenditure therefore required, and for an amount probably equal to that designated in these contracts, and then paid, we answer, that, whether the repairs would or would not be needed, and the amount of the expenditure and their payment were questions to be determined by the successors of the General Assembly who are supposed to have authorized these contracts to be made; and that General

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Assembly have, by their contracts, not only determined that the expenditure should be made, and fixed the amount beyond the control of their successors, but have also, in so doing, created a present liability against the State to pay specific sums of money *at such a period that they could not, by appropriations, provide for payment.* Their authority to provide, without the revenue or appropriations, for the repair of the canals beyond two years, by contracts creating a present obligation, clearly cannot be justified or constructively authorized from their duty to provide revenue and make appropriations for repairs for the period of two years only. *The first creates a contingent debt upon a subject matter beyond their sphere of duty, and relating to expenditures required by the Constitution to be provided for by their successors; the last creates no debt of any kind.*

"These contracts, then, so far as the inhibition of the Constitution relating to debts is involved, stand precisely upon the same ground as any other contracts for expenditure which the General Assembly have authorized, but provided no revenue and made no appropriations to meet the amount specified to be paid by the State when it becomes due. It is a contingent debt ripening into an absolute one, without money being set apart to meet and pay it. The contracts, indeed, can stand nowhere else than among inhibited debts, inasmuch as they are, in our opinion, and for the reasons which we shall now state, in addition to those already given, inconsistent with the provisions of the Constitution relating to expenditures and appropriations."

And again, page five hundred and forty: "Each General Assembly determines the amount of revenue to be raised by taxation, and are required by the Constitution to provide for raising sufficient to meet the expenditures which they authorize, and thus become officially responsible for the amount of the appropriations. And in order to make this responsibility direct and practical, and to rest upon each General Assembly during its term, the Constitution *prohibits any appropriation to be made for a period beyond two years.*

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"This last provision is the keystone of the whole system; for as the amount of taxes depends entirely upon the amount of the appropriations, if the General Assembly had no power or discretion to determine the amount of appropriations, or if the amount were fixed by a law of their predecessors, so that they could not disturb it, they would evade all responsibility for the amount of the taxes, however oppressive and grievous they might be.

"It results from these constitutional provisions:

*"First—The General Assembly at each biennial session determined the amount of the expenditure for the two years of their official term, in all cases not otherwise predetermined by the provisions of the Constitution. Second—They must take the responsibility of making the necessary appropriations for this purpose, otherwise no money can be paid. Third—They must assess a tax upon their constituency sufficient in amount to meet the appropriations. * * * But all these restraints upon the members of the General Assembly and their official responsibility for the amount of appropriations and taxes to be assessed, so wisely provided by the Constitution, are set aside and annulled by the contracts under consideration. Instead of being entered into for two years, and appropriations made and revenue provided therefor, the contracts are made for five years; and, after the expiration of two of the five years, the contracts determine, and not the succeeding General Assembly, what amount of appropriations shall be made, and consequently what amount of revenue shall be provided for the repair of the canals. (Ib. 541.) * * * We are of the opinion that the discretion, power and responsibility of the General Assembly conferred by the Constitution were not intended to be, and therefore cannot be thus superseded; that no law could be passed under which an agreement between the Board of Public Works and two or more citizens could for any period beyond two years divest the General Assembly of its discretion and control over the appropriations, or the amount of the appropriations to be made for repairs to the public works of the State." (Ib. 542.)*

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The principles thus stated and illustrated are these: That the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; but that the power of appropriation under the Constitution of Ohio is limited to two years—that, when an appropriation is made for an object to be accomplished, and paid for within the two years, and at the same time, revenue is provided to meet the appropriation, a contract made in pursuance of the appropriation, and payable out of it, does not create a debt within the meaning of the prohibitory clause of the Constitution. The whole is regarded as a single financial transaction. The revenue is provided and set apart for the specific object, and is in contemplation of law in the Treasury. In fact, only the ministerial duty remains of collecting the revenue, and paying it over in pursuance of the appropriation, and the acts done are regarded as cash transactions. But a contract to be performed beyond the two years, or without raising and appropriating the revenue to meet it, necessarily creates a debt, as the services cannot be paid for when rendered in the first case, because the legislative power has no authority to make the appropriation, and in the second, because it has failed to do it. The theory is, that if the Legislature provides a million of dollars revenue, by taxation or otherwise, for any given year, or other period of time within the constitutional limit, and appropriates a million of dollars to be paid out of it, the one balances the other, and the debt or liability of the State is not increased thereby. True, a portion of the money provided may be stolen, or destroyed, or by reason of some unlooked for accident may not be collected or on hand when needed, and in such case a debt or liability might ultimately accrue from this cause to the extent of the deficit thus accidentally arising. But no debt can result till the contingency arises, and the validity of the debt can only be affected to the extent of such accidental deficit.

In our Constitution, as we have seen, there is no restriction

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upon the power of taxation, or upon the objects, or the time for which appropriations may be made, except, that "no appropriation for a standing army shall be for a longer time than two years." As to all other objects, so far as any constitutional restriction is concerned, it may as well be for twenty as for two years. This may have been an unwise omission, and yet it does not seem to have been an oversight, for the attention of the framers of that instrument was directed to the subject, when the two years limitation was imposed upon "appropriations for a standing army."

The Act under consideration provides, that "there shall be levied and collected in the year 1864, and annually thereafter until the expiration of the time for the payment of said bonds, in the same manner as other State revenue is or may be collected, a tax of eight cents on each one hundred dollars of the taxable property in the State, in addition to other taxes, the same to be collected in the gold and silver coin of the United States, and the moneys to be derived from such tax shall be and is hereby appropriated and set aside to constitute a separate fund, to be known as the 'Pacific Railroad Fund,' out of which the coupons of interest on said fifteen hundred bonds hereinafter described shall be paid as they may fall due and be presented from time to time for said period of twenty years." (Section 2.) And in section five: "The several sums of money necessary for the payment required to be made under the provisions of this Act are hereby appropriated from the said funds and from the State Treasury for said several purposes, and the State Treasurer is hereby directed to pay the same as provided by this Act." Here is a provision for raising a fund, and setting apart and appropriating it to the payment of the interest on the bonds in question, more specific than those in the cases of *The State v. McCauley*, *McCauley v. Brooks*, and *Koppikus v. State Capitol Commissioners*, because in those cases the payment was to be made, generally, out of "moneys in the Treasury not otherwise appropriated," without providing any specific fund and devoting it to that use alone, or knowing whether or not there would in fact be any unappropriated moneys in

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the Treasury at the time payments would fall due. In this case a specific fund is provided and set apart, to be devoted to the payment of the interest in question alone; and it would seem to be more than ample for the purpose, as the tax provided for on a sum much less than the present assessed valuation of the taxable property in the State, would produce the required amount, and the appropriation from the General Fund will not be required till the specific fund is exhausted, which may, and in all probability, never will occur. For these reasons there would be even less propriety in holding this appropriation to be a debt or liability, within the meaning of the constitutional restriction, than those which were the subjects of discussion in the cases cited. The Legislature has provided a fund, and made the appropriation for the entire amount. No further legislation is required upon the subject. Nothing further remains to be done on the part of the State, but the ministerial duty of collecting the taxes and paying the interest out of the proceeds, as it from year to year accrues. Of course the State cannot, without a breach of good faith, refuse through its officers to perform this ministerial duty.

The same reasons that are urged to show that the Act under consideration creates a debt or liability within the meaning of these terms as used in the Constitution, apply with equal force to all of the appropriations made in this State for defraying the general expenses of the State Government; and upon the construction contended for, it would be impossible to carry on the Government without violating the Constitution, or levying and collecting the revenues of the State, under the present Constitution, two years in advance of the time when they would be required for actual disbursement. It is utterly improbable that such should have been the intent of the men who framed, or the people who adopted the Constitution.

But if the reasons for maintaining the decisions already cited upon this question were less cogent than they are, we should now hesitate long before overruling them. The last of them was rendered in 1860. The construction put upon the clause under consideration thenceforth became a judicially recognized

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part of the Constitution. Since that time two Legislatures have proposed, and the people have adopted, numerous amendments to other sections of the Constitution, but this provision was left unchanged. It must be presumed, therefore, that they were satisfied to have the provision under consideration stand with the interpretation thus put upon it by the Courts.

It follows, from these views, that the Act under consideration does not create, or authorize to be created, a debt, or liability, within the meaning of the limiting clause of the Eighth Article of the Constitution.

Secondly—Conceding a debt or liability to have resulted from the action of the Legislature, is it a debt created “in case of war, to repel invasion, or suppress insurrection?”

Whether or not the contingency has arisen, which authorizes the Legislature to exercise the power vested in it, within the meaning of this exception, and whether it will exercise the power, are questions for that body to determine. The duty and responsibility of providing ways and means to carry on a war in which the State may be engaged, or for repelling, or aiding to repel invasion, or suppressing or aiding to suppress insurrection, rest upon the political departments of the Government, and not upon this Court; and the correlative right to determine when the emergency has arisen requiring their action, must, necessarily, to be effective, reside in those bodies upon which this great public duty, and weighty responsibility are imposed. If this power is exercised improvidently or unwisely, the individual members of those departments are responsible therefor to their constituents. But when the political departments of the Government have determined that the emergency has arisen, and acted upon that determination, that action is conclusive, and not subject to be reviewed by this Court.

That the State of California, as an integral part of the United States, is actually engaged in war, and in suppressing a vast and powerful insurrection, the general history of the country, and the legislation, both of the State and National Governments, as well as their judicial records, furnish ample evidence.

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Nor can it be assumed, that, in the war actually existing, there is no active element of insurrection, and no immediate danger of conflict within our own borders and upon our own soil. The National Government has, at least, thought it necessary to make extraordinary preparations for our defense. It has during the last four years expended and is now expending, large sums of money in the erection of fortifications for the protection of our harbors, and in building an iron-clad vessel for our immediate use. Our principal city also, lest the completion of the ironclad Monitor furnished by the General Government should be too tardy, has assumed large responsibilities in order to hasten the work. So also successive Legislatures have, in various ways, appropriated and expended hundreds of thousands of dollars for organizing and drilling our militia, and holding camps of instruction to prepare our citizens for prompt and effective service, should the insurrection more decidedly manifest itself within our own borders.

It cannot be disguised, that, in spite of a determination on the part of the General Government to deal justly with all nations, and of the exercise of the most consummate skill of diplomacy to avert such a result, the existing rebellion is liable at any moment to draw after it a foreign war, and an invasion of our State from abroad. War has, in fact, been actually levied within our borders, as in the case of the Chapman, and active hostility may at any moment manifest itself anew. These facts constitute a portion of the general domestic history of the country, as well as of its legislative and judicial history, and as such may be noticed. (Prize cases, 2 Black, U. S. Sup. Court R. 667.) They furnish, at least, a basis for the political departments of the Government to consider, whether or not the contingency contemplated by the exception in the Constitution has arisen; and if those departments have considered and determined the question, that determination is conclusive. This point was also decided by our predecessors—all the Justices concurring—in the case of *Franklin v. The Board of Examiners*, 23 Cal. 175, in which the same question arose under the Act of April 27, 1863, (Laws of 1863, p. 662,)

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appropriating six hundred thousand dollars "for the relief of the enlisted men of the California Volunteers in the service of the United States." The Court say: "The evident intention was to impose limitations upon the general power of the Legislature to create debts, leaving them free, however, from such restrictions in great emergencies caused by a war, an invasion or an insurrection. In such cases the Legislature should be left free to exercise their judgment and discretion upon the subject, answerable alone to the people for any abuse of the power. The existence of the emergency calling for the exercise of the power is purely a political question, and the Legislature, as the body in whom the political power of the State is vested, are the sole judges as to the existence of such emergency. It is the exercise of a purely political power, upon a political subject, in no manner of a judicial character, and it is not, therefore, subject to review or liable to be controlled by the judicial department of the State Government." To the same effect are the cases of *Martin v. Mott*, 12 Wheat. 29; *Luther v. Borden*, 7 How. U. S. S. C. 44; *Vanderheyden v. Young*, 11 John. 157.

Railroads are, undoubtedly, among the most effective agencies employed in modern warfare. In the existing war hundreds of miles of railroads have been destroyed, at a great expenditure of life and treasure, expressly to deprive the adversary of the destroying army of their use; and many other miles have been constructed, at Government expense, expressly to facilitate the operations of its armies. A railroad from the navigable waters of the State to the granite quarries and forests of the Sierra Nevada mountains, might be of great importance to furnish timber and granite for fortifications, and timber for vessels of war, in case our only port of San Francisco should be blockaded, and cut off from all attainable external sources of supply; and it might be of great service for other uses to which such works are applied in military operations. Such a road the "Central Pacific Railroad" is designed to be. The National Government thought its construction a matter of sufficient importance in a military point of view to

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justify large grants of land, and grants of the use of the national credit to a large amount to aid in its construction. Whether or not, in view of such facts, this railroad is of sufficient importance to the military operations of the State of California in the emergency present and prospective, and as such a proper subject for legislative appropriations with a view to hastening its completion, and rendering it available to the State at an early day, are also questions committed to the sound discretion of the political departments of the State Government. These departments being charged with the duty of providing for the safety of the State, are authorized to select such means of defense and protection as they may deem most appropriate. Mr. Chief Justice Marshall, in *McCullough v. State of Maryland*, 4 Wheat. 421, says: "We think the sound construction of the Constitution must allow the National Legislature that discretion with respect to the means by which the powers it confers are carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional." (See also *Lick v. Faulkner*, 25 Cal. 405.) Such being the case, the determination of these questions by the political departments of the Government must, also, necessarily be conclusive.

The only remaining inquiry under this head, is, whether those departments have determined that the exigency has arisen requiring their action, and, that the work is of sufficient importance to the State for military purposes to justify an appropriation of the public moneys to aid and hasten its early completion? And to this inquiry, the Act itself under consideration furnishes a conclusive answer in the affirmative.

The preamble recites the existence and vigorous prosecution of the war between the Government of the United States, and certain States which have revolted against its authority; the grant by Congress of aid for the construction of the Central Pacific Railroad for military and other purposes; the insuf-

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ficiency of such aid to complete the work as speedily as necessary; and the importance "in view of the present state of war and the further [future] danger thereof, that the said railroad be constructed as soon as possible to repel invasion, suppress insurrection and defend the State against its enemies," and then enacts in section two, that "to expedite the construction of said railroad, *for the reasons set forth in the preamble to this Act*, there shall be levied and collected," etc. Thus the contingency contemplated in the Constitution is recited in the preamble, which is referred to in the body of the Act for the reasons that operated upon the Legislature to induce that body to pass the law and make the appropriation.

Thirdly—Does the Act in question give or loan the credit of the State to an individual, association or corporation, within the meaning of the prohibition contained in Sec. 10, Art. XI, of the Constitution?

"In case of war, to repel invasion or suppress insurrection," as we have seen, the Legislature may appropriate the funds, or employ the credit of the State without limit. The two provisions must be so construed, if possible, that they may stand together, and so that there shall be no restriction upon the general power of the political departments of the Government to render all the resources of the State available in time of war. If the Legislature may authorize the building of a railroad for military purposes, it may certainly appropriate funds to aid a corporation in the construction of a similar work in consideration of its use for such purposes. The principal end being the advantage to be derived from the use of the road, it matters not that the appropriation incidentally aids an individual, association or corporation. And as before shown, the question, as to whether the emergency requiring an appropriation for such purposes has arisen, is one for the political departments of the Government to determine.

But in our view there is no loan or gift of the credit of the State in any just sense of these terms. A railroad extending from the navigable waters of the State to its eastern boundary on the summit of the Sierra Nevada, and designed ultimately

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to unite with another road connecting it with the Atlantic seaboard, was, at the time of the passage of the Act in question, in process of construction, and actually completed and in operation for a very considerable portion of the distance. In the judgment of the Legislature, the State had, or was liable to have, immediate use for this railroad for military purposes, and upon certain onerous considerations, among which, were, that the company constructing said railroad should proceed and complete it at a certain rate per annum, and should, at "all times when required from and after the passage of this Act, transport and convey over the said railroad, all public messengers, convicts going to the State Prison, lunatics going to the Insane Asylum, material for the construction of the State Capitol, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion or insurrection, as well as at all other times, also transport over their said railroad all troops and munitions of war belonging to the State of California free of charge, and without any other compensation," than as in said Act provided, made the appropriation under consideration. It is, then, simply a case of the State paying a corporation for valuable services to be rendered, commencing at the present moment and extending through all future time. It is not a matter of the slightest consequence to the State whether the payment is made directly to the company or to the creditors of the company, except by securing it to the creditors of the company, who furnish in part, the funds to carry on the work, the money for that purpose is more likely to be readily obtained; and in this respect, an advantage accrues to the State in obtaining a greater security for the performance of the contract on the part of the company. The State purchases certain advantages of the company, and pays the price to certain designated creditors of the company in satisfaction of interest accruing from time to time on its bonds, instead of paying it directly to the company.

Besides, as we held in the discussion of the first point, no debt on the part of the State is created, and consequently no

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credit in any proper sense of the term arises. The act of the State in assuming to make these payments, consists in a single provision made in advance, raising a fund, setting it aside and specifically appropriating it to the payment of the interest semi-annually, from year to year, upon the presentation of the coupons at the State Treasury — these coupons serving as warrants upon which the money is to be drawn from the Treasury. As no debt or liability in the constitutional sense is created, so no credit in the constitutional sense arises, or is loaned or given. A fund is provided in advance for the purpose, and out of it the services to be rendered by the company to the State are to be paid, but the payments are to be made on behalf of the company, in satisfaction of interest due from it to certain designated creditors. The money being provided in the first instance, and being in contemplation of law, always on hand in the Treasury, before the instalments of interest accrue, the transaction on the part of the State upon the principles before stated, is regarded as a cash transaction. From these views, it follows, that, the Act in question is not repugnant to section ten of Article XI of the Constitution.

Our conclusion is that the Act in question is constitutional.

The judgment, so far as it denies the relief asked for in the complaint, must, therefore, be affirmed.

But the judgment goes beyond this and affords affirmative relief in favor of the "Central Pacific Railroad Company," one of the defendants, against Pacheco, another defendant, and his successors in office. There is nothing in the record to sustain this part of the judgment, and to this extent it is erroneous and ought to be corrected. True, Pacheco has not appealed, but the People, and not Pacheco, are the real parties in interest. That part of the judgment may be of no practical consequence, but it is, nevertheless, not sustained by the record, and for this reason ought not to stand.

It is ordered that the District Court modify its judgment by striking out all that portion of the said judgment subsequent to the denial of the injunction, and of the relief sought in the

Opinion of Rhodes, J., concurring specially.

complaint, and that the judgment as thus modified stand as the judgment of the Court.

Mr. Justice RHODES, concurring specially.

I concur in the judgment on the sole ground that, by virtue of the Act of the Legislature mentioned in the opinion of Mr. Justice Sawyer, and the issuing of the first fifteen hundred bonds with coupons attached, by the railroad company, payable by the State, a *debt* against the State was created, which was none the less a debt, and did not cease to be a debt, because provision was made in the Act for its payment—that is, because a tax was levied and an appropriation was made for that purpose; and that the existence of war removed the constitutional restriction against the creation of a debt exceeding three hundred thousand dollars.

JEFFERSON WILCOXSON AND JACKSON WILCOXSON v. CHAS. H. BURTON, JOHN E. P. SPILLMAN, JOHN B. BURTON, EDWARD McCARTY, AND S. MARSHALL, LATE SHERIFF OF SACRAMENTO COUNTY.

NEW TRIAL.—If the evidence is conflicting, a new trial will not be granted on the ground that the findings of the Court are not warranted by the evidence.

FRAUDULENT CONFESSION OF JUDGMENT.—A voluntary confession of a judgment made upon a *bona fide* debt by the debtor in favor of the creditor, without the knowledge of the creditor, and the issuance of an execution thereon at the request of the debtor, and a levy on the debtor's goods by virtue thereof—also without the knowledge of the creditor—for the purpose of enabling the creditor to obtain priority over other creditors of the debtor, is such a fraud upon the other creditors as renders the judgment and levy void, as to an attachment or execution in favor of the other creditors afterwards levied on the same property.

VOLUNTARY JUDGMENTS—WHEN VOID.—A judgment rendered upon confession of the debtor, and at his instance, without any request on the part of the creditor, and without his knowledge, is void as between the parties, and will not bar an action brought by the creditor on the same cause of action, nor will it estop the debtor from denying all the facts set forth in it.

RATIFICATION OF JUDGMENT.—When a debtor confesses judgment without the knowledge or request of the creditor, and the creditor thereafter ratifies it, and attempts to enforce it, it will become binding between the parties to it

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by force of the ratification, but such ratification cannot affect rights acquired by other parties prior to the ratification.

CONFESSION OF A JUDGMENT FOR A SUM GREATER THAN IS DUE.—The execution and delivery of a note by the debtor to his creditor for a sum greater than is actually due, for the purpose of defrauding other creditors of the debtor, and the voluntary confession of a judgment on the same by the debtor, renders the judgment fraudulent and void as to the other creditors of the debtor.

WHAT CLAIM IS MERGED BY JUDGMENT.—A judgment by confession merges no claim of the creditor except such as are included in it by some form of direct statement.

ESTOPPEL.—A defendant is estopped from proving the averments of his answer to be false.

STATEMENT CONFESSING JUDGMENT.—If the statement upon which a voluntary confession of judgment is made does not correctly describe the debt, the judgment is void as to the creditors of the judgment debtor.

EVIDENCE OF INDEBTEDNESS INCLUDED IN A VOLUNTARY JUDGMENT.—If a suit is brought to set aside a judgment confessed voluntarily, on the ground that the same is fraudulent, the parties defendant cannot introduce parol evidence to sustain the judgment, which will show that the statement on which it was rendered was false, nor can they introduce parol evidence of items of indebtedness not only not included in the statement, but by implication excluded from it.

NEW TRIAL FOR IRREGULARITY.—If the Court, after a case is submitted, examines books of account as evidence, which have not been given in evidence during the trial, a new trial will not be granted for this irregularity unless it is stated in the record to be one of the grounds on which the motion will be made.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The executions issued on the judgments confessed by Burton & McCarty in favor of C. H. Burton, and Spillman, were levied by Marshall, the Sheriff, on the goods of Burton & McCarty. The plaintiffs commenced suit against Burton & McCarty on their indebtedness, and procured attachments, which were afterwards levied on the same goods.

The other facts are stated in the opinion of the Court.

J. W. Winans, for Appellants.

H. H. Hartley, for Respondents.

By the Court, *SHAPFER, J.*

On the second day of October, 1861, a judgment for twenty-four thousand dollars was entered in the District Court of the Sixth Judicial District in favor of C. H. Burton against Bur-

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ton & McCarty, defendants herein, upon the following statement, duly entitled and sworn to by them:

"We hereby confess judgment in favor of Charles H. Burton, plaintiff above named, for the sum of twenty-four thousand (\$24,000) dollars, and authorize the entry of judgment against us therefor, with costs.

"This confession of judgment is for a debt now justly due from us to plaintiff, arising upon the following facts: Since the year 1852 up to the present time, plaintiff, Charles H. Burton, has been a resident of San Francisco, and has during such time acted as our agent, i. e., agent of firm of Burton & McCarty, of the City of Sacramento, of which we, John Burton and E. McCarty, are the members. That as such agent the plaintiff has from time to time during the period aforesaid made advances of money upon our account, and rendered services unto us; that upon the 31st of May, 1861, plaintiff and ourselves accounted together and made a balance sheet of our transactions to that day; that thereupon we were found indebted unto plaintiff in the sum of twenty-seven thousand dollars; that thereupon we gave our obligation unto plaintiff to pay unto him said sum, with interest at the rate of one and one half per cent per month; that upon said note there has been paid the sum of thirty-five hundred dollars.

"J. E. BURTON,

"EDWARD McCARTY."

The said Burton & McCarty on the same day made a further confession in favor of defendant Spillman, for ten thousand dollars, in which the facts out of which the indebtedness arose, are set forth as follows:

"This confession of judgment is for a debt now justly due from us to plaintiff, arising out of the following facts: The plaintiff has between the years 1852 to 1857, and from thence until the present time, with exception of some four months during the year 1857, been in our (Burton & McCarty's) employ as salesman, at our place of business. During such period

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we have become from time to time indebted unto him for his services, and during such time he has been in the habit of investing with us such moneys as he accumulated, to be used by us in our business. Upon investigating his account with us we find the sum of ten thousand dollars to be justly due him from us."

This action is brought for the purpose of setting aside these judgments, on the ground that they are, respectively, fraudulent and void as to the plaintiffs, creditors of Burton & McCarty.

As to the judgment in favor of C. H. Burton, the complaint charges that at the date of the confession the indebtedness of Burton & McCarty to C. H. Burton did not exceed two thousand dollars at the most; that the confession was made without his knowledge, consent or solicitation, and that no person was duly authorized to accept or receive the same in his name or for his benefit; that the same was made by Burton & McCarty on their own motion, and was filed by them or by their procurement; that they took out execution and caused the same to be levied on their property, and that the said C. H. Burton, who resided in San Francisco, knew nothing of these proceedings until the day after the levy, when he, being well aware of their fraudulent character, justified them, and has ever since continued to justify and claim under them, as *bona fide*.

As to the judgment of Spillman, the complaint alleges that Burton & McCarty owed him but a few hundred dollars, instead of ten thousand. That Spillman has taken out execution on said judgment, and caused it to be levied, and that Burton & McCarty are insolvent.

All the principal allegations were denied. The trial was by the Court, who found for the plaintiffs, and judgment was thereupon duly entered upon the findings.

The defendants moved for a new trial, on the ground of insufficiency of the evidence to justify the decision, and that it is against law; and upon the further ground, so far as Spill-

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man is concerned, of newly discovered evidence. The notice also refers to errors of law occurring at the trial, and excepted to by the party, as ground upon which the motion would be rested; but there is no specification in the record, nor does the brief filed for the appellant refer to any errors falling within the general description.

The motion for new trial was overruled, and the appeal is from the order.

The Court finds, generally, that both judgments are fraudulent, as alleged, and then proceeds to find specifically a series of facts, some of which are ultimate in their character, and others secondary merely, raising presumptions more or less cogent as to the truth of the allegations of fraud. Passing the general finding that both judgments were fraudulent as to the creditors of Burton & McCarty, the counsel of the appellants advanced two propositions: First—That all the facts, both final and secondary, bearing upon the question of fraud, were found by the Court upon insufficient testimony; and Second—That the ultimate facts found by the Court are, as matter of law, insufficient to support the judgment.

First—We have examined the testimony contained in the voluminous record filed in this action with patient attention; and have furthermore availed ourselves of the thorough and exhaustive discussion of counsel upon the weight of the evidence and the conclusions properly to be drawn from it, and we are satisfied not only that the case is one where the evidence is in conflict, but one in which the Court below did not so far mistake the relative weight of the opposing proofs as to justify us in going behind the special findings. The position of the counsel for the appellants that many of the special findings are without evidence to support them, is not borne out by the record. Where the findings are not sustained by direct evidence in opposition to the positive testimony of the parties to the respective judgments, they are sustained by the admissions or counter-statements in the answers, or by the evidence of circumstances; and under the

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settled practice of this Court we cannot review the case upon the testimony.

Second — The only question remaining to be considered, aside from that made upon the evidence alleged to be newly discovered, and a question of "irregularity," is as to whether all or any of the *find* facts, specially found, support the judgments as matter of law.

1. As to the judgment in favor of C. H. Burton.

It is found that Burton & McCarty were insolvent at the date of the judgment; that C. H. Burton resided in San Francisco, and was there the day the judgment was confessed; that "the confession was given and caused to be entered up by Burton & McCarty of their own motion;" that "no one was authorized by said C. H. Burton to receive said confession of judgment for him or to act as his agent in that respect;" that "he did not know said confession had been made until the day following its entry and after the levy of execution issued thereon, after the levy of plaintiff's attachment; and that the giving of said confession was a voluntary act on the part of said Burton & McCarty to enable said Charles H. Burton to obtain priority over all the creditors of said Burton & McCarty, including the plaintiffs; and that said Burton & McCarty directed and caused the execution on said confession to be levied on their property immediately after its issuance;" and that "the goods so levied upon were all the visible property of said Burton & McCarty." In addition to these findings, the complaint alleges that at the date of the confession Burton & McCarty were "apprehensive that the claims of these plaintiffs and others, their *bona fide* creditors, would be presented to them for payment, and if not paid, that attachments would be issued against them and their property;" and that "the confession was made for the purpose of giving a prior lien to C. H. Burton." The truth of these averments is not denied in the answers, and is assumed throughout in the argument of counsel. The question is: What is the legal effect of these facts upon the rights of the parties?

It was held in *Ryan v. Daley*, 6 Cal. 238, on a state of facts

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like the above in every substantial particular, that the judgment was void as to the subsequent attaching creditor. There can be no doubt as to the right of a debtor in insolvent circumstances to pay or secure a part of his creditors to the prejudice of the balance, nor is it doubted that security may be given, effectually, by confessions of judgment in favor of the creditors intended to be preferred. The real question is, when does a judgment based upon a confession made without any request on the part of the creditor and without his knowledge, and entered up at the instance of the debtor alone, become a judgment as between the parties to it? that is, when does it take effect in fact "as a final determination of the rights of the parties in the proceeding?" (Practice Act, Section 144.) It is clear that a judgment, in the case supposed, would have no effect at the date of its entry. So far as the creditor is concerned, he would not be bound to accept the judgment as the measure of his rights. It would not bar an action brought by him on the same *gravamen*, nor would it even estop the party by whom the confession was made from denying any or all the facts set forth in it. A judgment without parties, or a judgment, however perfect in form, which is attended with none of the consequences of a judgment, can be a judgment only by pretension. It may be admitted, where a debtor confesses judgment without the request or knowledge of his creditor, and the creditor thereafter ratifies it by claiming under it and attempting to enforce it, that the record will become binding as between the parties to it — by force of the ratification; and that by relation the judgment, as to them, would be considered as good from the date of its entry. But such ratification can neither override nor in any manner affect rights acquired prior to the ratification and while the judgment was one only in name. To hold otherwise would be to go counter to all analogy, and would be subversive of authority which it is now too late to question. The case of *Bailey v. Bryant*, 24 Pick. 198, cited for the appellants, is not opposed to the views which we have presented; for the decision in that case was put upon the ground — first, that the first attachment suit was brought

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in effect by the direction of the creditor; or, that failing, then upon the ground that both the suit and the attachment were ratified by the creditor before the second attachment was made.

2. The Court further found that the actual indebtedness of Burton & McCarty to C. H. Burton at the time when the note mentioned in the confession was executed, was nine thousand eight hundred and three dollars and seventy-three cents less than the amount for which the note was given, and that said excess was included in the note for the purpose of defrauding creditors. These facts being given, the judgment is unquestionably void. (*McKentry v. Gladwin et al.*, 10 Cal. 227; *Scales v. Scott*, 13 Cal. 76.) There is little or no positive evidence to support the finding upon which the conclusion proceeds, but the circumstantial evidence in favor of its correctness is entitled to the gravest consideration.

3. But further: The note is misdescribed in the judgment and in the statement on which the judgment is founded. The note was for twenty-seven thousand five hundred and forty-five dollars and eighty-one cents, at two per cent per month interest; and it is described as a note for twenty-seven thousand dollars at one and one half per cent interest, and the facts out of which the indebtedness arose are not set forth in the statement with proper precision. By reason of these defects, and on the authority of *Richards v. McMillan*, 6 Cal. 419; *Cordier v. Schloss et al.*, 12 Cal. 143, and *Cordier v. Schloss et al.*, 18 Cal. 576, the Court held that the judgment was *prima facie* fraudulent, and that the burden of rebutting the presumption was upon the party claiming under the judgment. Now, the confession states that the indebtedness for which the note was given was for "services and advances," and it behooved the creditor to prove that at the date of the note Burton & McCarty were indebted to him for "services and advances" in the sum of twenty-seven thousand five hundred and forty-five dollars and eighty-one cents. But the defendant (C. H. Burton) was estopped by his answer from proving the proposition — for he had averred therein that the amount

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for which the note was given was not due him for "services and advances," but for services and advances, and interest thereon (nine thousand four hundred and nineteen dollars and four cents,) at the rate of two per cent per month, under a special agreement to that effect. The defendant, however, was allowed to go into proof of the interest item, and the Court has found that as two thousand one hundred and two dollars and forty-four cents, parcel thereof, the interest was cast upon the amount due for service, and in the absence of any contract, either written or verbal; and, it may be added that the defendant, in his answer, in stating the contract for interest, limits the interest to "advances." Our purpose, however, is not to make any use here of the finding of the Court on the question of interest. For the purposes of the argument, at this point it may be assumed that the finding was a false finding, and that the nine thousand four hundred and nineteen dollars and four cents was lawfully due, as interest on the principal claims, at the time the note was executed; and that Burton & McCarty had reference to that item in settling, in their own minds, the amount of the judgment to be confessed. Still, these facts cannot be considered in the defendants' favor, for the reason that they contradict the terms of the confession and demonstrate a fraud, consisting at once in a suppression of the truth, and in a suggestion of what was manifestly false. In stating that Burton & McCarty were indebted to C. H. Burton in the sum of twenty-seven thousand dollars for "services and advances," a "suggestion" was made which all the answers show to have been false, for they all aver that when the note was given there was only eighteen thousand one hundred and twenty-six dollars and seventy-seven cents due on the grounds named in the statement; and though twenty-seven thousand five hundred and forty-five dollars and eighty-one cents may have been due at the giving of the note, still, by the answers, there was a suppression of the truth also; for the confession, by the hypothesis, disclosed less than two thirds of the true basis of the indebtedness; thereby putting C. H. Burton in a position to bring an action for the non-perform-

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ance of the interest contract alleged, unembarrassed by the judgment. A judgment by confession merges no claim of the creditor, except such as are included in it by some form of direct statement; and interest is neither a "service" nor "advance." The cases of *Richards v. McMillan*, and of *Cordier v. Schloss* have no bearing upon the point which we are now considering. In each of those cases the statement was defective, because it was too general; and the judgments were held to be fraudulent *prima facie* for that reason; and it was further considered that the party might supply the omitted details by testimony to be produced at the trial. The point adjudged is, that particular facts lying within the scope of the general terms used in a confession, may be brought forward by averment. If the confession states a "promissory note," (implying a consideration), or "services" or "advances," or both, as the source or ground of indebtedness, the creditor, always keeping within the limits of the terms used, may prove all matters explanatory. Beyond this he cannot go. To allow him to go further, and prove a claim which the statement not only does not include, but excludes by necessary intentment, would be to allow him to prove his judgment to be "virtuous" (6 Cal. 421) by proving it to be false; and to this solecism, we may add, that such license of proof would violate every rule of evidence applicable to the question, and invite a perpetration of the very frauds against which the statute was intended to guard.

Second — As to the judgment confessed in favor of Spillman.

For reasons kindred to those already stated, we cannot set aside the findings of the Court in their bearings upon this judgment, on the ground that they are not supported by the evidence. It is true there was no lack of positive testimony in favor of its integrity, but the Court below evidently more than doubted its truth in view of the logic of the events proved. As to the legal effects of the facts found there can be no question.

It is urged that the Court examined the account of Spillman in the books of Burton & McCarty after the case was

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submitted, the books not having been given in evidence. Were this imputation true as fact, no advantage could be taken of it on this appeal, however Spillman may have been prejudiced by it, and for the reason that the "irregularity" (Practice Act, Sec. 193) is not stated in the record as one of the grounds upon which the motion for a new trial would be made. But it is established, both by the statement and by a special certificate of the Judge, that the books were in evidence in fact; and as to the newly discovered evidence the affidavits disclose nothing new except the mistake of defendants' counsel in supposing the books were not put in evidence at the trial.

Mr. Justice SAWYER expressed no opinion.

JAMES B. McMINN v. MOSES O'CONNOR, RICHARD F. RYAN, AND JANE HOGAN.

ACKNOWLEDGMENT OF A DEED.—A consular agent of the United States in a foreign port, on the 15th of January, 1859, or prior thereto, was not empowered to take and certify the acknowledgment of the execution of a deed conveying real estate in this State.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED.—A certificate of the acknowledgment of the execution of a deed is defective if it does not state that the person making the acknowledgment is known to the officer, or proved to him to be the person described in and who executed the same.

CERTIFIED COPIES OF DEEDS AS EVIDENCE.—Copies of deeds duly filed for record in the Recorder's office of the proper county, or which, after having been duly filed for record, have been recorded in the proper book of records, are admissible in evidence in all Courts and in all actions and proceedings with the like effect as the originals could be if produced, upon proof of the loss of the originals, or that they are not in the power of the party offering the copies.

DEEDS DULY RECORDED.—Deeds not properly acknowledged or proved, but filed for record or recorded in the proper book of the proper county, are not duly filed for record or duly recorded.

CERTIFIED COPY OF RECORDED DEED NOT DULY ACKNOWLEDGED AS EVIDENCE.—A certified copy of a deed filed for record, or recorded in the proper book of records prior to the Act of April 30, 1860, but which was not acknowledged or proved as required by law, is not admissible in evidence without proof being first made that the original deed was genuine, and was, in truth, executed by the grantor or grantors therein named.

DEED NOT DULY ACKNOWLEDGED, EXECUTED AND WITNESSED IN A FOREIGN COUNTRY.—Where a deed not properly acknowledged is executed and wit-

Argument for Appellants.

nessed by a subscribing witness in a foreign country, proof that it was executed by the grantor is sufficient to entitle it to be received in evidence without producing the attesting witness, or accounting for his absence, or proving his handwriting.

EVIDENCE OF TITLE ACQUIRED PENDING LITIGATION.—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer.

CERTIFICATE OF PURCHASE AS EVIDENCE.—A certificate of purchase of real estate, executed by a Sheriff on a sale made by virtue of an execution issued on a judgment, is incompetent as evidence to establish any right, either legal or equitable, to the possession of the premises therein described.

DISCRETION OF COURT IN ALLOWING AMENDMENTS.—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending litigation, and has not pleaded such title in a supplemental answer, and for that reason his evidence of such title is excluded by the Court, it is not an abuse of the discretion of the Court to deny his application made during the trial, to be allowed to amend his answer so as to obviate the objection.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John W. Dwinelle, J. McM. Shafter, and Edmond L. Gould, for Appellants, confined their argument to the question whether the Court erred in excluding the judgment roll and proceedings in the District Court of the Twelfth Judicial District, in the case of *Gleason v. Maume and others*.

Edward Tompkins, also for Appellants.

I. The certified copy of deed from Maume to Dundon, under which plaintiff made title, was improperly admitted in evidence, because—

1. The original was not shown not to be in possession of plaintiff, nor was it in any manner accounted for.

2. The original, if it had been produced, could not have been admitted in evidence, because—

3. The officer does not certify that the person making the acknowledgment was either known or proven to him to be either Matthew Maume or Matthew Waldron Maume. He was, therefore, wholly unidentified, and there is no guaranty whatever that the real Matthew Maume ever saw, and much less executed the pretended deed.

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4. The officer who made the certificate had no power to take the acknowledgment. A "Consular Agent" is not one of those authorized by our statute to take acknowledgments. He is not a consul, vice consul, or even a *deputy* consul. He is a local agent, *appointed* by the *consul* to discharge certain specific duties, and having no general powers. But if this was otherwise, yet a consul has no power to depute a special authority given to him by statute, and that does not itself authorize him thus to delegate it.

There was also a subscribing witness, "P. Lynch," and his signature was not proven or accounted for in any manner. Had the deed itself been produced, it could *only* have been omitted after *both* were proven. It will not be pretended that the copy was *better* than the original would have been! If so, then a party unable to prove his deed has only to lose it, get a certified copy, and avoid the difficulty.

It will not be pretended that the original could have been read until the signatures of the grantor and the witness were both proven.

II. The tax deed to Ryan was improperly excluded. The only objection was, that it had not been set up by supplemental answer, and the right under it had accrued subsequent to the commencement of this action. It was not necessary to set it up at all. It proved (as it was not objected to for insufficiency, or on any other ground than that it was after the commencement of this action) that another party was the owner of a part of the lot at the time of the trial. The statute provides for the case where the plaintiff's title has terminated after the suit is commenced, and directs that the judgment shall be according to the fact.

Here the plaintiff recovered by this decision of the Court, the *whole lot*, and *damages* for its *detention*, when evidence, the validity of which was not questioned, was offered, that proved that as to a part, his title had terminated, and he had no right to its possession. If there could be any doubt as to its admissibility on the first ground, there can be none as to defendants' right to put it in evidence in reduction of damages. He would

Argument for Respondent.

yet be liable to Ryan for the use of his part of the lot, and thus would be compelled to pay for it twice. (See particularly *Tustin v. Faught*, 23 Cal. 237; *Moore v. Tice*, 22 Cal. 513.)

G. F. & W. L. Sharp, for Respondent.

The statute of 1860, (p. 358,) provides "that instruments embraced in section one of the Act, may be read in evidence, under the same *circumstances and rules* as are now or may be hereafter provided by law for using copies of instruments duly executed and recorded; provided, that proof shall be first made that the instruments, copies of which it is proposed to use, were *genuine* instruments, and were in truth *executed* by the grantor or grantors therein named."

The existence and genuineness of the original was conclusively established.

No objection was taken that the existence of original was not proven by the best evidence, that is, by the subscribing witness. Hence, such an objection cannot be taken for the first time in this Court. (*Doe v. Ross*, 8 Dowl. 389.)

The statute does not require such proof, and the construction sought to be placed upon it would take all force from the statute, because the proof insisted upon would prove the instrument without the aid of the statute.

It was absurd to contend that proof must be offered as to the signature of the subscribing witness, on the introduction of a *certified copy*. (*Jackson v. Vail*, 7 Wend. 125.)

This Court has dispensed with proof of the subscribing witness, even when original is introduced. It requires only proof of the signature of the "*party to be charged*," which is the sensible rule. (*Hurlburt v. Jones*, 25 Cal. 225.)

Again: The deed was executed out of the jurisdiction of the Court—*beyond seas*. Both the grantor, grantee, and subscribing witness, were at the time of trial in Ireland, which, in itself, dispensed with all other proof *even at common law*. (1 Green. on Ev., § 572.)

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The certified copy was also admissible, independent of the statute of 1860, under *Mott v. Smith*, 16 Cal. 552.

The tax deed offered by appellants was properly ruled out, because it was not pleaded. (*Hastings v. McKinley*, 1 E. D. Smith, 273.)

By the Court, CURREY, J.

Ejectment for one hundred vara lot Number Three Hundred and Nine, in the City of San Francisco. Both parties claim the property as derived from one Mathew Maume, the common source of title. The plaintiff claims under a deed from Maume to one Michael Dundon, dated January 15, 1859, and a deed from Dundon to himself, dated May 10, 1861. The defendants claim through a Sheriff's deed bearing date the 11th of June, 1861, made in pursuance of a sale under an execution issued upon a judgment in favor of one Timothy Gleason against said Maume, rendered on the 27th of October, 1860.

The plaintiff at the trial offered in evidence a certified copy of the deed from Maume to Dundon. But to lay a proper foundation for admitting in evidence a copy of the deed under the second section of the Act supplementary to the Act concerning conveyances, passed April 30, 1860 (Laws 1860, page 357,) the plaintiff proved by a witness that he had seen a deed in the hands of Dundon which was executed by Maume, of which the certified document offered in evidence was a copy. The defendant objected to the introduction of the same in evidence, on the ground that the certificate of acknowledgment of the deed was not by an officer authorized by law to make it, and also that the certificate was in form and substance insufficient.

The acknowledgment purported to have been made before, and certified by Michael R. Ryan, styling himself "Consular Agent of the United States for the port and district of Limerick." When this was done a Consular Agent was not an officer empowered by the statute, concerning conveyances, to take and certify the acknowledgment of the execution of a

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deed conveying real estate, and therefore this certificate was ineffectual as evidence. Besides this, it was radically defective, as it failed to show that Maume was known to the officer or proved to him to be the person described in or who executed the conveyance. But, notwithstanding the insufficiency of the acknowledgment, the deed was recorded in one of the books of record of deeds in the county in which the lot is situate, on the 20th day of November, 1859.

The first section of the Act of 1860 provided that all instruments of writing which were then copied into the proper books of record of the office of County Recorder of the several counties of this State should thereafter be deemed to impart to subsequent purchasers and incumbrancers, and all other persons notice of all deeds, etc., to the extent that the same were then recorded, copied or noted in such books of record, notwithstanding any defect, omission or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording or certificate of recording the same.

The second section of the same Act declared that duly certified copies of such instruments might be read in evidence under the same circumstances and rules as then were, or thereafter might be provided by law for using copies of instruments duly executed and recorded; *provided* that proof should be made in the first instance that the instruments, copies of which should be offered in evidence, were genuine instruments, and were in truth executed by the grantor or grantors therein named.

Since this Act became the law of the State, it has so remained. It here becomes important to know under what circumstances and rules of law copies of deeds duly executed and recorded could be used as evidence when this action was tried.

The thirtieth section of the Act concerning conveyances, passed in 1850 (Laws 1850, p. 252,) provided that a deed of conveyance of real estate duly acknowledged or proved, certified and recorded in the manner prescribed in that Act, might be proved by producing in evidence the record thereof, or the transcript of such record certified by the Recorder under the

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seal of his office; provided, it should first be shown to the Court that such deed was lost or not within the power of the party wishing to use it.

Under the Act here referred to, it was incumbent on a party who resorted to proof of a deed by producing a copy of it certified as prescribed, to establish the fact that the deed itself was lost or beyond his control, before he could avail himself of the use of a copy. In 1851 the Act concerning County Recorders was enacted, the twenty-first section of which reads as follows: "Copies of all papers duly filed in the Recorder's office, and transcripts from the books of records kept therein, certified by the Recorder to be full, true and perfect copies or transcripts, shall be received in all Courts, and in all actions and proceedings with the like effect as the original instruments, papers and notices recorded or filed, could be if produced."

This provision of the Act of 1851, gave to a certified copy of a deed duly filed in the Recorder's office, or which being so filed was duly recorded the like effect as evidence as the original of which it was a copy. The certified copy of a duly filed and recorded deed was proof of the execution of the deed, because the execution of it by the grantor necessarily had to exist as a condition precedent to its becoming duly filed in the Recorder's office, or to its becoming duly recorded. Then when, after the passage of this Act, a copy of a deed, duly filed and recorded, might be given in evidence in an action in a Court of justice, it became of equal probative force as the original deed would have been, had it been produced and its execution proved, and then given in evidence. (*Powell's Heirs v. Hendricks*, 3 Cal. 430.)

The deed from Maume to Dundon, as found copied in the book of records, was not duly filed for record nor duly recorded, because it was not acknowledged or proved so as to entitle it to be filed and recorded, and therefore a certified copy of the deed as it stood recorded did not prove the genuineness and due execution of the deed itself; and hence it was necessary, in order to make the certified copy evidence, to prove the existence of the original deed, and that it was executed by the

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person purporting in the copy thereof to be the grantor. For this purpose evidence was introduced of the execution by Mathew Maume of the deed of which the certified copy obtained from the Recorder was given in evidence. No objection seems to have been made to this species of evidence on the ground that the plaintiff had not shown to the Court that the original was lost or not within his power; and if such an objection had been made, we do not see how it could have prevailed without disregarding the twenty-first section of the Act of 1851, provided the deed in question, with the certificate of the Consular Agent, is to be deemed of a character falling within the purview of the Act of 1860; and that it was and is of such character we must hold in the affirmative upon the construction of that Act by this Court in the cases of *Wallace v. Moody*, 26 Cal. 387, and *Landers v. Bolton*, 26 Cal. 393.

Another objection was made to the introduction of this copy of the deed, which was that as from the copy produced, the deed purported to have been executed in the presence of an attesting witness, it was not competent to prove its execution otherwise than by him.

The deed was executed in Ireland, and the presumption is that the subscribing witness resided and remained there, and being a resident of a foreign country at the time of the trial, it was competent to prove the execution of the deed without producing the attesting witness, or otherwise accounting for his absence beyond the jurisdiction of the Court. But it is insisted on the part of the defendants that the handwriting of the attesting witness to the absent deed should have been proved before admitting the certified copy in evidence. The questions of law herein involved have been fully considered in the case of *Landers and Wife v. Bolton*, 26 Cal. 393, and to that case and the authorities therein cited, we refer in justification of the ruling of the Court below.

The plaintiff having established a case which entitled him to recover the demanded premises, the defendants offered to show that one of the defendants had acquired title thereto by

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a deed bearing date on the 11th of June, 1861, through a judgment obtained by Timothy Gleason, on the 27th of October, 1860, against Mathew Maume, in an action commenced in the District Court of the Twelfth Judicial District, in and for the City and County of San Francisco, on the 2d day of November, 1859; and for this purpose the defendants proposed and offered to produce in evidence the judgment roll and all the proceedings in the case of Gleason, plaintiff, against Mathew Maume and others, defendants, and the deed of the 11th of June, 1861. The plaintiff objected to the evidence so offered on the ground that the record in that case showed that the Court acquired no jurisdiction of the person of the defendant, Mathew Maume, and the objection was sustained.

The defendants' counsel have directed their argument very fully to the point that the Court below erred in excluding the evidence so offered, and on the side of the plaintiff the questions involved in this point made on the part of the defendants, have been elaborately discussed. We have examined this jurisdictional objection interposed by the plaintiff, and regard it as well founded. The same question exists in the case of *McMinn v. Whelan and O'Connor*, *post*, 300. and to our opinion in that case we refer for the reasons for our determination respecting the judgment in the case of *Gleason v. Maume*.

For the purpose of showing that as to a portion of the demanded premises the title had passed to one of the defendants since the action was commenced, the defendants offered in evidence a tax deed executed on the 19th day of July, 1862, by the Tax Collector, to the defendant, R. F. Ryan. This evidence was objected to by the plaintiff, on the ground that it could not be given in evidence without pleading it by supplemental answer, and the objection seems to have been sustained, though the record is somewhat ambiguous on the point, and to this ruling the defendants excepted.

The two hundred and fifty-sixth section of the Practice Act provides that "in an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action

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was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property." The plaintiff's right to recover a specific portion of the property, the defendants proposed to controvert by matters arising after the commencement of the action and two months before the trial. The fact proposed to be proved by the tax deed was affirmative matter and should have been set up by a supplemental answer, and then the plaintiff would have been apprised of what he would in such event have been required to meet. Facts which occur subsequent to filing an answer materially affecting the rights of the respective parties to the advantage of the defendant, and which if in evidence would necessarily change the result to the detriment of the plaintiff, should be embodied in a supplemental answer to authorize evidence of them without the plaintiff's consent. (*Van Maren v. Johnson*, 15 Cal. 311.) Whether the tax deed would have constituted evidence of a transfer of any portion of the premises to the grantee therein named it is not necessary to decide in this case. It is enough that it was objected to at the threshold for the reason assigned. Its exclusion by the Court, which we hold to have been correct, also excludes the question as to its validity from consideration.

The defendants also offered in evidence a judgment of a Justice's Court, obtained by George E. Worn against Michael Dundon and others, and proposed, further, to prove that an execution was issued on this judgment and that a sale was made thereunder of Dundon's interest in the premises, and that the defendants had become the assignees of the certificate issued to the purchaser at such sale. The plaintiff objected that the proposed evidence should have been pleaded as an equitable defense, and the Court sustained the objection. It does not appear, by the offer or otherwise, when the sale under this judgment was made. If the time for redemption had not expired, the evidence was wholly incompetent to establish any right in the defendants, either legal or equitable, to the

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possession of the premises. If the time for redemption had passed, the defendants should have obtained their deed to which they would have been entitled, and then interposed their new defense by a supplemental answer. There can be no doubt of the correctness of the decision of the Court in excluding the evidence which the defendants thus proposed to give.

The defendants allege that the Court erred in refusing to postpone the trial of their cause upon the motion and affidavits in support of it, and also in refusing their application to be allowed to amend their answer so as to obviate the objections interposed by the plaintiff to the evidence offered by the defendants and excluded by the Court. Matters of this kind rest very much in the discretion of the Court, which should be exercised for the promotion of just ends, and in the case before us we are of opinion this discretion was properly exercised.

Judgment affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

J. G. DOLL v. JOHN ANDERSON.

WAIVER OF JURY.—A jury may be waived by the parties by a failure to file with the clerk, at least six days before the commencement of the term at which the action may be tried, a notice that a jury will be required.

RIGHT OF COURT TO SUBMIT ISSUE OF FACT TO A JURY.—The Court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same by a failure to give notice at least six days before the commencement of the term that one will be required.

A CONTRACT ASSIGNABLE.—A contract where the owner of a stallion leases him for a season for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable, and the assignee, who is also the purchaser of the horse from the owner is entitled, to all the benefits arising out of the contract.

SAME.—Before the assignee of such contract is entitled to the benefit of the same he must give notice to the lessee that he has purchased the same.

THE PRESUMPTION OF LAW IS THAT THE EVIDENCE WARRANTED THE VERDICT.—If the jury in their verdict necessarily pass on a material question of fact, the appellate Court will not reverse the judgment on the ground that

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there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of the law is that there was evidence to sustain every material fact found by the jury.

ORDER OF PRODUCING TESTIMONY ON TRIAL.—The assignee of a contract who claims under it may introduce it in evidence before giving proof that the opposite party had notice of its assignment.

APPEAL from the District Court, Second Judicial District, Tehama County.

John P. Welsh was the owner of a stallion, and on the 18th day of February, 1862, he contracted in writing with the plaintiff, to deliver him the horse for one year from that date. The defendant was to pay him one thousand dollars for the use of the horse for the year, and Welsh reserved the right to have the horse cover ten mares, to be brought to such place as the plaintiff might stand him in the State of California; provided, that no mares in Tehama County, or any county adjoining thereto, other than those owned by Welsh, should be included in the number. Plaintiff had the privilege of keeping the horse two years at the same rate.

On the 6th day of September, 1862, Welsh sold the stallion to defendant, and assigned to him the contract. Afterwards, plaintiff elected to keep the horse for another year.

The defendant had nine mares served by the horse in the season of 1863. Plaintiff brought this action to recover nine hundred dollars for the use of the horse in covering the mares. Defendant recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The Court, as a matter of law, erred in admitting the contract and assignment in evidence, without proof that plaintiff had notice thereof. It was said by Mr. Justice Baldwin, in *Jackson v. Feather Water Company*, 14 Cal. 25: "The rule is that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to

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show, not that probably no hurt was done, but that none could have been done by the error."

Adverse counsel seem to say in their brief that this Court must presume there was evidence showing notice to Doll of the assignment previous to the service of the mares, and quotes, in italics, the certificate of the judge to the effect that both plaintiff and defendant testified as to the question whether plaintiff had notice.

We will concede that the error would be cured, if the statement had said there was evidence before the jury tending to show that Doll had notice of the assignment before the mares were served — but there is nothing of the kind; the statement simply says *the plaintiff and defendant both testified as to the question whether the defendant had notice of the assignment*. Now, the Court will mark that the Judge don't say how they testified, nor whether they testified that plaintiff had notice, nor whether the burden of the testimony was to that effect that he had notice, nor, if he had notice, whether it was before or after the service of the mares, nor whether both parties testified alike on the question, nor that there was a conflict in the testimony.

Townsend & Combs, for Respondent.

By the Court, RHODES, J.

Upon the calling of this cause for trial the defendant demanded a jury, and the plaintiff objected to a trial by a jury on the ground that the defendant had waived a jury by failing to file a notice that a jury would be required six days before the commencement of the term. The Court overruled the objection and the plaintiff excepted. That decision is now assigned as error.

It is provided by section twenty-three of the Act of 1863, concerning grand and trial jurors, that "a jury shall be deemed waived unless the parties, or one of them, to the action or proceeding, shall, at least six days before the commencement

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of the term at which the same may be tried, file with the Clerk a notice that a jury will be required," and there can be no doubt that a jury may in that manner be waived by the parties. The Court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of the Court.

The contract made by the plaintiff and Welsh was assignable, and the defendant, as the assignee of the contract and the purchaser of the horse from Welsh, was entitled to all the benefits arising out of the contract and the ownership of the horse that Welsh would have been entitled to, had he continued to be the owner of the horse and the contract.

The remaining error assigned by the plaintiff is, "That the Court as a matter of law erred in admitting the contract and assignment in evidence without proof that plaintiff had had notice thereof." The appeal is taken from the judgment, and the record contains, besides the judgment roll, a statement on appeal, which appears to have been settled and certified as a bill of exceptions and as a statement on appeal, by the Judge of the District Court. The statement sets out the contract and its assignment, the fact that they were offered in evidence, that the plaintiff objected to their admission on the ground that the defendant had not proved notice to the plaintiff of the assignment, that the objection was overruled and the evidence admitted; and that the defendant duly excepted to the decision. The statement contains none of the evidence in the case except the contract and its assignment to the defendant and the bill of sale of the horse, by Welsh to the defendant, and it does not affirmatively appear that all the evidence in the case, or all that relates to the question of notice of the assignment is set out in the statement, but on the contrary it appears from the certificate to the statement that evidence was given upon that point, for it is stated in the certificate that "The plaintiff and defendant both having been sworn and having testified before the jury upon the trial of the cause

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as to the question whether the plaintiff had notice of the assignment of the contract prior to the service of the mares by the horse." The defendant in his answer alleges that the plaintiff had "actual and full notice" of the sale of the horse and the assignment of the contract to the defendant before the "season" of 1863. The argument of the plaintiff shows that this is an allegation of a material fact in the case. The verdict having been for the defendant, the presumption, in the absence of a motion for a new trial on the ground that such material fact in the case had not been proven, and of a statement in some part of the record, showing that no material evidence was introduced to prove the fact, is that the fact was sufficiently proven before the jury to warrant their verdict. The objection of the plaintiff to the introduction in evidence of the contract and assignment on the ground stated, does not show whether any evidence of notice to the plaintiff had then been introduced, and certainly it does not tend to show whether or not such evidence was subsequently given by either or both of the parties. The objection amounts in substance to this — that the defendant should not have been permitted to prove the assignment of the contract until after he had proven notice thereof to the plaintiff; that is, that the proof of notice should precede the proof of the fact, of which notice was given. The contract and its assignment were admissible in evidence before proof of notice to the plaintiff was introduced; but if the notice was not proven before the jury in some stage of the proceedings, then the important question discussed by the learned counsel for the plaintiff, as to the effect of the absence of proof of notice, would arise, and probably would be held to be a material question in the plaintiff's motion for a new trial, if he had moved for a new trial and had assigned as the cause the insufficiency of the evidence in that respect to justify the verdict. But we are not authorized from the mere statement of the plaintiff's ground of objection to the admission of the contract and its assignment to presume that no evidence was given during the trial, of notice to the plaintiff, and thereupon to determine the consequences flowing from the

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failure of the defendant to notify the plaintiff of the assignment of the contract.

Judgment affirmed.

JOHN B. FRISBIE v. JOHN R. PRICE.

CONTRACT FOR SALE OF LAND AS EVIDENCE.—In an action for the recovery of real estate, a contract in writing signed by both plaintiff and defendant, for the sale and conveyance of the land in dispute by plaintiff to defendant, is admissible in evidence on behalf of plaintiff, for the purpose of proving that defendant obtained possession of the premises from plaintiff, and went in under him.

NOTICE TO QUIT.—A landlord cannot maintain an action to recover possession of land from a tenant at will without first giving him notice to quit.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Moore & Laine, for Appellants.

Whitman & Wells, for Respondent.

By the Court, SANDERSON, C. J.

This is an action to recover real estate. The plaintiff avers seizin and possession on the second day of June, 1862, and entry and ouster by the defendants on the same day. The complaint is not verified, and the answer, after denying generally all the allegations of the complaint, proceeds and avers: First—That all the title or claim which the plaintiff has to the land in controversy is derived from a pretended Spanish grant, which has been rejected and declared null and void by the Supreme Court of the United States; and that said land is public land belonging to the Government of the United States. Second—That the defendant, John R. Price, has taken up and holds said land under the possessory Act of this State, and had done so prior to the alleged entry and ouster. Third—That the defendant, Mary E. Price, is the wife of her co-

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defendant, John R. Price, and has therefore been improperly joined as a defendant. Fourth — That plaintiff's cause of action has not accrued within five years, etc.

The trial was by the Court, without a jury. The findings and judgment were for the plaintiff as against John R. Price, and as to Mary E. Price, the plaintiff took a nonsuit.

The defendants offered no evidence, but after the plaintiff had closed his case, moved for a nonsuit, which was denied; and the question presented for our consideration is whether the plaintiff was entitled to recover upon his testimony.

It appears that the plaintiff sought to recover as landlord and upon notice to quit; and to make out his case he offered in evidence two instruments in writing, one signed by himself and the defendant John R. Price, and the other by himself and Mary E. Price. Both are contracts for the sale and conveyance of the land in question. The first was dated on the 20th day of February, 1856, and the last on the 24th day of December, in the same year. At the foot of the first appears a release by Price of all his interest in the contract, dated on the 23d of December, being the day next preceding that on which the contract with his wife was executed. At the time these instruments were offered, the counsel for plaintiff stated that they were offered solely for the purpose of proving that the defendants obtained possession of the premises from the plaintiff, and went in under him. Both instruments contain a covenant that the defendants may enter, possess and enjoy the premises until a breach of the contract on their part. Both of these instruments were objected to by the defendants upon the ground that they were "irrelevant, immaterial, and incompetent testimony." The objection was overruled, and the defendants excepted.

Both instruments were certainly relevant, material and competent for the purpose of proving that the defendants received the possession from the plaintiff, and, inferentially, a prior possession in him, which was all that was claimed for them. So far as the purposes for which they were introduced are concerned, the fact that Price had released his interest in the first,

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and the fact that his wife had no capacity in law to make the second, is of no consequence. They were, nevertheless, written admissions, by both of the defendants, of the prior possession of the plaintiff, and that they obtained their possession from him. It is obvious from the date of the release of the first and the date of the second that the release of the first was made merely to clear the way for the second contract, for some reason which does not appear, and not for the purpose of changing the substantial relation of the parties, or the tenure by which the defendants held the premises. Doubtless all parties supposed that the wife had legal capacity to make the second contract, and it was intended as a substitute for the first. The first contract was ended by the release by Price and acceptance thereof by the plaintiff, and the second was a nullity for the want of capacity in one of the contracting parties; but although thus of no account as contracts, they were still good as evidence to show from whom and upon what terms the defendants obtained possession of the premises.

The plaintiff next introduced two papers purporting to be notices to quit by plaintiff to each of the defendants. They were objected to by defendants, upon the ground that they were irrelevant and incompetent. The objection was overruled and the defendants excepted.

They were neither irrelevant nor incompetent. The action was between landlord and tenants at will, and in order to give the former a right of action notices to quit are necessary.

Judgment affirmed.

Mr. Justice CURREY expressed no opinion.

**E. M. HALL, B. C. ALLEN, AND HENRY HUBBARD v.
THE AUBURN TURNPIKE COMPANY.**

POWER OF ITS OFFICERS TO BIND A CORPORATION.—The officers of a corporation have no power to execute the note of the corporation for a debt having no relation to its business, due from a third person to the payee, nor can

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they ratify such note after its execution. A note made for such purpose creates no liability in the payee's hands against the corporation.

EVIDENCE IN SUIT AGAINST A CORPORATION.—In an action brought against a corporation by the payee of a note executed by its officers in the name of the corporation, for a debt due the payee from a third person, and having no relation to the business of the corporation, evidence that the note was not given for the debt of the corporation is admissible under an answer denying the execution of the note.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The defendant was a corporation. The following is a copy of the note sued, and on which plaintiffs failed to recover:

“AUBURN, April 1st, 1863.

“Eight months from date, for value received, The Auburn Turnpike Company promise to pay Hall and Allen, at their banking house in Auburn, in gold coin currency of the United States, three thousand two hundred and four dollars, with interest at two per cent per month from date until paid. The above indebtedness is subject to a claim held by Marriner and Willard, of \$5,500.

“\$3,204.

“J. R. CRANDALL, President.

“E. M. BANVARD, Secretary.”

The following is a copy of the ratification of the note made by the Directors of the corporation, and entered on the book of records of the company:

“AUBURN, April 14th, 1863.

“The directors of the Auburn Turnpike Company met pursuant to call of the President, in Auburn, on Tuesday, April 14th, A. D. 1863; present, J. R. Crandall, James Neall, and E. M. Banvard. On motion, *Resolved*—That the President and Secretary of the company are hereby authorized to borrow, on the credit of the company, a sum of money not exceeding three thousand five hundred dollars, and issue the company's note therefor.

“*Resolved*—That the note given to Hall & Allen on the 1st day of April last, by the President and Secretary, for the sum

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of three thousand two hundred and four dollars, (subject to the demand of Marriner & Willard,) is hereby ratified and considered a part of the loan authorized in the above resolution.

[Signed:]

"J. R. CRANDALL, President.

"E. M. BANVARD, Secretary."

Tuttle & Fellows, for Appellants.

Tweed & Craig, for Respondent.

By the Court, SAWYER, J.

This is an action on two promissory notes, claimed to have been executed by defendant in favor of plaintiffs. Judgment was rendered for plaintiffs on the first note set out in the complaint, and against them on the second. Plaintiffs appeal from the judgment.

The Court finds as follows, viz: "The second note, set up in the second count of the complaint, was given to secure the personal indebtedness of one E. M. Banvard to plaintiffs, and no part of the consideration of said note was received by defendant, or went to its benefit. The said Banvard was individually indebted to plaintiffs, who wanted security for such indebtedness, and the note in question was given as such security. After the note was given, it was ratified and approved by the Board of Directors of said turnpike company defendant, by an order spread upon the minutes to that effect."

The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business, and in which the corporation has no interest. Such a transaction is not within the scope of its business, and a party receiving such note with notice of the circumstances under which it is given cannot recover on it. (1 Parsons on Notes and Bills, 166; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; Angell and Ames on Corp., Secs. 257 and 258.) The note in question was given to plaintiffs for a debt due them from Banvard, one of the Directors of the corporation, and creates no liability in the

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plaintiffs' hands against the corporation. The Directors acted without authority in making and ratifying the note, and it is, therefore, not the note of the corporation.

The only other point is, that the evidence showing the note to have been given for a debt due from Banvard was improperly admitted, for the reason that the facts constituting the defense were not pleaded. The answer denies the making and delivery of the note by defendant, and the evidence introduced establishes the fact that the making and delivery of the note was not the act of defendant. It shows that there never was any liability. There is no confession and avoidance. The evidence was admissible under the issues.

Judgment affirmed.

CHARLES L. WILSON v. SAMUEL BRANNAN.

MORTGAGE OF PERSONAL PROPERTY.—The mortgagee of personal property may, after the conditions of the mortgage are broken, upon giving reasonable notice to the mortgagor of the time and place of sale, sell the property mortgaged at public auction, and if the sale be *bona fide*, an absolute title to the property passes to the purchaser.

MORTGAGE OF PERSONAL PROPERTY HAS TWO REMEDIES.—The mortgagee of personal property has two remedies, either of which he may pursue at his election. He may resort to a Court of equity to foreclose the mortgagor's right to redeem, or to compel a redemption, or he may obtain the same object by a fair public sale of property after due notice to the mortgagor.

NOTICE OF SALE OF PERSONAL PROPERTY MORTGAGED.—What is a reasonable notice to the mortgagor of the time and place of sale at auction of personal property mortgaged, must be determined from all the circumstances of each particular case, and he who alleges that a notice is not sufficient must assign some reason for his allegation.

SALE OF PERSONAL PROPERTY PLEDGED.—Personal property pledged to secure a debt may be sold by the pledgee, after the debt to secure which it was pledged has become due, if the sale be made at public auction and after reasonable notice of the time and place of sale be given to the pledgee.

RIGHTS OF MORTGAGOR IN PERSONAL PROPERTY MORTGAGED.—The mortgagor of personal property has an equity of redemption in the mortgaged property after the conditions of the mortgage are broken, which he may assert by paying the debt and redeeming the property at any time before this equity of redemption has been cut off by a foreclosure or by a sale at auction.

RIGHT OF MORTGAGOR TO REDEMPTION PERSONAL PROPERTY.—If the mortgagee of personal property refuses, after condition broken, to allow the mortgagor to

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redeem the property mortgaged, the mortgagor may assert this right by a bill in equity, if he brings his suit within a reasonable time.

RIGHT OF ONE OF TWO MORTGAGERS OF PERSONAL PROPERTY.—If a mortgage on personal property is made to two persons, to secure the separate debt of each, either mortgagee, after condition broken, may advertise and sell at public auction the undivided interest which he holds in the property as security for his debt, and the purchaser will become a tenant in common with the owner of the unsold portion.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The plaintiff appealed from the order refusing the injunction.

The other facts are stated in the opinion of the Court.

Cook, and Hittell, for Appellant.

Can the mortgagee of a chattel mortgage in California sell the mortgaged property without a judicial foreclosure?

It is well known that the old common law doctrine regarded a mortgage as an absolute sale of the property mortgaged, to be defeated upon the performance of the condition; and this doctrine applied as well to mortgages of personal as of real estate. But the equitable interposition of the English chancery early changed the rule in regard to real property, and it soon became settled law that real mortgages were mere securities and that there could be no sales of mortgaged real estate by the mortgagee without foreclosure. In regard to chattels, on account probably of their being sold with delivery, and easily transferred from hand to hand, the old idea of absolute sale upon condition subsequent had a firmer hold; and it will be seen that such sales, which are still possible as to personal though not as to real estate, still occur, and are more or less confounded in the books with what we now understand to be meant by the term "mortgage" — that is to say, a security in contradistinction to a sale on condition.

The mortgage of the present day, unless the nature of the transaction or the express terms of the contract show otherwise, is regarded as a mere security, and resembles what was known in the old common law and in the civil law, as a pledge.

Argument for Appellant.

While the notion of a mortgage being a sale upon condition remained, it was held that the property upon default became absolute in the mortgagee. But from the earliest times there was a recognized distinction between such mortgages in the way of conditional sales and mortgages in the way of securities, or pledges.

Glanville, the earliest of writers on the common law whose works have come down to us, says that a loan is sometimes made on the security of a pledge, (*sub vadi positione*) and the pledge may consist of chattels, lands, or rent. Sometimes possession is immediately given of the pledge on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged, and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that, in case the debtor should not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property — the agreement must be observed. But if there be no such agreement, and there be a fixed time of redemption, and the debtor make *delay* in payment, the creditor may quicken the redemption by a writ (of which he gives the form) and which requires the debtor without delay to redeem (*acquietet rem quam invadiavit*) the pledge. On the return of the writ, if the defendant confessed the pledge, he was commanded to redeem in a reasonable time, and on default, the creditor had license to treat the pledge as his own. But if the pledge was made without mention of any particular term, the creditor might (*debitum petere*) demand his debt at any time, and the debt being discharged, the creditor was bound to restore the pledge without any deterioration.

And Mr. Chief Justice Kent, from whose opinion we cite the above extract, regards the doctrine laid down by Glanville, and followed by a number of early cases in England, which he also refers to, as correct. The property was to be considered as a mere deposit to be detained as security. (See *Cortelyou v. Lansing*, 2 Caines' Cases, 203.)

Argument for Appellant.

It is unnecessary to particularly cite the old cases upon this subject; but it may be stated generally that one series of them, commencing in *Capper v. Dickinson*, 1 Rolle, 315, followed the notion of a conditional sale, and the other series that of a pledge in the way of security. The case in Rolle went so far as to hold that if the property was not redeemed at the day, it was forfeited; and this decision, though as rigorous and as odious as the *lex commissoria* of Rome, which it resembled, was no more than the logical and legitimate result of the premiss upon which it was based, namely, an absolute sale upon condition subsequent. It never could properly or equitably be applied to cases of delivery of property in the way of security, or to a case, such as the one at bar, where the delivery was expressly as "collateral security" and in no respect as a sale.

The same reasons in favor of the equity of redemption, which apply to a mortgage of real estate, apply to a mortgage of personal property; and there is no good reason why the law should be different in respect to the two cases. We do not deny that there are cases, and some comparatively late ones, in which the old doctrine that a mortgagee after default may sell upon notice, is repeated; but we believe that in all those cases the term "mortgage" was misapplied, and that the contracts embraced something more than mere security, and either amounted to absolute sales with conditions of defeasance, or expressly contained powers of sale. (See *Hart v. Ten Eyck*, 2 John. Ch. 99; 2 Story Eq. Jur. § 1,033; *Wheeler v. Newbould*, 16 N. Y. 392.)

We therefore feel safe in affirming, that by the general rules of law, unless a power of sale is expressly given or necessarily to be implied from the nature of the contract, there is no authority in a mortgagee to sell personal property without a judicial foreclosure.

In California, as we have intimated above, we do not know that the point has ever been raised; but all the decisions in regard to real estate mortgages and the nature of mortgages in general, as well as a fair construction of our statutes, lead

Argument for Respondent.

irresistibly in our opinion to the conclusion that whatever may be the law in England, and other States, in California there can be no nonjudicial sale of pledged or mortgaged personal property except under an express power. (*Goodenow v. Ewer*, 16 Cal. 461; *Smith v. '49 and '56 Quartz Mining Co.* 14 Cal. 242; *Johnson v. Sherman*, 15 Cal. 287; *Dutton v. Warschauer*, 21 Cal. 609; Practice Act, Sec. 246.)

J. W. Winans, for Respondent.

The common law doctrine that a mortgagee of chattels has the absolute title, subject only to be defeated by performance of the contingency, and may sell or otherwise dispose of them after forfeiture, is asserted in *Tucker v. Williams*, 1 Peere Williams, 261; *Lockwood v. Ewer*, 2 Atk. 303; *Westerdell v. Dale*, 7 Term, 306, 312; *Ryall v. Rowles*, 1 Vesey, 365, and elsewhere. It is thus clearly set forth in *Parker v. Banker*, 22 Pick. 46: "The law appears to be well settled, both in England and in this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and a decree of foreclosure, upon giving reasonable notice to the debtor to redeem. It was so decided in *Tucker v. Wilson*, 1 P. Wms. 261, and in *Lockwood v. Ewer*, 2 Atk. 303. The same rule of law was laid down in *De Lisle v. Priestman*, 1 Browne's Penn. Rep. 176, and in New York by Mr. Chancellor Kent, in *Hart v. Ten Eyck*, 2 Johns. Ch. 100, and again in his Commentaries, 2 Kent, 3 ed. 582. The principle thus settled seems to be founded in good sense, and may be essentially necessary to enable the pledgee to avail himself of his pledge in a reasonable manner, for the discharge of his demand." This doctrine of the Supreme Court of Massachusetts is also sanctioned in Alabama. "By the contract of mortgage," (says the Court in *Brown v. Lipscomb*, 9 Porter, 475,) "the title was vested in the mortgagee, subject to be divested by the payment of the money on or before the day stipulated. On the failure to pay, the title became absolute, and the mortgagee had nothing but an equity of redemption.

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the possession having accompanied the mortgage." And, again, it has been so held in Missouri: "It is well settled that a mortgagee of personal chattels, after the day of redemption has passed, is regarded in law as the absolute owner." (*Robinson v. Campbell*, 8 Missouri, 366.) And in the same case, page 616, the Court thus decides: "Unquestionably, after forfeiture, the mortgagee has the legal title — is, in the eye of the law, the absolute owner of the chattels. It is difficult to conceive of a title of this character accompanied with such restrictions as to prevent its transfer to another. How can a man be said to be the absolute owner of a chattel, and yet unable to make any valid disposition of that chattel, by sale, gift, or otherwise?" Such is also the view taken in New Jersey; for says the Court, in *Hall v. Snowhill*, 2 Green's N. J. 18: "The mortgage is a grant *in presenti*, subject to be defeated on payment of the money intended to be secured. The legal title to these chattels passed by the mortgage, and vested in the plaintiff." And the same principle prevails in North Carolina. (*Holmes v. Hall*, 3 Dev. N. C. 98.) In *Flanders v. Barstow*, 6 Shepley, Maine, 357, the Court sanctions the doctrine.

Although the character and effect of real mortgages have changed under the influence of modern decisions, yet no such change has taken place in regard to personal mortgages, nor has the distinction between real and personal mortgages been removed or affected by modern rulings.

The whole reasoning of appellant is based upon the proposition that there is no difference between real and personal mortgages, and that the decisions of this Court in reference to mortgages on real estate apply with equal force to mortgages on chattels. "Is it not evident," he says, "that the Legislature not only did, but intended to place personal property mortgages upon the same footing as real, and in both to take away the right claimed under the strict old notion of the common law to belong to the mortgagee, of selling without a judicial foreclosure?" This view of appellant is neither sustained by reasoning, analogy, or the authorities. The distinc-

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tion between real and personal mortgages is just as decided and just as arbitrary now as it was a century ago, and just as absolute in this State as elsewhere. Our Supreme Court has in no instance applied its decisions affecting real mortgages to those upon the personalty. Indeed, the very reasoning of those decisions shows them inapplicable to the case of chattels.

On the other hand, the case of *Wildman v. Radenaker*, already cited, and the case of *Smith v. '49 and '56 Quartz Mining Company*, 14 Cal. 242, sustain the distinction which we claim. But let us examine what the books say upon this point. "There is a wide difference," holds the Court in *Stewart v. Slater*, 6 Duer, 99, "between a mortgage of lands and a mortgage of chattels. In the first case, as the law in this State is now settled, the estate, subject to the mortgage, remains in the mortgagor, is bound by a judgment, and may be sold under an execution against him; the mortgage is regarded merely as a security for the debt, and not as a transfer of the title. But a mortgage of personal chattels in all cases vests the legal title in the mortgagee, and when by the terms, or by the legal construction of the instrument, he has an immediate right to the possession, although the possession may not in fact have been changed, he is, in judgment of law, the absolute owner, and it is merely as his bailee, and by his sufferance that the mortgagor retains the possession." Here we are furnished with a description, both full and clear, of the difference between a mortgage on real and one on personal estate. Again, the distinction between them is as important and absolute in regard to remedies as in regard to rights. Thus Mr. Chancellor Kent says, in *Hart v. Ten Eyck*, 2 Johns. Ch. 99, 100: "It seems now to be admitted (though Lord Chancellor Harcourt once held otherwise) that the creditor who holds the stock in mortgage is not bound to wait for a bill of foreclosure and decree of sale, as in the case of a mortgage on land, but may sell on reasonable previous notice to the creditor to redeem. * * *

But if a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of fore-

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closure." The learned Chancellor proceeds to say, that for a party holding *land* in pledge, to sell the same at his own pleasure, "would open a door to the most shameful imposition and abuse;" which remark, appellant, by an easy but not very ingenious transition, has assumed the author to have applied to sales of personal instead of real property. The opinion of the Court, in *Butler v. Miller*, 1 Comstock, 500, is equally explicit. "*A mortgage upon real estate*," they declare, "is a mere security upon the land, and gives the mortgagee no title or estate therein whatever." Now this is precisely what this Court has determined in the cases quoted by appellant, and in other cases. Does it then follow that a personal mortgage is in the same category? Hear what the New York Supreme Court says in continuation: "Whereas a personal mortgage is more than a mere security, it is a *sale of the thing mortgaged*, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition." This question, then, is here fully passed upon by the Supreme Court of a State whose system of jurisprudence is analagous to our own, or rather identical, since we have preferred the appropriation of her system to the adoption for ourselves of any independent plan.

By the Court, CURREY, J.

This case has come to this Court on an appeal from an order refusing to grant an injunction. The respondent being about to sell at auction certain personal property, mortgaged or pledged to him by the appellant, the latter filed a complaint to prevent the sale, and obtained an order requiring respondent to show cause why an injunction should not issue as prayed for, and a further order temporarily restraining the sale. The respondent appeared and showed cause, and thereupon the injunction was refused and the temporary restraining order discharged.

The facts of the case are in substance as follows: On the 10th day of June, 1861, respondent loaned to appellant seventy.

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five thousand dollars, and one William A. Dana loaned him fifteen thousand dollars; for the payment of these sums, one year from that date, with interest at the rate of two per cent per month, appellant gave his promissory notes, to wit: to the respondent a note for fifty-thousand dollars and a note for twenty-five thousand dollars, and to said Dana a note for fifteen thousand dollars. To secure the payment of these notes at their maturity, appellant executed and delivered to the respondent and Dana, a chattel mortgage of personal property consisting of four hundred tons of iron and one hundred bonds of the California Central Railroad Company of one thousand dollars each, with a quantity of cars and locomotives not then set up and put together, all of which property was at the time delivered to the mortgagees. The parties at the time contemplated that the appellant should thereafter have possession of the cars and locomotives, and it was agreed between them that they should be set up and put together when a new mortgage under and in accordance with the provisions of the Chattel Mortgage Act of 1857 (Laws 1857, p. 347,) should be executed, by which the mortgagor should mortgage to the same mortgagees the cars and locomotives so put together, and then the same should be delivered to the appellant. The cars and locomotives were accordingly set up and their construction completed in October, 1861, when the new mortgage was executed and the cars and locomotives were delivered to the appellant. This new mortgage was given not only to secure the sum of money specified in the first mortgage, but also the further sum of ten thousand dollars loaned to appellant by respondent on the 20th of June, 1861. The iron and bonds were held by respondent and Dana in possession under and subject to the mortgage first executed, and after the execution of the second mortgage the appellant held the possession of the cars and locomotives under and subject to its provisions.

The first mortgage contained therein apt words of bargain and sale of the property described and declared to be delivered by the mortgagor to the mortgagees, but it was also declared that such sale was intended as collateral security for

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the payment of certain promissory notes described, given by the appellant to the respondent and to Dana respectively, which were payable, according to their tenor and effect, on the 10th of June, 1862, with interest at a specified rate; and it was provided by the mortgage that if the notes should not be paid at maturity the mortgagees or their assigns should have power to foreclose as to the property sold and delivered, or to subject the same in any legal manner to the payment of the sums of money advanced to the mortgagees respectively, with interest according to the tenor and effect of the notes.

The first mortgage also provided that the mortgagor should give to the respondent and Dana additional security in case it should be ascertained that the property mortgaged was insufficient as security for the amount of his indebtedness to them, and by the complaint it appears that afterwards, in June, 1862, eighty-five second class bonds of the California Central Railroad Company, each of which was in the sum of one thousand dollars, were delivered to the respondent as an additional security in pursuance of the stipulation in the mortgage thereto relating, and it is alleged in the complaint that at the time the last mentioned bonds were delivered they were so delivered with the understanding and on the condition that the appellant should have a reasonable extension of time to allow him to make negotiations for raising money to discharge the mortgages and the debts thereby secured. The respondent, by his answer, denied that these bonds were delivered to him with the understanding and condition alleged, but, on the contrary, averred that they were delivered in pursuance of the stipulation so to do contained in the mortgage first executed.

The notes made and delivered to the respondent remaining unpaid, he gave notice to the appellant on the 15th of February, 1863, that unless the same were paid and the iron and the bonds mentioned in the first mortgage, and the eighty-five bonds given as additional security, were redeemed, he, the respondent, would cause the same, to the extent of the respondent's interest, together with the appellant's equity of redemption therein, to be sold at public auction on the 28th day of

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the same month of February, at a particular hour of the day and at a place specified. This notice also stated that such sale would be made at the time and place designated after giving public notice thereof for eight days in the *Alta California* newspaper. Such notice was first published in the newspaper named on the 20th of February, 1863, and this action was commenced on the 24th of the same month.

The question raised and to be determined is, whether the mortgagee or pledgee of goods and chattels delivered to him by the mortgagor or pledgor as security for the payment of a debt at a particular day can sell the property after the debt has become due, in the manner proposed by the respondent in this case.

The iron and bonds which are involved in this controversy were not a part of the property mentioned in the second mortgage, and as security, could only be subjected to sale under the first mortgage, in some mode sanctioned by the law of the land, other than the Chattel Mortgage Act of 1857. By the seventeenth section of the Act concerning fraudulent conveyances and contracts (Laws of 1850, p. 267), it is provided that "no mortgage of personal property hereafter made, shall be valid against any other persons than the parties thereto, unless possession of the property be delivered to and retained by the mortgagee." When this statute was passed, the common law had been adopted by legislative enactment. (Laws 1850, p. 219.) And as between the parties to a mortgage of chattels, their rights were to be determined by the rules of the common law on the subject. (*Wildman v. Radenaker*, 20 Cal. 617.)

The first mortgage seems to have been executed and the property delivered to the mortgagees, with the view to conform to the requirements of the seventeenth section of the Act concerning fraudulent conveyances and contracts. By the common law a grant or conveyance of goods in gage or mortgage passes the legal title conditionally to the mortgagee, and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption. (Story on Bailments, Sec. 287.)

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The Supreme Court of New York, in *Langdon v. Buel*, 9 Wend. 83, held that a mortgagee of personal property, upon failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the property. This, say the Court, is well established to be the legal effect and operation of a chattel mortgage. The same doctrine is laid down in *Brown v. Bement*, 8 John. 96; in *Ackley v. Finch*, 7 Cow. 292; in *Case v. Boughton*, 11 Wend. 109; in *Patchin v. Pierce*, 12 Wend. 61; in *Smith v. Acker*, 23 Wend. 667, 668; in *Burdick v. McVanner*, 2 Denio, 171; in *Fuller v. Acker*, 1 Hill, 475; and in *Butler v. Miller*, 1 Coma. 500. To these might be added many decisions to the same effect of the highest Courts of that State. The same doctrine in substance was held by the Supreme Court of Missouri in *Williams v. Roger*, 7 Mo. 556, and in *Robinson v. Campbell*, 8 Mo. 366, 615; by the Supreme Court of Alabama in *Brown v. Lipscomb*, 9 Porter, 475; by the Supreme Court of Maine, in *Flanders v. Barstow*, 18 Maine, 357, and by the Court of Errors and Appeals of Mississippi in *Thornhill v. Gilmer*, 4 Sm. & Marsh, 153. The Supreme Court of New Jersey held, in *Hall v. Snowhill*, 2 Green, 9, 18, that the mortgagee of personal property is considered the true owner, and has a right to the actual possession and control of it in the event of the non-payment of the debt due him from the mortgagor—that the mortgage is a grant *in presenti*, subject to be defeated on payment of the money intended to be secured.

The cases which hold that at law the title of the mortgagee to the chattels mortgaged becomes absolute upon the breach of the stipulation to pay at a particular day, recognize that the mortgagor has an equitable right or interest in the property of which he may avail himself by paying the debt due and thus redeeming the property; and as long as the right of redemption remains in the mortgagor, it may be said, viewing the subject from an equitable stand-point, that the title of the mortgagee is not to every intent absolute. In mortgages of personal property there exists, after condition broken as in mortgages of land, an equity of redemption, which may be

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asserted by the mortgagor, if he brings his suit to redeem within a reasonable time. (2 Story's Eq. Jur. Section 1,031; *Westbrook v. Kemp*, 1 Vesey, 278.)

The argument on the part of the appellant is to the effect that the mortgagee of personal property is limited to the remedy of judicial foreclosure for the purpose of subjecting the property to a sale for the satisfaction of the debt due. The rule that prevails in relation to the foreclosure of mortgages on real property is invariable that the creditor must obtain a decree of a competent Court for a sale of the mortgaged premises, unless the mortgage deed provides otherwise for the sale of the lands mortgaged. (*Hart v. Ten Eyck*, 2 John. Ch. 99, 100; *Fogarty v. Sawyer*, 17 Cal. 593.) But Judge Story says (2 Story's Eq. Jur. Section 1,031): "There is a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagee, after a breach of the condition. In the latter case there is no necessity to bring a bill of foreclosure; but the mortgagee, upon due notice, may sell the personal property mortgaged, as he could under the civil law, and the title, if the sale be *bona fide* made, will vest absolutely in the vendee. And it makes no difference whether the personal property mortgaged consists of goods or of stock, or of personal annuities," and he cites cases and elementary authorities in support of the doctrine thus declared. (See, also, 2 Story's Eq. Jur. Secs. 1,008, 1,009; Story on Bailments, Sec. 309, and the authorities cited; *Patchin v. Pierce*, 12 Wend. 61.)

The mortgagee has two remedies, either of which he may pursue at his election. He may resort to a Court of equity to compel a redemption or to foreclose the mortgagor's right to redeem, or he may obtain the same object by a fair public sale of the property after due notice to the mortgagor. (*Charter v. Stevens*, 3 Denio, 35.) The mortgagor's right of redemption remains until foreclosure by judicial sentence in the one case, or sale after due notice in the other; and this right may be enforced in equity. (Powell on Mortgages, Sec. 1,041, and cases before cited.)

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Personal property pledged may in like manner be sold after the debt which it was delivered to secure has become due, if such sale be made at public auction and upon reasonable notice thereof to the pledgor (*Mauge v. Heringhi*, 26 Cal. 577;) or, if the pledgee prefers, he may file a bill in a Court of equity against the pledgor for a foreclosure and sale. (Story on Bailments, Sec. 310; Edwards on Bailments, 249, 250.)

Whether the iron and bonds delivered be regarded as a pledge or mortgage can make no practical difference, as in either case the mode of subjecting the security to sale for the payment of the debt may be the same, and hence we have made no reference to the distinction to be found in the books between a pledge and mortgage, and we deem it unnecessary in disposing of the case before us to do so. (See on the subject, *Wilson v. Little*, 2 Coms. 445; *Dewey v. Bowman*, 8 Cal. 148.)

It is insisted on the part of the appellant that the two hundred and forty-sixth section of the Practice Act is virtually a denial of any right in the mortgagee to any other remedy for the recovery of a debt or the enforcement of a right secured by a mortgage or other lien on personal property than by an action. The statute generally denominated the Practice Act, is an Act to regulate proceedings in civil cases in the Courts of justice in this State, and the language of the two hundred and forty-sixth section providing that there shall be but one action for the recovery of any debt or the enforcement of any right secured by mortgage or lien upon real or personal property must be understood as relating to civil actions commenced and prosecuted in the Courts of justice of the State, and not to embrace and control proceedings sanctioned by the common law, which in no just legal sense can be called actions at law or suits in equity.

Notwithstanding the general doctrine that real property mortgaged can only be subjected to sale for the payment of the debt thereby secured, by judicial decree, in the absence of any express power granted by the mortgagor to sell and convey the premises for the payment of the debt, the Court in

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Fogarty against *Sawyer*, 17 Cal. 593, held that a sale of mortgaged real estate might be made in accordance with the conditions of the power, and that a sale so made would pass to the purchaser a good title upon its consummation by a conveyance. If a sale of real property could be made under a power granted in the mortgage, we see no reason why a sale of personal property, mortgaged or pledged, could not be made for the debt secured by it and due, under the authority conferred on the mortgagee by the law of the land.

It is maintained by the appellant that as the two mortgages had relation to one and the same transaction, and as the second mortgage could not, under the provisions of the Act of 1857, be enforced otherwise than by judicial foreclosure, that therefore the mortgagee could not proceed under the first mortgage to an enforcement of payment of the debt in any other mode than by an action in a Court of equity to obtain a foreclosure and a decree for the sale of the mortgaged property. Though the object of the second mortgage was to secure the debt for which the first was given, it does not follow that the first mortgage, as to the iron and bonds, was in any degree affected by the second. In fact it is manifest that the second mortgage was intended, as originally contemplated, as a substitute for the first only so far as the cars and locomotives were concerned.

If it had not been the purpose of the parties that the appellant should have the possession of the cars and locomotives, there would have been no necessity for the second mortgage, and it is fair to presume it would not have been executed except to preserve the security on the portion of the property delivered to the appellant. It is by the first mortgage alone that the mortgagees have any lien on the iron and bonds, and their rights in respect thereto are the same as they would have been if the second mortgage had not been executed.

The respondent and Dana were joint mortgagees, holding the property mortgaged and in their possession as security for the debts due them respectively in the proportions that their respective demands bore to each other, and it is suggested on

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behalf of appellant that the respondent could not proceed to sell the property to the extent of his interest in it without the co-operation of Dana. The respondent did not propose to sell any greater proportion of the property than the undivided interest which he held as security for his own debt. That he might do so is decided in *Tyler v. Taylor*, 8 Barb. 585. The purchaser at such sale of the undivided interest would become the owner of such interest or share as a tenant in common with the owner of the remaining and unsold portion of the property, and hold it discharged of the appellant's former equity of redemption.

The objection that the notice to the appellant calling on him to redeem, and of the sale, was not a reasonable notice, we think is not well founded. The appellant was aware that the debt had at that time been due for more than eight months, and it does not appear that he had any valid reason for delaying payment, nor does it appear that the period of thirteen days within which he was at liberty to redeem after notice given, was not sufficient if he could redeem at all. In *Willoughby v. Comstock*, 3 Hill, 389, the Court held that a notice of two days of the time and place of sale was sufficient, and it is not pretended in this case that a notice for thirty or sixty days, or even for any longer period, would have been of any advantage to the appellant. In the absence of any positive rule of law or established custom on the subject, the reasonableness of the notice as to time must be determined from all the circumstances of the particular case; and he who alleges that a notice in this respect is not sufficient, should assign some reason for his allegation.

From an attentive examination of all the questions presented and argued by the learned counsel for the respective parties, we are of the opinion the Court below properly decided the case and that the order should be affirmed.

Order affirmed.

Mr. Justice SHAFER expressed no opinion.

Statement of Facts.

BERNARD SCHROEDER v. CARL JAHNS, ADMINISTRATOR, WITH THE WILL ANNEXED, OF HERMAN SCHROEDER, DECEASED.

PLEADING STATUTE OF LIMITATIONS.—The general allegation in an answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the Statute of Limitations.

LIMITATION OF ACTIONS IN CASES OF TRUST.—A deposit of money by one with another to be held by him in trust for the depositor until he shall demand it, constitutes an express continuing trust, and no right of action will accrue to the *cestui que trust* until the trustee assumes a position in hostility to the trust relation, either by refusing to pay the money on demand, or by some other act, nor will the Statute of Limitations commence running until a demand is made for the money, or the trustee has violated his contract.

SAME.—In such case if no demand be made on the trustee, and he does not violate his contract in his lifetime, but demand is made on his administrator after his death, the Statute of Limitations does not commence running against the intestate, but the cause of action accrues against the administrator.

ANSWER SETTING UP STATUTE OF LIMITATIONS.—If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his lifetime, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within two years next before the death of the intestate, and that the same is barred by the Statute of Limitations, does not raise any issue in the case.

DEFECTIVE FINDING OF FACTS.—If the answer sets up a counterclaim and the Court finds that the defendant introduced no evidence as to the counterclaim, the finding is defective; but if the evidence is all before the appellate Court, and it appears that no testimony was introduced by either party as to the counterclaim, the judgment will not be reversed on account of the defective finding.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court below found the following facts, viz:

That between the first day of January, 1853, and the death of the deceased, Herman Schroeder, there was deposited with and collected by said Herman Schroeder money to the amount of two thousand nine hundred dollars, to be held by him on deposit and in trust for the plaintiff, and was so held by him at the time of his death, with the exception of three hundred and forty-seven dollars paid by said Herman Schroeder, in his lifetime, to the said plaintiff, leaving a balance in said Her-

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man Schroeder's hands, at the time of his death, of two thousand five hundred and fifty-three dollars; and it appearing from the pleadings that said claim was duly presented to the defendant as administrator with the will annexed of the estate of the said Herman Schroeder, that the same was rejected by the defendant, and the action brought therein within the time required by the statute.

The defendant excepted to the finding of the Court for insufficiency, and the Court then made the following amendments to its findings:

1st. After the word "Schroeder" insert the words: "And more than four years before the death of said Herman Schroeder or the commencement of this action, to wit, in the month of January, 1853."

2d. After the word "Statute" add the words: "That no evidence whatever was introduced by defendant of the defense set up in his answer, that deceased in his lifetime had paid, laid out, and expended for plaintiff, and at his request, large sums of money, amounting to one thousand dollars, or any sum paid, laid out, and expended by deceased for plaintiff except the sum of three hundred and forty-seven dollars, for which credit is given by the plaintiff in his claim against said estate, and allowed in this finding."

James B. Townsend, for Appellant.

The *judgment* appealed from is *erroneous*, because, first, the finding of the Court, *as amended*, did not *dispose* of the *issues* made by the second and third defenses set up in said defendant's answer. These defenses were, respectively, that the cause or causes of action sued on, if any ever existed, did not accrue to said plaintiff within the periods of *two* nor *four* years, respectively, next before the death of the said Herman Schroeder. These two *different periods* of time were plead because it was not then known whether the plaintiff's evidence of the receipt of money by the deceased would be *in writing*, or by parol merely.

The defendant contended on the trial that the *cause of action*

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accrued when the money was *received* by the deceased. On the other hand, the plaintiff contended that a *demand* was necessary before any cause of action accrued. It was necessary, therefore, that the Court should determine by its finding, not only *when the money was received*—because that would not necessarily decide the issue—but when the *cause of action accrued*, which included not only the *fact* of the receipt of the money, but likewise, the *manner* in which and the purposes for which it was received; and whether received in such manner and for such purposes as to render a *demand* necessary before a cause of action would exist—and if so, then the *fact* of the *making of such demand*, and *when* it was made.

1st—The Statute of Limitations ran against the demand proved, from the *time of the receipt* of the money by the deceased. (*Buckner v. Patterson*, Litt. Sel. Cases, 234; *Hickok v. Hickok*, 13 Barb. 632; *Dale v. Birch*, 8 Camp. 347; *Farnam v. Brooks*, 9 Pick. 243, 244; *Kane v. Bloodgood*, 7 John. Ch. 110, 111, 114; *Robinson v. Hook*, 4 Mason, 151, 152.)

2d—If a *demand* were necessary in a case of this kind, before the bringing of an action, it is well settled that such demand must be made *within the statutory period*, or the claim will be barred. (*Codman v. Rogers*, 10 Pick. 119, 120; *Staford v. Richardson*, 15 Wend. 305-307; *Lafarge v. Jayne*, 9 Penn. 410; *Chalfin v. Malone*, 9 B. Mon. 498.)

P. G. Buchan, for Respondent.

The complaint avers that the money was left with Herman Schroeder in trust, to be paid when demanded; the proof establishes it, and the Court finds it. The relation of trustee and *cestui que trust*, as between Herman and Bernard, therefore existed—it was an *express* trust. The statute in such case does not commence to run from the time of making the contract in reference to the deposit, but from the breach of it; that is, from the time of a demand and refusal.

This is a plain elementary principle. The principle is fully recognized in the case of *Baker v. Joseph*, 16 Cal. 174. The case of *Baker v. Joseph*, is much stronger for the defend-

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ant than this case. In that case the money was deposited to be invested by defendant in loans at interest, and the principal and interest to be paid to plaintiff on request. It might have been urged in the Baker case, that the defendant had a right to loan it to himself, and his so appropriating it turned it into an ordinary contract. But, in the case before us, there was no such authority. The money was deposited to be safely kept till demanded. In the case of *Baker v. Joseph*, the Court say, that "whether he loaned it or not, or whatever the responsibilities incurred for not loaning it, the repayment of the money received was not to be made until demanded by plaintiff;" and that in that case the statute does not commence to run until demand made.

The rule is distinctly laid down by Mr. Chancellor Kent, in *Decouche v. Sabitica*, 8 John. Ch. 216, that so long as a trust subsists, the right of a *cestui que trust* cannot be barred by the length of time during which he has been out of possession.

In *Phelps v. Bostwick*, 22 Barb. 314, it is expressly decided that "a bailee or depositary is not liable to an action until demand and refusal; therefore, where money has been left with another, in *naked deposit*, for the benefit of the owner, the latter cannot maintain an action to recover it until a demand has been made upon the depositary to return it, and he has refused so to do."

The principles in reference to trusts of this character, and the principles governing the relation of trustee and *cestui que trust*, so far as they have any reference to this case, will be fully illustrated by a reference to the following cases: *Coster v. Murray*, 5 John. Ch. 581; *Murray v. Coster*, 20 John. 558; *Brown v. Cook*, 9 John. 361; *Beardslee v. Richardson*, 11 Wend. 25; *Day v. Roth*, 18 N. Y. 452.

By the Court, RHODES, J.

The plaintiff sued the defendant, as the administrator of Hermann Schroeder, deceased, to recover a balance due him for moneys before that time deposited by him with Hermann

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Schroeder; and he charges that Hermann Schroeder received the moneys "in trust for the said plaintiff, to be kept by him, the said Hermann Schroeder, as a depositary thereof, until the same should be demanded by him the said plaintiff;" that he promised to keep the same in safe deposit for the plaintiff, subject to his order, and that the same remained in the hands of Hermann Schroeder at the time of his death subject to the order of the plaintiff; and he also charges that he presented his claim for the moneys against the estate of the deceased to the defendant, as administrator, who rejected the same. The defendant fully denies the alleged indebtedness of his testator, and that he received or held the moneys of the plaintiff in any manner, and he sets up the Statute of Limitations of two years, and of four years, in separate answers, and he alleges, by way of counterclaim, that the plaintiff is indebted to the estate of the deceased in the sum of about one thousand dollars, for moneys laid out and expended, etc., by the defendant's testator.

Judgment was rendered for the plaintiff upon the finding of the Court, and the defendant appeals from the judgment and the order denying his motion for a new trial.

The first point relied upon by the defendant is that the finding of the Court did not dispose of the issues made by the second and third defenses of the Statute of Limitations, but as the statute of four years is clearly inapplicable to the facts of the case, and as the argument of counsel applies equally to both defenses, the second defense, setting up the limitation of two years, will alone be considered in this connection.

The defendant alleges in that defense that the causes of action did not accrue to the plaintiff "within two years next before the death of the said Hermann Schroeder, and that the same, if any, are barred by the statute prescribing limitations for the bringing of actions in this State."

The last clause of the defense—that the cause of action is barred by the statute—is not a statement of a fact, but of a conclusion of law. The fact averred in the defense is that the cause of action did not accrue within two years next before

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the death of Hermann Schroeder; and it will be observed that this fact does not constitute a defense to the action, for the complaint alleges that Hermann Schroeder, at the time of his death, still held the money as a depositary for the plaintiff, and there is no charge that he had done anything inconsistent with the contract between the parties, or was in any manner in default, and therefore no cause of action is alleged to have accrued against him; but the cause of action is alleged to have accrued against the defendant who, on demand being made, rejected the plaintiff's claim for the money deposited with his testator. The fact alleged in the defense, instead of being in denial, is consistent with the facts stated in the complaint, and does not raise an issue in the case. We do not intend, however, for those reasons to dispose of the point raised by the defendant without further consideration, for the parties have treated the answer as sufficient to form the issue of the Statute of Limitations, and in this respect they have but followed the practice prevailing to a considerable extent in this State—though we think erroneously—of setting up the Statute of Limitations by means of the general allegation that the action or the cause of action is barred by the statute prescribing two or any other number of years, as the limitation for bringing the action.

That portion of the case relating to the sum of one hundred dollars collected by Hermann Schroeder for the plaintiff may be left out of view, because the plaintiff has remitted from the judgment the amount constituting that item in his account.

The transaction stated in the complaint—the depositing of the money by the plaintiff with Hermann Schroeder, to be held by him in trust for the plaintiff, until the plaintiff should demand it, and the receipt of the money by Hermann Schroeder, with the promise on his part to hold it as such depositary, subject to the order of the plaintiff—constituted an express and direct trust. (*Kane v. Bloodgood*, 7 John. Ch. 111, and cases cited.) The trust was also a continuing trust, within the principles of the case of *Baker v. Joseph*, 16 Cal. 173. This is not one of those “technical and continuing trusts which

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are not cognizable at law, but are creatures of the Court of equity," for in case of a breach of the contract to safely keep, or to pay over the money on demand, the *cestui que trust* has his action at law. The relation of trustee and *cestui que trust* would continue, so long as the trust was a subsisting one, manifested as such by the acts or declarations of the parties, and no right of action against the trustee would accrue until he assumed a position in hostility to the trust relation. So long as he held the money on deposit for the *cestui que trust*, ready to be paid over to him on demand, the *cestui que trust* could not maintain an action against him to recover the trust property. If the trustee has not, by act or declaration, manifested a determination to repudiate the trust, and violate the contract under which the money came to his hands, there must be a demand by the *cestui que trust* for the money and a refusal, before he is liable to an action for the money. This principle necessarily grows out of the relation the parties have assumed, and is too clear to require either argument or authority in its support. The Statute of Limitations, therefore, would not commence to run in such case unless the demand was made. The only demand alleged is the one made upon the administrator.

The Court finds that the money was deposited with the testator "to be held by him on deposit and in trust for the plaintiff, and was so held by him at the time of his death," etc. The defendant objects that the finding does not specify the kind of deposit that was made and says that a deposit may be made for many different purposes; but we think the objection untenable. The very definition of a deposit is a naked bailment of goods to be kept for the bailor, without reward, and to be returned when he shall require it. (See Bouvier's Law Dic.; Jones' Bailee, 36, 117; Story, Bailees, Sec. 41.) No other purpose would be implied than what the term itself imports, in the absence of any fact tending to show a deposit for another purpose. The finding shows that the depository held the property at the time of his death in the same capacity in which it came to his hands. No presumption could be indulged in of a demand upon and a refusal by the depository,

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for the presumption would be that he had at all times complied with his agreement with the *cestui que trust*. The fact found that at the time of his death he still bore his original relation to the property — that is, that he remained such depositary — holding the property in trust for the depositor, to be returned to him on demand — negatives any presumption that the depositary had assumed a position in hostility to the trust.

It is alleged in the complaint and not denied in the answer, that a demand for the money deposited was made of the defendant as administrator, and that he rejected the claim for the money. It is not doubted that the rejection amounted to a refusal to return the money deposited with his testator. The cause of action accrued at that time, and the Statute of Limitations commenced from thence to run. The facts found by the Court, together with the facts in the case, that stand as admitted by the failure to deny them, completely meet the defendant's answer of the Statute of Limitations, and show that the two years had not elapsed since the cause of action accrued. While agreeing with counsel for the defendant that the Court must find as to the truth of every issue of fact found in the case, we think the finding need not be directly and pointedly made that each of the several allegations of the complaint or the answer is or is not true, but if the Court finds such facts as will be sufficient, with the facts admitted by the parties to be true, to necessarily determine every material issue in the cause, the requirement of the law in that respect will be satisfied.

The defendant further objects to the finding on the ground that the Court failed to find the acts as to the counterclaim. The finding, as amended after it was objected to by the defendant, is in substance that no evidence was introduced by him of that defense, except of the sum of three hundred and forty-seven dollars, for which credit was given in the plaintiff's claim, and which was allowed in the finding. The finding does not respond to the issue, and technically it is incorrect, for the statement is not that there was no evidence introduced of the counterclaim, but that the defendant introduced none.

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If there was any evidence in the case tending to prove the counterclaim beyond the amount allowed, the finding would be held to be defective and erroneous; but the defendant made a statement in support of his motion for a new trial, in which is contained "all the evidence given" in the cause, and upon an examination of the statement no evidence is found therein tending to prove the counterclaim, beyond the amount allowed the defendant. If the Court had passed directly upon the issue, the finding would have been against the truth of the facts set up in the defense, except as to the amount allowed the defendant. The finding is technically erroneous, but the error has not operated to the prejudice of the defendant, and will, therefore, be disregarded.

The remaining points urged by the defendant do not require separate consideration, as all of them have been answered by the views already expressed, except the one relating to the preponderance of the evidence, and we are not justified in disturbing the finding on that ground.

Judgment affirmed.

WILLIAM REDDING, AND EDWARD P. REED v. JOHN WHITE, AMOS WHITE, LAURA WHITE, AND P. KAMMERER.

POWER TO GRANT OR LEASE PUEBLO LANDS.—Under the Mexican law the power to grant or lease pueblo lands was vested in the municipal authorities; but this power was limited to the granting of house lots for building purposes, and lots two hundred varas square, called *suertes*, for cultivating or planting as gardens, vineyards, orchards, etc.

LEASE OF PUEBLO LANDS.—A lease of four hundred acres of pueblo land for ninety-nine years made by the municipal authorities of a pueblo in California in 1847, was void for want of power in the authorities to make the lease.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

On the 9th day of April, 1863, plaintiffs commenced this action to recover possession of a tract of land in San José,

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designated as Lot Number Forty-nine of the lots commonly called the five hundred acre lots of the Pueblo of San José.

The complaint averred possession and ownership in plaintiffs as tenants in common on the 27th day of May, 1862, and ouster by defendants on the same day. The answer denied the allegations of possession and ownership, and averred that defendants, and those whose title they had acquired, had been in possession of the land sued for for fourteen years. Plaintiffs, to maintain their action, relied on a grant made by the Alcalde of the Pueblo de San José, in accordance with the decree of the Junta and people of the Pueblo. Plaintiffs recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

C. T. Ryland, for Appellants.

The court erred in admitting said pretended loan in evidence, because the Alcalde was not authorized or empowered in any manner to make such an instrument, and because the same conveyed no title or right. The Alcalde does not pretend to make said loan by virtue of any general power in him vested as such officer, but he makes it by authority of certain decrees of the Junta and people.

We have been unable to find in the Spanish or Mexican law any tribunal or power authorized to make grants, known or called "Junta," nor do we find any power given to the people to assemble as a Junta, for the purpose of authorizing Alcaldes or other officers to make grants. "Junta" simply means a meeting or gathering, and there is no power conferred on such to authorize Alcaldes to dispose of pueblo lands.

In the regulations for the government of the Province of California, by Governor Felipe de Neve, dated at Monterey, 1st June, 1779, and approved by the King of Spain, October 24th, 1781, the extent of *suertes* is fixed at two hundred varas square, (a vara is about thirty-three inches English measure.) *Two suertes of irrigable land, and two of dry land*, were all that were given to one person; the rest of the lands were held

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to be granted in the name of his majesty, by the Governor. (Sec. 5, App. 2, Rockwell, 446, 447.)

In the same law it is declared "that the corresponding titles to house lots, lands, and waters, granted to the new pobladores, or which may hereafter be granted to other residents, shall be made out by the Governor, or Commissary whom he may appoint for this purpose, records of which, etc., must be kept, etc. (Sec. 17, App. 2, Rockwell, 450.)

From this law, made at Monterey in 1779, and approved by the King, 1781, it would seem that four *suertes* were all that could be granted to an individual; and it further appears that the Governor and his Commissary were alone authorized or empowered to make even such grants or dispositions of the pueblo lands.

T. Bodley, also for Appellants.

W. T. Wallace, for Respondents.

The instrument being shown to be a genuine original official act of the Alcalde, upon its being read in evidence certain presumptions arose; among which was the presumption *that the Alcalde had authority to make the grant*, and that the land granted was inside the boundaries of the Pueblo of San José. (*Cohas v. Raisin*, 3 Cal. 453; *Welch v. Sullivan*, 8 Cal. 188-202; *White v. Moses*, 21 Cal. 40.)

This doctrine of presumption is one that has been indulged in in support of instruments of this character *whenever the question of authority to make the grant was presented, unembarrassed by any question of fraud or forgery.*

In the case of *United States v. Clark*, 8 Peters' U. S. Rep. 448, a royal order of 1790 was recited in the grant, as being the authority upon which it was issued. Of this order, thus recited, the Supreme Court of the United States said: "It most certainly does not authorize that grant * * * and it is not doubted that the quantity contained in the grant far exceeded the quantity authorized by that order." The grant

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in that case was *sustained*, notwithstanding that the authority recited in it was not sufficient to sustain it.

By the Court, SANBURNSON, C. J.

The conclusion which we have reached upon the controlling question involved in this case, renders a notice in detail of the several points made by counsel unnecessary. The plaintiffs' title is founded upon an Alcalde grant or lease of the land in controversy for "a term of ninety-nine years, with the right of nine renewals." The quantity of land is described in the lease as five hundred acres, more or less; but, as appears from the record, the actual quantity is a little less than four hundred acres. The grant, upon its face, purports to have been made on the 14th of November, 1847, in accordance with the decree of the Junta and the People of the Pueblo de San José Gde., in Upper California, passed and entered of record on the 29th day of June, 1847, and in accordance with a confirmatory decree of the people of said pueblo, passed in Primary Assembly, on the 30th day of the same month, and entered of record in the office of the Alcalde.

Assuming that the decrees of the 29th and 30th of June fully empowered the Alcalde to make the grant in question, we think they were void for the want of power in the Junta and people of the pueblo, and leaving those decrees out of the case and assuming that the Alcalde made the grant by virtue of the general powers vested in him as such Alcalde, we also think the grant was void for the same reason.

It has been held that the power to grant or lease pueblo lands was vested in the municipal authorities under the Mexican system. (*Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 530; *White v. Moses*, 21 Cal. 34.) But this power, as appears from the same cases, was limited to the granting of house lots for building purposes, called *solares*, and sowing ground for cultivating or planting as gardens, vineyards, orchards, etc., called *suertes*. Upon the question as to how much land a *suerte* embraced, we are cited to no authority,

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except the fifth section of Appendix No. 2, Rockwell's Spanish Law, 446, containing extracts from the regulations for the government of the Province of California, by Don Felipe De Neve, Governor of the same, dated in the Royal Presidio of San Carlos de Monterey, June 1, 1779, and approved by his majesty in a royal order of the 24th October, 1781. It is there provided that each *suerte* of land, whether capable of irrigation or dependent on the seasons (*de riego de temporal*) shall consist of two hundred varas in length, and two hundred in breadth, such being the area generally occupied in the sowing of one *fanega* of Indian corn; and it is further provided that not more than two *suertes* of irrigable land, and other two of dry land, shall be allotted to each of the *pobladores*. If from that time until the cession of California to the United States any change was made in the size of a *suerte*, counsel have failed to produce the evidence of such change, and our own researches have discovered none. But admitting that a *suerte* had no precise limits as to quantity, the word by definition signifies a small, or middling sized lot, suitable for a garden, vineyard, or orchard. In Seoane's Neuman and Baretti's Dictionary the word is defined in English by the word "lot," and the expression *suerte de caña* is defined as each patch or lot into which a large sugar cane field is divided.

Guided by such light as we have we are of the opinion that the municipal authorities under the Mexican law did not have the power which was attempted to be exercised in the present case. We know of no instances where such grants were made except in the Pueblo of San José, and even there not until after the occupation of the country by our own people. This is, of itself, strong if not conclusive evidence of the non-existence of the power. Such a power would have been in direct antagonism to the policy of the Mexican Government as indicated in its laws touching the establishment of towns and villages, and would have retarded and defeated that policy.

For the purpose of inducing colonization and encouraging the building up of towns and villages, a certain quantity of

Points decided.

land was allotted to each to be distributed in small quantities among the inhabitants for building lots and for cultivation upon a moderate scale. In view of the quantity of the land thus allotted and the purposes for which it was allotted, it is apparent to us that leases by the municipal authorities of five hundred acre tracts for nearly a thousand years at a rent of only three dollars per annum could not have been authorized consistently with the end in view.

Judgment reversed and cause remanded.

THE PEOPLE v. WALTER SKIDMORE, WALTER A. SKIDMORE, EGBERT VAN ALLEN, AND LOUIS DENOS.

FORMER JUDGMENT AS A BAR.—If the defendants demur to the complaint for misjoinder of parties defendant, as well as for other reasons, and at the same time answer, and the parties stipulate to submit the issues of law and fact to the Court upon the pleadings, and a general judgment is rendered for the defendants, it is a bar to another suit for the same cause of action, although the real ground upon which the judgment was based was the misjoinder of parties defendant.

EXPRESSION OF OPINION ON A POINT NOT BEFORE THE COURT.—If a judgment is rendered generally for the defendants upon issues of both law and fact, and the Supreme Court upon appeal affirm the judgment, a statement in the opinion that the judgment was affirmed because there was a misjoinder of parties defendant, and that the effect of the judgment will not preclude the plaintiff from suing again, does not prevent the judgment from being a bar to a new suit brought for the same cause of action.

JUDGMENT RENDERED ON DEMURRER AS A BAR.—If the defendants demur and answer at the same time, and issues of law and fact are submitted to the Court, and an order is made sustaining the demurrer by reason of a misjoinder of parties defendant, and judgment is rendered for the defendants upon the order, the judgment will not bar a new action.

APPEAL from the District Court, Seventh Judicial District, Marin County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

John Reynolds, and S. F. Reynolds, for Appellants.

Argument for Respondent.

The cause in the former case was fully tried upon its merits, and the judgment there is a perfect bar to this action, and is completely brought within the case of *Gray v. Dougherty*, 25 Cal. 266.

Bradley Hall, for Respondent.

Patterson, Wallace & Stow, also for Respondent.

The parties are not identical. Daniel T. Taylor was a party to the first action; he is not a party to this. He was made a party for the sole purpose of obtaining equitable relief against him. Because he was made a party, his co-defendants demurred, and also because the relief sought against him was equitable, whilst that sought against the obligors was legal.

This Court say: "If the demurrer for misjoinder of causes of action had been sustained—that, and no more—and judgment had been entered for the defendants upon that order, and the plaintiff had appealed, and the judgment had been affirmed, there can be no pretense that the judgment would have barred a new action unaffected with a like misjoinder." The demurrer was not *withdrawn*; it was submitted to the *referee* for decision. The judgment as entered does not, we submit, purport to be rendered upon the *facts* found by the *referee*, for he *found none*; and *one* of the assignments of *error* was that judgment could not be entered by the Clerk without a finding of facts. The demurrer, then, was properly *before* the Court, and the Supreme Court properly considered it and *passed upon it*. It must be conceded that taking the opinion signed by the Judges, and not the Clerk's entry or conclusion of *what the judgment was*, as the law of the case and as the decision and judgment of the Court, and plaintiffs' right to bring a new action was not barred, the Judges certainly knew what they meant and intended, and they expressed the *judgment of the Court* to be that the demurrer was properly sustained; and the language, "We affirm the judgment upon the demurrer for this misjoinder," controls the subsequent words, "*judgment is affirmed*," and leaves the balance of the decision

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operative—that the affirmance shall not preclude an action upon the recognizance.

The sustaining of the *demurrer* and affirming the judgment for a misjoinder of parties is not a *bar*, any more than an acquittal upon a defective indictment. (4 Cow. 44; 2 Hawk. C. 55; 1 Bulstrode, 142; 2 Hale's Pleas, 248; *People v. Barrett*, 1 John. 66; 13 John. 351.)

By the Court, SHAFER, J.

This is an action upon a recognizance entered into by the defendants to secure the appearance, etc., of W. Skidmore to answer to a charge of murder.

The answer of the defendants denies many of the allegations of the complaint, and sets up a judgment in a former suit as a bar to the action.

The record of the proceedings in the former suit is made part of the transcript by stipulation, and it appears, on comparing the two records, that the actions are identical in subject matter and parties. The only question, therefore, having any connection with the special defense, is whether the judgment in the former action was based upon the merits.

In the complaint in the first suit there was a prayer for equitable relief against D. T. Taylor, trustee in an express trust created by Skidmore for the protection of his sureties against their liability upon the recognizance, and the trustee was to that intent made a party defendant.

The defendants in the first suit demurred to the complaint on the ground of ambiguity, misjoinder of causes of action and parties defendant, and for want of facts sufficient to constitute a cause of action, and they also answered the complaint. Thereafter, on stipulation of parties, an order was entered referring the case to Charles Halsey "to try all the issues of law and fact therein and to report a judgment thereon."

The parties in due time appeared before the referee, and in the first place, as appears by the record, drew up and submitted to him a categorical statement of the matters charged

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in the complaint and admitted by the answer; which list embraced most, if not all, the substantive allegations in the complaint.

The plaintiff thereupon moved that the demurrer be overruled, which motion was denied and the plaintiff excepted.

The plaintiff then moved for judgment against the cognizors, upon the pleadings and "admissions of facts as aforesaid in the action at law;" which motion was also denied and the plaintiff excepted.

The plaintiff then "moved for the equitable relief and decree asked for in the complaint, against all the defendants, upon said facts proved and the admission in the pleadings, which motion was then and there denied by the referee, and the plaintiff duly excepted."

The record thereafter proceeds as follows: "And the issues of law and fact raised by the pleadings were submitted to the referee upon the pleadings for his decision, and to report a judgment thereon in the case.

"On the 2d day of July, 1860, the referee filed his report, which is attached to the judgment, finding no facts, but finding as conclusions of law from the facts shown by the pleadings, that defendants are entitled to judgment against the plaintiff, to which decision plaintiff duly excepted.

"On the same day of July, 1860, the Clerk of said Court of Marin, without any order of Court, entered up judgment in favor of the defendants and against plaintiff for costs, the Court then being in session; to which decision and judgment the plaintiff duly excepted."

All the foregoing passages occur in the plaintiff's statement on motion for new trial, and on appeal, in the first action. The statement closes with the following assignment of errors:

The plaintiff, on the motion for a new trial, assigns and will rely upon the following grounds of error:

1. Error of the referee in not overruling defendants' demurrer.

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2. Error of the referee in not granting plaintiff's motion for judgment in the action at law.
3. Error of the referee in not granting plaintiff's motion for judgment in the equity case or cause of action.
4. Error of the referee in deciding as conclusions of law that defendants were entitled to judgment against plaintiff.
5. That the judgment entered in the report of the referee is against law and evidence.
6. That the Clerk of the Court erred in entering judgment without a finding of facts by the referee.

The following is the report of the referee:

The People of the State of California, plaintiff, v. *Walter Skidmore, Walter A. Skidmore, Egbert Van Allen, and Louis Denos*. State of California, in the District Court for the Seventh Judicial District, in and for the County of Marin.—The undersigned, to whom this action was referred to try the issues therein and report a judgment thereon, does report that the said action was submitted by the attorneys for the respective parties thereto upon the pleadings in the same. And from the facts therein stated I do find as a conclusion of law, that the said plaintiff is not entitled to recover, and I do report a judgment upon the issues in said action in favor of the said defendants against the said plaintiff.

July 2, 1860.

CHARLES HALSEY, Referee, etc.

Upon that report the following judgment was rendered:

The People of the State of California, plaintiff, v. *Walter Skidmore, Walter A. Skidmore, Egbert Van Allen, Louis Denos and Daniel T. Taylor*. In the District Court of the Seventh Judicial District of the State of California, in and for the County of Marin.—The above entitled action having been heretofore, by consent of the parties thereto, duly referred to Charles Halsey to try all the issues of law and fact therein and report a judgment thereon, and the said referee having duly made and filed his report thereon, wherein and whereby

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he has found and reported a judgment in favor of the said defendants, therefore it is now ordered, adjudged and decreed by the Court that the said defendants herein do have and recover a judgment against said plaintiff; that they, the said defendants, be hence dismissed without day, and the said plaintiff take nothing by this said action. And it is ordered and adjudged that the defendants do have and recover their costs and disbursements, amounting to one hundred and two dollars and twenty-five cents.

The motion for new trial having been denied, the plaintiff brought the case to the Supreme Court by appeal.

The Court in the opinion say:

We affirm the judgment upon the demurrer for this misjoinder. The effect of the judgment will not be to preclude the plaintiff from suing again when the cause of action can be more formally set out.

Judgment is affirmed.

1. The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with the judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words "judgment affirmed," as they occur in the published report of the case. (17 Cal. 261.) We have examined the record, now remaining in this Court, and find an unqualified entry to the effect that the judgment was affirmed.

The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the Court below. The Supreme Court found no error in the record, and therefore not only

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allowed it to stand, but affirmed it as an entirety, and by direct expression.

If the demurrer for misjoinder of causes had been sustained—that, and no more—and judgment had been entered for the defendants upon that order, and the plaintiff had appealed, and the judgment had been affirmed, there can be no pretense that the judgment would have barred a new action, unaffected with a like misjoinder; and hence if the judgment below was in fact based solely upon an ascertained misjoinder of causes of action or of parties, or upon ambiguity in the complaint, or upon all of them combined, or upon any other matter not involving the very merits of the plaintiff's claim, a new action, free from these dilatory infirmities, might have been brought to enforce it. The remark made by the Court in the opinion as to the effect of its own non-reversal, and expressed affirmance of the judgment, was not upon a point then before it in error, and therefore, though eminently entitled to consideration, cannot be considered as *res judicata*, nor even as authority in the exact sense.

2. Assuming, then, that the judgment rendered in the first action is now as it was in the beginning, the question is narrowed to a single point of inquiry: Was the former judgment upon the merits of the claim?

The judgment, howsoever comprehensive in its terms, must be read in the light of the whole judgment roll.

It appears that the issues of law raised by the demurrer, and the questions of fact raised by the answer, were by the stipulation of the parties sent to the referee; that the plaintiff at the hearing, having in the first place agreed with the defendants upon a statement of the facts bearing upon the merits, moved that the demurrer should be overruled. The motion was denied, and, as we presume, upon the ground that it would be irregular to pass upon the merits of a demurrer on motion to overrule it.

The subsequent motion for judgment on the facts, as shown by the pleadings and agreed statement, was also overruled; and as, in one point of view, the motion was a proper one, the

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ruling upon it may be considered as having been in itself a disposition of the case upon the merits. But however that may be, it would seem that the parties, after running the issues of law and fact one after another through the gauntlet of these motions, concluded to begin, and did in fact begin *de novo*; for immediately thereafter the issues of *law* and *fact* were submitted to the referee upon the pleadings for his *decision* and to report a *judgment thereon in the case*.

How did the referee act upon the matters of thought and judgment so committed to him? The answer to this question is to be found in the report.

The report commences with a recital, to the effect that the case was submitted by the attorneys of the respective parties upon the pleadings; and, "*from the facts therein stated*," it finds, as a conclusion of law, that the plaintiff is not entitled to recover, and reports a general judgment in favor of the defendants against the plaintiff.

In view of this sweeping report and the matters that immediately preceded it, we are not at liberty to hold that the general judgment entered upon "the report," in terms, was not entered upon it, and the whole of it, in legal effect. Going by the record, it appears affirmatively that the judgment was based upon the merits of the claim, and not upon the dilatory matters raised by the demurrer nor any other mere technical defect. It may be conceded that the proceedings before the referee were irregular, as they were in some particulars; and it may further be assumed that the judgment was erroneous in view of the facts agreed upon; still, the judgment has never been reversed nor modified, and therefore its efficacy as a bar to this action is impaired neither by the irregularity nor the error.

We have further considered the plaintiff's claim upon its original merits, and our convictions, upon a somewhat hurried consideration of the defendants' objections, are in favor of the claim. But this action is to be decided upon the present legal merits of the claim, and we consider that it is barred by the former judgment.

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In the case of *Phelan v. Supervisors of San Francisco*, 9 Cal. 15, cited for the respondents, the judgment was distinctly upon the demurrer, and the Court, reversing and not affirming the judgment, as here, held that the plaintiff could amend his complaint on application to the Court below. The point decided in that case is not the point presented here, and the distinction is so manifest that a formal statement of it is unnecessary.

Judgment reversed and new trial ordered.

RUDOLPH STEINBACH v. JACOB P. LEESE, GEORGE
W. BAKER, AND ALFRED G. JONES *et al.*

SERVICE OF SUMMONS BY PUBLICATION.—Where service of summons is had by publication, proof of the publication can only be made by the affidavit of the printer, his foreman, or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way: "A. B., principal clerk, etc., • • being sworn, deposes," etc., is insufficient, and would not give the Court jurisdiction of the person of the defendant.

WHAT CONSTITUTES AN APPEARANCE IN AN ACTION.—A defendant cannot appear in an action so as to give the Court jurisdiction of his person, except by answering, demurring, or giving plaintiff written notice that he appears; and the service of the notice of appearance must antedate or be contemporaneous with the service of all other notices and papers.

PLAINTIFF PRESUMED TO KNOW DEFECTS IN PROCEEDINGS.—If the plaintiff in an action of foreclosure purchases the property at Sheriff's sale, he is presumed to buy with full knowledge of all defects in the proceedings relating to service of summons.

WRIT OF ASSISTANCE.—If the Court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

There was no proof of publication of summons. The affidavit does not show that Hoffman was competent to be a witness on the trial of the action. It does not show that

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Hoffman was the "printer," or his "foreman," or "his principal clerk." Practice Act, section thirty-three, subdivision three—the words "principal clerk in the office," etc., are mere "*descriptio personæ*"—he does not swear that he is such clerk, nor that there was any such newspaper. (*Merritt v. Seaman*, 2 Selden, 171, and the numerous authorities there cited by the Court; *People v. Penin*, 1 How. Pr. R. 75; *Ex parte B. of Monroe*, 7 Hill, 178; *Cunningham v. Gorlet*, 4 Denio, 71.)

It should appear affirmatively and distinctly that Hoffman was the principal clerk of the printer, because it does not appear his means of knowledge of the publication is not disclosed to the Court. (See *Hill v. Hoover*, 5 Wisconsin, 370; and a correct form, 2 Barbour's Ch. 706, which we deem conclusive.)

Brooks & Whitney, for Respondents.

Appellant's counsel objects that the affidavit is insufficient in reciting the fact that the deponent is the principal clerk, instead of stating that he is the principal clerk.

The cases cited from the New York Reports in support of this position are not cases of the affidavits of publication, and there is a material difference. The cases cited are in point so far as this: that in New York a description of the character of the deponent at the commencement of the answer is not considered as sworn to, but is a mere description of the person. But these were cases of the exercise of some private right by individuals. In the case of the publication of a summons there is this difference: that the Court designates the paper, and the law designates the person who shall make the affidavit, so that *pro hac vice* and *quoad hoc*, he is acting as the officer of the law, and is in no sense the private agent of the party. The form cited from Barbour's Chancery Practice is an affidavit of publication, and is in the form contended for by the counsel. The case of *Hill v. Hoover*, 5 Wisconsin, 370, was a case of proof of publication of a notice of sale, and is in point as far as it goes; but none of these cases were attempts to

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invalidate a judgment on this ground. We might concede that such affidavits were *irregular*, but that is a very different thing from their being *void*.

We think it must be confessed that the criticism is exceedingly nice. In a pleading or affidavit, it is the ordinary way to commence by describing the status of the party as "one of the defendants in this cause," or "the attorney for the plaintiff herein," etc., and "common error may make law." We are free to admit that the form given by Barbour is *better*, but it would be a hard thing that all the judgments which have been rendered in this State on just such affidavits are nullities. If the Court will look at its own records, it will find that the practice has been universal. In the case of *Gray v. Palmer*, 9 Cal. 627, the affidavit of publication seems to have been precisely the same as this. But it never seems to have occurred to the learned counsel who contended in that hotly contested case, or to the Court, that the judgment of *Gray v. Eaton* was void on that ground. The affidavit was criticised and attacked by counsel, and sustained by the Court. The Court say: "When there is but one clerk, his affidavit must be sufficient, and it is unnecessary for him to improperly *describe* himself as principal clerk." It is evident that the Court considered a *descriptio personæ* sufficient.

By the Court, SHAFER, J.

This appeal is from an order granting a writ of assistance.

The action was brought to foreclose a mortgage executed to Salvador Vallejo by defendant Leese in 1850, which mortgage came to the plaintiff by assignment. The complaint was filed May 1, 1857, and a notice of *lis pendens* was filed on the 30th of the same month. At the time the action was brought, Jones, who was named as a defendant in the complaint, was the owner of a part of the mortgaged premises by title derived from Leese and Yale subsequent to the mortgage. A final decree was entered November 3, 1860, against all the defendants, and the plaintiff became the purchaser of the mortgaged

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premises at the Sheriff's sale, and is now the holder of the Sheriff's deed. The appellants, Brooks, Tenant, Lazarus, and Johnson, claim under their co-appellant Jones, by title derived from him since the filing of the notice of *lis pendens*. The only question is, whether Jones was a party to the foreclosure suit.

On the 24th of September, 1857, an order was made directing the service of summons as to Jones and three other defendants, by publication in the *California Chronicle*, at least once a week for a period of three months. The proof that the order was complied with was the following affidavit:

"STATE OF CALIFORNIA,
"City and County of San Francisco. }

"H. F. W. Hoffman, principal clerk in the office of the *California Chronicle*, a daily newspaper published in said city and county, being duly sworn, deposes and says, that the notice of which the annexed printed notice is a copy, has been published in said paper at least once a week three months, commencing on the 26th day of September, 1857, and ending on the 26th day of December, 1857. H. F. W. HOFFMAN.

"Subscribed before me this 26th day of December, 1857.

"D. B. HEMPSTEAD, Notary Public."

By subdivision third of the thirty-third section of the Practice Act, the fact that an order of publication has been complied with, is to be proved by "the affidavit of the printer, or his foreman, or principal clerk;" and as we construe the provision, they are the only persons competent to testify on the subject. That the affiant is one of the three, is itself a substantive fact, and must be proved as such before the Court in which the action is pending can proceed to render judgment against the parties to whom notice is intended to be given. In the affidavit now in question, the affiant swears to nothing except to the matter set forth after the word "deposes." He names himself as principal clerk, but he does not swear that that was his position in fact. (*Ex parte Bank of Monroes*, 7

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Hill, 178; *Cunningham v. Goelet*, 4 Denio, 71; *Staples v. Fairchild*, 3 N. Y. 44; *Payne v. Young*, 8 N. Y. 158.) The result is, that as the record in *Steinbach v. Leese*, ante, 295, is made up judgment was rendered against Jones without any proof that the order of publication had been complied with. There are other grounds upon which it is insisted that the proceedings under the order were fatally defective, but it is not necessary for us to consider them.

The respondent, however, contends that Jones appeared to the action by giving a notice of appeal from the decree through an attorney, who, it appears, properly represented some of the defendants, but who, without authority and inadvertently, inserted Jones' name in the notice as one of the parties for whom he acted. It is provided by the five hundred and twenty-third section of the Practice Act, that "a defendant shall be deemed to appear in an action when he answers, demurs or gives the plaintiff a written notice of appearance for him." The words "answers" and "demurs" are obviously words of enumeration, and we cannot, on received principles, interpolate into the text, notices of motion for new trials, notices of appeal, nor any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is, not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause. We have no doubt that the written notice of appearance provided for in the section, is a document to be drawn up especially for that purpose, and that service of it is to antedate, or to be contemporaneous with, the service of all other notices and papers.

Steinbach was himself the purchaser at the Sheriff's sale, and must be presumed to have bought with notice of all defects in the proceedings relating to the publication. (*McMillan and Wife v. Reynolds*, 11 Cal. 378.)

The order appealed from is reversed.

Points decided.

JAMES B. McMINN v. PATRICK WHELAN AND MOSES O'CONNOR.

PROOF OF EXECUTION OF INSTRUMENTS IN WRITING.—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or at a place beyond the jurisdiction of the Court, can be proved by evidence of the handwriting of the party who executed it.

SERVICE OF SUMMONS BY PUBLICATION.—When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterwards filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the Court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons; but the summons issued on the supplemental complaint must be served by publication.

HOW SUMMONS SHOULD BE PUBLISHED.—If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made.

JUDGMENT WITHOUT JURISDICTION OF PERSON.—If it appear by the record or otherwise that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also.

JURISDICTION OF PERSON.—If jurisdiction of the person of defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued, and in such case there will be no presumption in favor of jurisdiction.

ACTION TO SET ASIDE CONVEYANCE OF LAND.—A lien on land acquired by an attachment, cannot be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in the attachment, until judgment is obtained in the suit in which the attachment issued.

CREDITOR WITHOUT JUDGMENT.—A creditor at large, without a judgment, is not in a position to maintain an action to set aside a conveyance of property made by his debtor.

ASSIGNEE OF VOID JUDGMENT.—If the assignee of a void judgment, together with the cause of action on which it was rendered, offers the same in evidence, this does not prove that the assignee is a creditor of the defendant in the judgment.

DEED FOR LAND SOLD FOR TAXES AS EVIDENCE.—If the certificate of sale of property for taxes is made to "Michael Dundon," and the deed under the certificate is made to "Patrick Michael Dundon, Jr.," and it appears in proof that there were two persons, Michael and Patrick Michael, and there is no evidence that Patrick Michael acquired the right of Michael by assignment, the deed is not admissible in evidence without proof that the two names are for the same person.

CLAIMANT OF LAND CANNOT ACQUIRE TAX TITLE.—One who is in possession of land, claiming it as his, when it is assessed for taxes, cannot, by failing to pay the tax and allowing the land to be sold for the same, and becoming the purchaser, and obtaining a Sheriff's deed, acquire a title to it.

CONDUCT OF A JUDGE DURING A TRIAL.—If the character of a witness is called in question during a trial, and the Judge makes a remark from the bench indorsing his respectability, it is good cause for a reversal of judgment, if the testimony of the witness is material.

STATEMENTS AND EXCEPTIONS.—A statement on motion for new trial, or a

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bill of exceptions, should contain only so much of the evidence or a reference thereto as may be necessary to explain the grounds specifically set forth as causes for new trial. Judges or Courts, in settling statements, should see that the above rule is complied with.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant.

The power of attorney from Maume to Dundon was not sufficiently proven, and its admission was error.

Whether secondary evidence as to the execution of the power of attorney should be received or not, was a preliminary question, to be legally and correctly decided by the Judge. Whether O'Farrell, the attesting witness, was absent from California; whether his signature could be proved in California; and whether due diligence had or had not been used by the plaintiff to ascertain these alleged facts, were matters to be decided by the Judge upon the testimony introduced upon those points. The plaintiff testified that in his search for O'Farrell, "he found nobody of the name of O'Farrell; and that he thought he looked into some of the Directories." If this was sufficient as *prima facie* proof, still it was not conclusive; and accordingly the defendant offered to rebut it by showing, "from the City Directory, that there were a number of persons in the city by the name of O'Farrell," which proof, if received, would have overturned the *prima facies* of the plaintiff's testimony, by showing that he did not consult the City Directory, the most obvious source of information, and so did not use due diligence in that regard. But the Judge treated the matter as if testimony were to be received on only one side, and no rebutting testimony to be admitted, which is insisted to be error.

Again: If it be held that the absence of the attesting witness was properly accounted for, this would not admit testimony as to the genuineness of the signature of the donor of

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the power, but only testimony as to the genuineness of the signature of the attesting witness. The rule is, that "the testimony of the subscribing witness, or proof of his handwriting and of his absence should be given." (*Jones v. Underwood*, 28 Barb. 481; *Story v. Lovett*, 1 E. D. Smith, 153; 2 Abbott's N. Y. Digest, p. 709, Sec. 1,816; 2 Phillips' Ev. 4th Am. Ed. 460, 500, etc.) See a curious history of the origin of the rule, *Fox v. Reil*, 3 Johns. *478.

But in the case at bar, the plaintiff proved only the absence of the attesting witness, and then, after suggesting that such witness resided in Limerick, without endeavoring to prove his handwriting by any method, the plaintiff proceeded at once to prove the handwriting of the maker of the power of attorney.

The Court below erred in excluding the tax deed from Hunt, the Tax Collector, to Patrick Michael Dundon, and the exception thereto was well taken.

The ground of exclusion was, that the certificate of the tax sale was to Michael Dundon, whereas the deed was to Patrick Michael Dundon, Jr., and these were two different persons, and no connection shown between them by assignment. The law only knows one Christian name. (*Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Goodwin*, 2 Cowen, 463.) The law also disregards the word *Jr.*, or *junior*, as a part of a name. (*People v. Collins*, 7 Johns. 549; *Foot v. Youngs*, 11 Wend. 522.)

The Court below erred in its charge to the jury in regard to the tax deed to Ryan, under which the defendants claimed title, and the exception thereto was well taken.

The mere fact that a person is in possession of land as a trespasser, but claiming it as owner, will not prevent his acquiring title to it under a tax sale. There must be something more, throwing an obligation upon him, making it his duty to pay the taxes. The lands must be assessed to him; (*Moss v. Shear*, 25 Cal. 38;) or, he must have agreed with the owner to pay the taxes; or, finally, he must be a trespasser in possession, excluding the rightful owner, and the annual

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value of the land must be equal to the tax assessed. In these cases the law throws the obligation and duty of paying the taxes upon the person in possession, and he will not be permitted to make title against the real owner under a tax sale. (*Gaskins v. Blake*, 27 Miss. 675.)

[In the case of *McMinn v. O'Connor et al*, *ante*, 238, reference is made to a brief of Dwinelle, Shafer & Goold, in which they discussed the ruling of the Court in excluding the judgment roll in the case of *Gleason v. Maume*. The brief was not published there because the Court in its opinion in that case leave the discussion of that point to the opinion in this case. The following are extracts from the brief — REPORTER]:

The record being that of a Court of general jurisdiction, having jurisdiction of the subject matter, it will be presumed that it acquired jurisdiction of the parties.

The reported cases in which Courts have avoided judgments rendered by Courts of general jurisdiction, upon a defective service of process, or without any service, have been generally cases where the judgment was attacked *directly* in the same Court by motion or on appeal, or by a bill in equity. If Courts upon such occasions have said that the judgment was *void*, that must be considered as an inaccurate mode of expressing the proposition that the judgment could not be sustained, unless the Court has expressly said that it is "absolutely void, and not merely voidable." (*Whitwell v. Barbier*, 7 Cal. 54; *Bell v. Thompson*, 19 Cal. 706.)

"On appeal a judgment by default will be reversed, unless the record show service on the defendant, though possibly a judgment so obtained could not be impeached collaterally." (*Schloss v. White*, 16 Cal. 65; *Per contra*, *Hart v. Seixas*, 21 Wend. 40.)

But, "There is a very decided distinction between the *want* of jurisdiction and *irregularity* in procuring jurisdiction. In the latter case some of the authorities speak of it as a want of jurisdiction, but when so employed it is a loose and im-

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proper use of the term. In the one case the judgment can be attacked in any form—that is, directly or collaterally; in the other, only by a direct proceeding against the judgment in the Court which rendered it, or in an appellate Court upon an appeal from the judgment.” (*Whitwell v. Barbier*, 7 Cal. 63, 64.)

The distinction is, that the jurisdiction of a Court of general jurisdiction need not be shown affirmatively, but will be presumed. (*Bloom v. Burdick*, 1 Hill, 140; *Borden v. The State*, 6 Eng. 519; *Hardy v. Gholson*, 26 Miss. 70; *Tallman v. Ely*, 6 Wis. 244.)

But even in the case of a Court of general jurisdiction, if the record affirmatively shows that it had not in fact acquired jurisdiction of the person of the defendant, that fact will be fatal to the judgment. (*Borden v. Fitch*, 15 John. 141; *Whitwell v. Barbier*, 7 Cal. 54, 63.)

In regard to inferior Courts nothing will be presumed, and if the party in interest is to be brought in by means of publication of notice, the want of such notice will be a fatal defect. (*Whitwell v. Barbier*, 7 Cal. 64; *Bloom v. Burdick*, 1 Hill, 140; *Mills v. Martin*, 19 Johns. 7; *People v. Huber*, 20 Cal. 88; 3 Phillips Ev. 4th Ed. 137, note 293.)

It is provided by 2 Revised Statutes of New York, page *319, § 18, (Sec. 12,) that in cases of partition of lands unknown owners may be served by publication. Section two hundred and sixty-nine of our Practice Act is taken from this provision, and does not differ from it in substance.

Held, *at first*, that a judgment made in partition under this statute was not valid, and could be impeached collaterally by unknown owners, if the record did not show on its face that they had been served by such publication. (*Denning v. Corwin*, 11 Wend. 648.)

But this doctrine was immediately overruled, and the Court held that such a judgment by a Court of general jurisdiction was not absolutely *void*, so as to be impeachable *collaterally*, but merely *irregular*. The true proposition is, that a judgment of a Court of record within the State, of general juris-

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diction, and proceeding according to the course of the common law, where a want of jurisdiction is not apparent on the face of the record, cannot be impeached by the parties to it so long as it remains unreversed. (*Granger v. Clark*, 9 Shep. 128; *Van Dyke v. Bartedo*, 8 Green, 224.)

But the want of averment of service of process, or a defective averment on that point, is not an affirmative showing of want of jurisdiction, but at the utmost suggest only error to be corrected directly on appeal. (*Smith v. Bradley*, 6 Smedes & Marshall, 485; *McIlrath v. Butler*, 7 Iredell, 398; *Bloom v. Burdick*, 1 Hill, 130; *Foot v. Stevens*, 17 Wend. 483; *Cole v. Hall*, 2 Hill, 625.)

If it be said that the record disclosed a defective service of an imperfect summons, the obvious reply is, that these are evidently not what the Court adjudged to be a regular service of regular process, and we refer to those cases cited in this argument where the process was clearly defective in substance or in the proof of service, and there can be no difference between the cases of good process without proof of its service, and of defective process with sufficient proof of service, as both cases are defective in not showing service of process. The presumption in favor of jurisdiction is not rebutted by an irregular process appearing in the record. After a lapse of time, conveyances, powers of attorney, fulfilment of conditions precedent, and the like acts, will be *presumed* in order to connect possession with title. (*Beall's Lessee v. Lynn*, 6 Har. & Johns. 361; *McConnell v. Bowdry's Heirs*, 4 Monroe, 395; *Buhols v. Boudousquie*, 8 Mart. Lou. [New S.] 221; *Clinton v. Campbell*, 10 Johns. 475.)

But under the same circumstances, on an attempt to connect possession with title, a defective and void deed was offered in evidence and rejected, and yet a good deed was presumed. (*Gitting's Lessee v. Holl*, 1 Har. & Johns. 14, 18.)

Even if a Court of general jurisdiction does not acquire jurisdiction of the parties, the judgment is not therefore void, but only irregular, and can be attacked only directly, and not collaterally.

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It is only when a Court has no jurisdiction of the *subject matter* of the proceeding in which an order is made, that the order is wholly void for want of jurisdiction. (*Bingham v. Disbrow*, 14 Abbott, 251; *Cole v. Hall*, 2 Hill, 625; *Bloom v. Burdick*, 1 Hill, 141; *Foot v. Stevens*, 17 Wend. 483, 488; *Hart v. Seixas*, 21 Wend. 40; *Newham v. City of Cincinnati*, 18 Ohio, 323; *Lamprey v. Nudd*, 9 Foster, N. H. 299; *Grier v. McLendon*, 7 Geo. 362; *Reed v. Wright*, 2 Green, Iowa, 15; *Barry v. Greenfield*, Wright, 348.)

If the judgment is not void on its face it cannot be attacked collaterally. (*Hall v. Hiffly*, 6 Humph. 44; *Barron v. Yart*, 18 Ala. 668; *Hopkins v. Howard*, 12 Texas, 7; *Seely v. Reed*, 3 Iowa, 374.)

When it appears on the face of the record of a judgment of the Court of ordinary and proceedings, that the Court had jurisdiction over the subject matter, such judgment will be conclusive when offered in any other Court, and cannot be collaterally attacked. (*Grier v. McLendon*, 7 Geo. 362; *Mobley v. Mobley*, 9 Geo. 247; *Pease v. Whitten*, 31 Maine, 117.)

G. F. & W. H. Sharp, for Respondent.

It is established law, as to the judgments of all Courts, *when it appears from the record itself*, that summons was not served in one of the statutory modes, jurisdiction of the defendant is not acquired. Such statute being *stricti juris*, the most exact compliance with all the prerequisites of the statute must be shown. *No judgment* can be obtained without it. In the absence of one requirement, that purporting to be a judgment is *coram non judice* and void.

How could a Court pass beyond the limits of the very law that confers the authority? (*Practice Act*, Sec. 30; *Gossett v. Howard*, 10 Q. B. 452; *Bigelow v. Stearns*, 19 John. 39; *Harrington v. The People*, 6 Barb. 607; *Steen v. Steen*, 3 Cushman, 513; *Noyes v. Butler*, Id. 613; *Denning v. Corwin*, 11 Wend. 648; *The People v. Cassel*, 5 Hill, 164.)

Again, in acquiring jurisdiction by *publication*, there are no

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presumptions in favor of the record. It can be impeached or set aside collaterally. (See cases cited above.)

It is only in reference to matters *within their common law jurisdiction* that records of Courts of general jurisdiction cannot be attacked. As to new rights conferred by statute, they are *inferior Courts*.

"Whenever a new right (service of summons by publication) is created by statute, and its enforcement is committed to a *Court of general jurisdiction*, such Court *quo ad hoc* is an *inferior Court*, and must pursue the statute strictly." (Cohen v. Barrett, 5 Cal. 210; Whitwell v. Barbier, 7 Id. 321; Reynolds v. Harris, 14 Id. 678; Denning v. Corwin, 11 Wend. 647; Sharp v. Spier, 4 Hill, 76; Williamson v. Berry, 8 How. 495.)

That jurisdiction may always be inquired into in every action, by every Court, where the proceedings are relied upon by any one claiming a benefit thereunder. (Whitwell v. Barbier, 7 Cal. 62; Gray v. Hawes, 8 Id. 568; Hampton v. McConnell, 3 Wheat. 234; Mills v. Duryea, 7 Cranch, 481; Chemung Canal Bk. v. Judson, 8 N. Y. 254; Dobson v. Pearce, 12 N. Y. 156; and cases before cited.)

The respondent stands in the same if not a better position than Maume. We cannot conceive how appellants, having derived possession from Maume's tenant, could resist, by force of that record and sale, his (Maume's) claim to be restored to possession. In law they entered in subordination to but in fraud of Maume's right.

They must restore the possession before they could show, if they had such, a title adverse to Maume. They can show only that his title has expired, and has centered in them. This must be, however, a legal title; and if derived at a Sheriff's sale, it must be supported by a *valid* judgment. This is true of all titles derived under judicial sales. (Johnson v. Scissam, 3 John. 499; Johnson v. Bard, 4 Id. 230; Johnson v. Dennison, 4 Wend. 558; McKune v. Montgomery, 9 Cal. 576.)

Certainly Maume could attack this judgment, if invoked against him, in ejectment, to be restored to his possession. Respondent's position is superior to his, because he was *not* a

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party to the suit. Respondent could only attack it when used against him. He could neither prevent nor control the suit; hence, he cannot be affected by it. This is the first opportunity that is presented for so doing.

The charge of the Court in regard to the tax deed to Ryan was correct.

When this property was assessed and offered for sale, Ryan claimed it; hence, if valid in its preliminaries, the tax sale to him, and payment by him, would only amount to the payment of the tax, (*for the tax ran against him as a claimant,*) and would not result in passing the title. (*Kelsey v. Abbott*, 13 Cal. 619.)

By the Court, CURREY, J.

This is an action of ejectment commenced on the twenty-third of September, 1863, for the recovery of a lot of land on the corner of Folsom and Tenth streets, in San Francisco, and for damages for withholding it from plaintiff. By the answers, the defendants denied the material averments of the complaint, and then pleaded the Statute of Limitations, and also an equitable defense on which they prayed affirmative relief. The cause was tried by a jury, without first disposing of the equitable defense, and a verdict was rendered in favor of plaintiff for the recovery of the possession of the premises, and one hundred and eighty dollars damages. On this verdict judgment was entered. The defendants moved for a new trial, which was denied.

Much evidence was given at the trial respecting the possession of the premises by Mathew Maume and his tenants existing in the year 1854, and thence continuing to the time of the defendants' entry thereon, which was in 1861. That Maume had the prior possession of the premises was determined by the jury in the affirmative, and as there was evidence authorizing the verdict in this respect, no just complaint can be made, because it was not more ample.

The plaintiff claimed title to the premises by a deed of con-

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veyance produced in evidence, bearing date the tenth of May, 1861, purporting to have been executed by Mathew Maume, by his attorney in fact, Michael Dundon.

To prove that Dundon had authority as attorney for Maume to execute in his name the deed of conveyance to the plaintiff, the plaintiff offered in evidence an instrument in writing under seal, purporting to be a power of attorney executed on the thirty-first of January, 1859, by Mathew Maume, then a resident of Limerick, in the United Kingdom of Great Britain and Ireland, to Michael Dundon, of Brookville, in the County of Clare, Ireland, appointing and constituting the said Dundon the attorney for the said Maume, and granting to him power to sell and convey, for and in the name of the constituent, the premises in controversy. This power of attorney appears upon its face to have been executed in the presence of one Thomas O'Farrell, and when it was offered in evidence it was objected to by defendants on the ground that it was not proved to have been executed by Mathew Maume. The plaintiff then introduced evidence to the Court for the purpose of laying a foundation for the introduction of secondary evidence of the execution of the instrument by Maume. The plaintiff himself was sworn and examined respecting the efforts he had made, preparatory for the trial, to discover the attesting witness, if within the jurisdiction of the Court. His testimony showed that he had exercised great diligence for the purpose of finding the witness, and also to discover some one by whom his handwriting could be proved. After this evidence was admitted, the plaintiff proved the handwriting of Mathew Maume by a person who knew it, and then submitted the power of attorney to the Court for inspection, and at the same time offered it in evidence as proved. The defendants objected that the absence of the subscribing witness was not sufficiently accounted for, and also that his handwriting was not proved; and accompanying this objection they proposed to prove by exhibiting the City Directory that a number of persons were residing in San Francisco by the name of O'Farrell, and insisted that they were the proper persons of whom to inquire

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for the witness. The Court overruled the objections and the instrument was read in evidence to the jury. To this ruling the defendants excepted.

In the case of *McMinn v. O'Connor and Others*, ante, 238, we have declared, on the authority of *Landers and Wife against Bolton*, 26 Cal. 409, and the authorities cited in that case, that an instrument in writing, executed and attested by a subscribing witness in a foreign country or at a place beyond the jurisdiction of the Court, could be proved by producing evidence of the handwriting of the party who executed it. The presumption in the case is, that the attesting witness, who was in Ireland when he signed the document as a subscribing witness, remained there, and consequently was beyond the jurisdiction of the Court at the time of the trial. (*Valentine v. Piper*, 22 Pick. 89, 90.)

The defendants, for the purpose of showing that the title of Mathew Maume had passed to one of them, offered and gave in evidence a judgment obtained by Timothy Gleason against Mathew Maume on the twenty-seventh of October, 1860, and also the judgment roll and the proceedings in the case. The plaintiff objected to the evidence offered controverting the validity of the judgment, and maintaining that it was *coram non judice* and void.

On the second of November, 1859, Gleason commenced an action by filing a complaint in the District Court of the Twelfth Judicial District against Mathew Maume, Samuel Adamson and Mary E. Maume, the object of which was to recover from Mathew Maume seven thousand dollars, alleged to be due from him on a contract set forth in the complaint, and to obtain a decree against the defendants Adamson and Mary E. Maume, setting aside as fraudulent certain mortgages on real property, executed and delivered to them by Mathew Maume, and a decree against Mathew Maume, compelling him to execute a mortgage on the same real property as security for the payment of the debt sought to be recovered, in pursuance of an alleged agreement that he would so secure the same. A summons was issued on the day the complaint was filed, and on

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the same day the attorney for the plaintiff therein made an affidavit that the defendants were absent from the State, two of them residing in Ireland and the other in England. Whereupon the Court made an order that the service of the summons be made by publication in a certain newspaper specified in the order, for at least once a week for three months. On the fifth of December, 1859, the plaintiff Gleason filed a supplemental complaint in the action against the same persons and also against Michael Dundon, Michael Maume and Johanna Maume as defendants. This supplemental complaint embodied, by direct averments and reference, the same matters contained in the original complaint, and further alleged and charged that Mathew Maume, with intent to cheat and defraud the plaintiff Gleason out of the debt due him, entered into an agreement with Michael Dundon, in Ireland, to come to California for the purpose of covering up, concealing and disposing of his property so as to cheat and defraud the plaintiff and other of his creditors out of their debts; and fraudulently agreed with Dundon to convey to him certain real property in the City of San Francisco, for the fraudulent purpose of cheating and defrauding his creditors.

The supplemental complaint is replete with charges of acts of the defendants by which they designed to defraud and had defrauded the creditors of Mathew Maume, and that the defendant Dundon had thus acquired title to a portion of his property, and others of the defendants had obtained from him mortgages on other portions of his property, all of which transactions were fictitious, and intended to cheat and defraud the creditors of Mathew Maume. In conclusion, the plaintiff Gleason, in addition to the relief which he sought in his original complaint, prayed that the conveyance from Mathew Maume to Dundon might be declared fraudulent and void, and that the same might be decreed to be delivered up to be cancelled.

By the supplemental complaint it was sought to obtain an accounting by Johanna Maume and Michael Maume for the income and profits of the property of Mathew Maume while

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in their possession and use. A summons was issued on this supplemental complaint on the day it was filed. On the tenth of the same month the Court made an order, on an affidavit of the plaintiff's attorney therein, that the service of the summons be made on the three absent defendants by publication thereof in a specified newspaper for at least once a week for three months.

The proof of the publication of summons in the Gleason case was by the affidavit of "the bookkeeper in the office of the printer and publisher of the *Daily Morning Call* newspaper," made on the second day of May, 1860. This affidavit states "that a notice, of which the annexed is a printed copy, has been regularly published in the said newspaper at least once a week for three months, commencing on the 8th day of November, 1859, and ending on the 24th day of April, 1860." The "notice" mentioned in the affidavit purported to be a summons, issued on the second of November, 1859, in the case of *Timothy Gleason*, plaintiff, against *Mathew Maume et al.*, defendants, and directed to the defendants named in the original complaint. It differed from the summons actually issued, showing that it had been altered. Instead of its simply requiring the defendants to answer "the complaint filed," it required them to answer "the complaint (original and supplemental) filed." In the statement of the cause and general nature of the action the summons first issued set forth, among other things, that the action was brought "to set aside certain conveyances made by said Mathew Maume to the defendants, Samuel Adamson and Mary E. Maume, alleged to be fraudulent and void," while the summons as published contained the same notice, with the name of Michael Dundon interpolated after the name of Mary E. Maume as one of the defendants. At the time of the filing of the supplemental complaint making Dundon, Michael Maume and Johanna Maume parties defendants, there had been four publications of the "notice" or summons mentioned in the affidavit of the bookkeeper according to such affidavit. While we do not intend to impugn the integrity of the bookkeeper, the convic-

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tion is forced upon us that some one concerned was guilty of tampering with the record by interpolating matter in the summons that was not therein when it was issued, and when the order for its service by publication was made.

By filing the supplemental complaint and issuing a summons thereon, the original action became merged in the action as supplemented by the addition of parties and subject matter, and the summons last issued should have been served by publication in order to clothe the Court with jurisdiction of the persons of the absent defendants. The publication of the original summons, even if it had been made, would have been ineffectual to give the Court jurisdiction of the persons of the absent defendants, because the original complaint had been superseded by the supplemental complaint. Mathew Maume had the right to appear and be heard as to the additional matters charged as well as in respect to the matters contained in the original complaint which had been carried into the supplemental complaint. (*Lawrence v. Bolton*, 3 Paige, 295; *Scudder v. Vorhis*, 1 Barb. 55.)

The defendant's counsel insist that the judgment in the Gleason case cannot be questioned collaterally, for the reason that the jurisdiction of a Court of general or superior jurisdiction will be presumed in the absence of evidence on the face of the record to the contrary. The case of *Peacock v. Bell*, 1 Saund. 73, is generally relied on in support of this doctrine. In that case it was declared that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged." The case here cited involved the question of jurisdiction as to the subject matter of the action, and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any intentment of jurisdiction over the person of the defendant, when the same is to be acquired by a special statutory mode, without personal service of process. If jurisdiction of the person

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of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued. (*People v. Huber*, 20 Cal. 81; *Ricketson v. Richardson*, 26 Cal. 149; *Kendall v. Washburn*, 14 How. Pr. R. 380.)

It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had an opportunity to be heard. Though the rule in relation to Courts of general or superior jurisdiction is, that their jurisdiction will be presumed until the contrary appears, it may be doubted whether the rule obtains when the course prescribed for acquiring jurisdiction of the person of the defendant is contrary to the course of the common law. (*Oakley v. Aspinwall*, 4 Coms. 521 and 525.) Be this as it may, if it appear by the record or otherwise that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question; and this is so whether the Court be of inferior or superior jurisdiction.

The judgment in the Gleason case contains no averment nor recital from which it can be inferred that the Court acquired jurisdiction of the person of the defendant Mathew Maume. If it did it would not be conclusive of the assumed jurisdiction in such a case. It is a fundamental rule that no Court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it. If it could be intended in the absence of evidence to the contrary that such jurisdiction was acquired, such intendment is overcome by the evidence furnished by the defendants themselves, consisting of the affidavit of the bookkeeper of the newspaper publisher and the notice or summons annexed to that affidavit.

Neither the summons issued on the original complaint nor that issued on the supplemental complaint was published. The interpolation noticed so changed the summons pretended to have been published as to destroy it as evidence of service of process by publication, and hence we must hold that no publication of any summons issued in the case was made.

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Other objections were made touching the sufficiency of the respective affidavits on which the orders of publication were made concerning which we shall express no opinion, as we deem the point of objection considered fatal to the Gleason judgment; the result of which is that such judgment, for want of jurisdiction in the Court that rendered it, over the person of Mathew Maume, must be held void, and as a consequence, the execution thereon and the sale of the property under and by virtue of it must be held void also.

But it is insisted on the part of the defendants that the attachment which was issued and levied upon the property in question and which with all rights acquired thereby, had been assigned to the defendant O'Connor, constituted a lien upon the property, which continues notwithstanding the judgment obtained by Gleason against Maume may be void, and that O'Connor, having such lien, had an interest in the premises which entitled him to impeach the conveyance to the plaintiff on the ground of fraud. If the defendant O'Connor had a lien on the premises by reason of the attachment, that lien could not be rendered effectual for the purpose of impeaching the conveyance to the plaintiff until judgment obtained in the suit of *Gleason* against *Maume*, and it is possible that no such judgment will ever be obtained. If the defendant O'Connor, as the assignee of Gleason, was at the commencement of this action, and when it was tried, the creditor of Mathew Maume, he was simply a creditor at large without a judgment, and hence was not in a position to maintain an action by answer in the nature of a cross bill in equity to set aside the conveyance made to the plaintiff. (*Crippen v. Hudson*, 3 Kern. 161; *Reubens v. Joel*, 2 Kern. 488; *Bishop v. Halsey*, 3 Abbott, 400; *Wilson v. Forsyth*, 24 Barb. 117.)

Even if it had been competent for the defendants, in the capacity of creditors at large of Mathew Maume, to have impeached in this action the conveyance to the plaintiff as fraudulent, they failed to establish the fact that they were creditors, or that either of them was a creditor, of plaintiff's grantor. The void judgment of Gleason, with the assignment

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of it, together with the alleged cause of action on which it purported to be founded, did not prove O'Connor to be a creditor of Maume, and no other evidence was offered to prove him such. The attachment and proceeding therewith connected given in evidence by the defendants, but finally excluded by the Court on the plaintiff's motion, were, as the case then stood, incompetent for the purpose for which they seem to have been produced in evidence, and were properly excluded.

The defendants gave in evidence a judgment recovered in May, 1861, by Bernard Rooney against Mathew Maume, foreclosing a mortgage on other property in San Francisco than that in controversy, and in connection with it, showed that after the sale of the mortgaged premises there remained due the sum of about ninety dollars. The object of this evidence was declared by the counsel for the defendants on the trial to be merely to show that the Rooney judgment was not satisfied.

But it was subsequently attempted to be shown that the balance due had passed by assignment to the defendant O'Connor. It was sought to be proved that Rooney had made an assignment of the balance due on his judgment through the agency of an attorney in fact, and the defendants having failed to establish this fact to the satisfaction of the Court, the document purporting to be Rooney's assignment was excluded on the plaintiff's objection. The testimony offered to prove the authority of the person who pretended to act as the attorney in fact for Rooney we regard as very unsatisfactory, and we are of opinion the document was properly excluded.

The defendants failed to show that they, or either of them, were creditors of Mathew Maume, and consequently, were not in a position to impeach the conveyance of the premises to the plaintiff as fraudulent and void as to Maume's creditors. (*McElwain v. Yardley*, 9 Wend. 548; *Crippen v. Hudson*, 3 Kern. 161; *Reubens v. Joel*, 3 Kern. 488; *Bishop v. Halsey*, 3 Abbott, 400; *Wilson v. Forsyth*, 24 Barb. 105.) As between the grantor and grantee, a conveyance executed to defraud creditors is valid. (*Bolt v. Rogers*, 3 Paige, 154; *Gale v.*

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Gale, 19 Barb. 249; *Chamberlin v. Barnes*, 26 Barb. 160; *Gardenier v. Tubbs*, 21 Wend. 169; 1 Story's Eq. Jur., Sec. 371.)

In addition to the equitable defense interposed by the defendants, they offered evidence to show that the defendant O'Connor had acquired title to a portion of the property by virtue of a sale and conveyance of it for the payment of taxes. Two tax deeds were given in evidence, the one bearing date on the sixteenth of July, 1860, executed by the Tax Collector to Patrick Michael Dundon, Jr., the other bearing date the nineteenth of July, 1862, executed by the Tax Collector to R. F. Ryan.

The first tax deed was objected to by plaintiff on several grounds. The certificate of sale, which was produced in evidence by the defendants, showed that the premises described in it and in the deed, were sold to Michael Dundon, whereas the deed was made to Patrick Michael Dundon, Jr., and there was no evidence showing that the grantee named in the deed had acquired the right of Michael Dundon by assignment or otherwise. But it is insisted on the part of defendants that Patrick Michael Dundon, Jr., is presumptively the same person as Michael Dundon. This position, in view of the authorities cited to support it, might appear in some degree plausible had it not been proved on the trial that there were two persons by the name of Dundon, one of whom was called Michael, and the other Patrick Michael.

Other objections were made to this deed, which need not be noticed, as this alone was sufficient to warrant its exclusion.

The tax deed to R. F. Ryan was objected to by plaintiff on the ground that no preliminary evidence was produced laying a foundation for its introduction; and, also, that the deed was void on its face because of the uncertainty of the description of the property as assessed and advertised, and also on the ground that at the time of levying the taxes and the sale of the land Ryan was a claimant of the property, and for that reason could not acquire title to it by paying the taxes by purchase at the tax sale. The Court, notwithstanding these

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objections admitted this deed in evidence, and the plaintiff attempted to impeach its validity by showing that a portion of the taxes for which the property was sold were not levied by law nor by any person or body under authority of law.

The assessment of the lot appears by the deed to have been made to "P. M. Dundon and to all owners and claimants known or unknown and to all owners and claimants of any interest present or future therein, or any lien upon the same."

The third section of the Revenue Act of 1857, as amended by the Act of 1859 (Laws 1859, p. 344,) requires the Assessor to assess all real estate to the person, firm, corporation, association or company owning it, or having the possession, charge or control of it, if known to him; and it is provided further that the property shall be assessed to the owner or claimant, if he shall be known to the Assessor, "and to all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future therein, or any lien upon the same, and no error in regard to such owner or claimant shall in anywise affect the validity of such assessment."

When this assessment was made the property did not belong to P. M. Dundon, though it may be he claimed some interest in it; but it was also assessed to "all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same," and the law declares, as already seen, that no error in regard to such owner or claimant shall in anywise affect the validity of the assessment so made. At the time of the assessment Ryan was in possession of the lot, claiming it, or some interest in it, and by the terms of the assessment it was assessed to him as a claimant, known or unknown, and when he paid the taxes properly levied, he only discharged his own obligation under the law. (*Kelsey v. Abbott*, 13 Cal. 609; *Moss v. Shear*, 25 Cal. 38.) On this point the learned Judge of the Court below charged the jury as follows:

"If the jury believe from the evidence that at the time the property was assessed and offered for sale Ryan claimed it and was in its possession, the tax sale to him and payment by him

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would only amount to the payment of the tax which it was his duty to have paid. In such case the sale thereof would not result in passing the title. In other words, he who is on land claiming it to be his is not at liberty to obtain a title by omitting to perform his duty to the State by paying the taxes as they accrue—that such claimant and possessor is not permitted under the law to be delinquent in his duty, and then seek by proof of such delinquency to obtain a title from the State to the land he so occupies.”

We are of opinion that this charge to the jury is sound in principle and should be maintained as the law of the land.

Johanna Maume was examined as a witness on behalf of plaintiff to prove Mathew Maume's prior possession of the demanded premises. On her cross examination inquiries were made of her respecting her residence and business. The plaintiff's counsel objected to this course of examination. The objection was overruled, but at the same time his honor the Judge stated that the witness was one of the most respectable women in his neighborhood. To this remark the defendants' counsel excepted, when the Judge further stated that he did not mean to say that she was one of the most respectable, but a woman of respectability. The defendants complain of the conduct of the Judge in this particular as an irregularity of sufficient magnitude to authorize the reversal of the judgment.

From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and though we

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do not impugn the expression as designed to aid the side of the plaintiff, we may say, we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed; but as it is, the testimony of Johanna Maume may be obliterated, and then the fact sought to be proved by her is established by the testimony of several other witnesses of the plaintiff, without any attempt on the part of the defendants to disprove it; besides which, such fact was virtually conceded by the defendants, whose claim to the possession of the premises, as the successors in interest of Mathew Maume, involved them in an admission of his prior right.

There are many other assignments of error in the record, all of which we deem untenable. We cannot give our reasons in this place for our conclusions respecting them, as to do so would be to extend this opinion to a burdensome length.

The transcript of the record and the proceedings in the Court below, seems to have been made up in palpable disregard in one respect of the law on the subject. The appeal is from the judgment and the order denying a new trial. The statute provides that a statement on which a party intends to rely for a new trial shall contain so much of the evidence or reference thereto as may be necessary to explain the grounds specifically set forth therein as causes for a new trial, and no more. (Practice Act, Sec. 195.) A similar provision respecting bills of exception, is contained in section one hundred and ninety of the same Act; and section two hundred and thirty-eight provides that when the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall prepare such statement, which shall state specifically the particular errors or grounds on which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more.

Instead of the statement in this case conforming to these provisions of the statute, or with any one of them, the Dis-

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strict Court Reporter's minutes of the testimony is embodied in gross, with every remark made by the Court or counsel, whether important or otherwise, during the progress of the trial; and besides this, long documents are set out in full, when a brief abstract in respect to most of them would have served as useful a purpose as the documents at length, and would have been much more convenient as well as more economical of time and money. The judgment rolls in the Gleason and Rooney cases are set forth in full, covering over sixty printed pages, when everything in them material for the purpose of the motion for a new trial, or on appeal, might have been embodied in an abstract of one sixth their length. The labor of examining and mastering the contents of a record thus made up, in order to discover what is material, is greatly enhanced beyond what it would be, were the provisions of the statute referred to observed.

We are aware that it is not unfrequently the case where statements and bills of exception are prepared according to the letter and spirit of the statute, attorneys for respondents insist, by way of amendments, that all the evidence given and all that transpired at the trial shall be set forth in the statement or bill of exceptions, and the Judge who may have tried the cause is asked, not in vain, generally to order the statement to be so amended and engrossed. This course of conduct is sometimes adopted on the part of respondents to embarrass and oppress appellants. Such conduct and such a practice should be discountenanced not only by Courts having power in the premises, but also by all honorable men engaged in the practice of the law. While it is the duty of Courts, in settling statements, to see that so much of the evidence as may be necessary to explain the grounds assigned as error is stated fully and fairly, we may suggest that a great reform might be effected by exacting a compliance with the law on the subject. (See also Laws 1864, p. 246.)

We have thus noticed the character of the transcript in this case, which is only one of many of the same kind, for the purpose of calling the attention of those who may have cases

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to prepare for this Court, to the provisions of the statute prescribing the mode of procedure in the preparation and settlement of statements and bills of exceptions, with the hope that a general reformation in practice in this particular may be effected.

Judgment affirmed.

**CHRISTIAN J. MEGERLE v. RICHARD P. ASHE,
THOMAS VAN SYCKLE, AND LUTHER FLANDERS.**

LEGISLATIVE GRANT OF LAND.—A legislative grant is as effectual to pass title to lands owned by the Government as a grant evidenced by a patent.

PATENT AS EVIDENCE OF TITLE.—A patent is not conclusive, as evidence of title as against a grant made by the legislative department, prior to the patent.

GRANT OF LAND TO STATES BY ACT OF SEPTEMBER 3d, 1841.—The Act of Congress of September 3d, 1841, is a present grant to each new State, upon its admission into the Union, of five hundred thousand acres of land; but the grant does not attach to any particular parcel of land until the State, through its agents, has selected the same, and the selection has been approved by the United States.

CONFLICT BETWEEN STATE PATENT AND UNITED STATES PATENT.—When a State has selected any tract of land as a part of the five hundred thousand acres granted by the Act of Congress of September 3d, 1841, and that selection has been made of public lands subject to the grant, and the selection has been approved by the United States, then the State or its grantee holds the title to the tract selected by a title superior to that asserted by the holder of a subsequent patent issued by the United States.

CONFLICTING PATENTS AS EVIDENCE.—If a plaintiff in ejectment offers in evidence a patent of the United States and rests, the defendant is entitled to offer in evidence a State patent of prior date for the same land, accompanied with proof that the land was selected by the State as part of the five hundred thousand acres granted to the State, and that the United States approved of the selection.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The defendants, Van Syckle and Flanders, were in possession of the land as tenants of defendant Ashe, who claimed to own it and defended on behalf of his tenants.

The following is the patent from the State to Terry:

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UNITED STATES OF AMERICA. }
State of California. }

To all to whom these presents shall come, Greeting:

WHEREAS, under the provisions of Act of the Congress of the United States, entitled "An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September fourth, one thousand eight hundred and forty-one, five hundred thousand acres of the public lands were granted to the State of California; and whereas, the Legislature of the State of California provided for the selection and location of said five hundred thousand acres of land, under and in pursuance of said Act of Congress, by the following Acts of the Legislature of said State, to wit: an Act entitled "An Act to provide for the disposal of the five hundred thousand acres of land granted to this State by Act of Congress, that the people of the State of California may avail themselves of the benefits of the eighth section of the Act of Congress, approved fourth April, eighteen hundred and forty-one, chapter sixteen, entitled 'An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights,' the following provisions are hereby enacted," approved May 3d, 1852. Also an Act entitled "An Act authorizing the location and patenting of school lands," approved April 30th, 1857. Also an Act entitled "An Act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to this State for School purposes, and the seventy-two sections donated to this State for the use of a Seminary of Learning," approved April 23d, 1858. And whereas, the Legislature of the State of California passed an Act entitled "An Act to provide for the issuance of patents to lands located with State School land warrants, and for lands purchased under the Act of April twenty-third, one thousand eight hundred and fifty-eight," approved April 16th, 1859. And whereas, it appears by the certificate of the Register of the State Land Office, No. 79, issued in accordance with the provisions of said last named Act, bearing date the sixth day of January, 1862, that the tracts of land here-

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inafter described have been duly and properly located in accordance with the provisions of the said laws of this State, and that David S. Terry is entitled to receive a patent therefor;

Now, therefore, the State of California hereby grants to the said David S. Terry, and to his heirs and assigns forever, the said tracts of lands located as aforesaid, and which are known and described as follows, to wit: The north half and the southwest quarter of section twenty-one (21), township four (4) north, range eight (8) east of Mount Diablo Meridian, containing four hundred and eighty acres, taken in lieu of four hundred and eighty acres, together with all the privileges and appurtenances thereunto appertaining and belonging.

To have and to hold the aforegranted premises to the said David S. Terry, and to his heirs and assigns, to his and their use and behoof forever.

In testimony whereof, I, John G. Downey, Governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed. Given under my hand at the City of Sacramento, the eighth day of January, in the year of our Lord, A. D. one thousand eight hundred and sixty-two.

JOHN G. DOWNEY, Governor of State.

Attest:

[L. s.] JOHNSON PRICE, Secretary of State.

Countersigned:

[L. s.] H. A. HIGLEY, Register of State Land Office.

Indorsed—Letters Patent from the State of California, issued January 8th, 1862, to David S. Terry for 480 acres of State school land lying in San Joaquin County.

Plaintiff's patent from the United States did not recite nor purport to be founded upon a pre-emption, but upon a location of a bounty land warrant issued under the Act of Congress of March 3d, 1855, nor did the patent state when the land was surveyed, or at what time the warrant was located.

Plaintiff recovered judgment in the Court below and defendants appealed.

Argument for Respondent.

The other facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

Defendants offered to prove the recitals in the State patent.

The presumption is that the State officers had complied with the law.

If the law of the State was complied with, the land was vacant and unoccupied at the time of the State location, and was surveyed, etc.; and in that condition the State had a right to select and locate it—as part of the five hundred thousand acres. (See *Doll v. Meador*, 16 Cal. 316.) And when she made such selection with the consent of the United States Register and Recorder, to perfect the State title, all that remained was a ministerial act to be performed by the officers of the United States, viz.: the issuance of a patent. The selection by the State could not be overridden by the patent issued to plaintiff at a subsequent date. A patent could not be issued by the United States until the State had made a selection and location. Having made a selection, the United States could not defeat it by issuing a patent to *another* whose selection and purchase were subsequent.

Tyler & Cobb, for Respondent.

We maintain two propositions:

First—That a United States patent is *conclusive evidence* of legal title in the patentee, *in an action at law*, as against everything except a *prior patent* from the *same source of title*.

Second—That a patent of the United States cannot be attacked, except for fraud or mistake, and for these *only* in the United States Courts.

In support of the first proposition we cite the Court to the following authorities: *Bagwell v. Broderick*, 13 Pet. 436; *Finley v. Williams*, 9 Cranch, 164; *Hoofnagle v. Anderson*, 7 Wheat. 212; *Brush v. Ware et als.* 15 Pet. 93. A patent of the United States carries on its face the presumption that all the previous requisites of the law have been complied with.

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(*Polk's Lessee v. Wendal*, 9 Cranch, 87.) And this presumption is *conclusive* in an action at law. (*Bagwell v. Broderick*, 13 Pet. 436.)

In support of the last proposition we cite the cases of *Bagwell v. Broderick*, 13 Pet. 436; *Waterman v. Smith*, 13 Cal. 419; *Moore v. Wilkinson*, 13 Cal. 487; *Yount v. Howell*, 14 Cal. 165; *Stark v. Barrett*, 15 Cal. 366.

By the Court, RHODES, J.

The plaintiff claims title to the premises in controversy through a patent issued to him by the United States, September 1, 1863; and the defendants claim title under a patent issued by the State of California, January 8, 1862, to Terry, the grantor of Ashe. The plaintiff having introduced his patent rested, and the defendants then offered in evidence the patent from the State to Terry, and in connection therewith offered to prove by independent evidence that the statement and recitals in the patent were true, which were in substance that the land had been properly selected and located by the State, as a part of the five hundred thousand acres of land granted to the State, by the Act of Congress of September 3, 1841, and that Terry was entitled to receive a patent from the State for the lands described in the patent. The premises described in the two patents were identical. The Court excluded the patent and the evidence offered in connection with it, and the defendants excepted.

In support of the ruling of the Court the plaintiff advances two propositions: "First, that a United States patent is conclusive evidence of legal title in the patentee in an action at law as against everything except a prior patent from the same source of title; and second, that a patent of the United States cannot be attacked except for fraud or mistake, and for those only in the United States Courts." If the first proposition cannot be maintained the consideration of the second will be unnecessary, for if the patent is not absolutely conclusive it will be deemed to have been issued without authority of law—

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through fraud or mistake — as against a title that passed from the same source of title prior to the date of the patent. The first proposition assumes that, the title of the United States can pass only by a patent, for the learned counsel would not contend that the patent would be conclusive as against a prior title derived from the United States simply because the title did not issue in the form of a patent. This assumption stands opposed to a long series of decisions of the Supreme Court of the United States, as well as that of several of the States. In *Rutherford v. Greene's Heirs*, 2 Wheat. 196, in which the title of General Greene to the twenty-five thousand acres granted to him by the Act of the Legislature of North Carolina, was in issue, it being objected that the grant was not complete, because not attested by an instrument having the seal of the State attached. Mr. Chief Justice Marshall, in delivering the opinion of the Court, said that "the Court would certainly have thought it unnecessary to advert to it (the objection) had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability." A legislative grant is as effectual to pass the title to lands, in all respects and for every purpose, as a grant evidenced by a patent. (*Lessieur v. Price*, 12 How. 59; *Kernan v. Griffith*, ante, p. 88; *Summers v. Dickinson*, 9 Cal. 554; *Owen v. Jackson*, 9 Cal. 322.) The patent, therefore, being of no higher grade, as evidence of title, than a legislative grant, is not conclusive as against a person claiming under a grant made by the legislative department prior to the adverse patent. It may be remarked, also, that the Act of Congress makes no provision for the issuing of a patent to the State or her grantees, and if one should be issued it would amount to no more than a further assurance.

For the purpose of determining the question of the admissibility of the evidence offered by the defendants, it is necessary to ascertain in what manner the title to any particular tract of land passes to the State or her grantee, under the Act of Congress of September 3, 1841, for if the evidence tended to show that the title to the tract in controversy passed to the

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State or her grantee, prior to the date of the plaintiff's patent, the Court erred in excluding the evidence.

The eighth section provides that "there shall be and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission and while under a Territorial Government, for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid." The language "hereby is granted" as has uniformly been held by the Courts, imports a present grant. The title to the amount of land specified in the Act passes upon the admission of the new State, though "wanting identity to make it perfect"—to attach it to a particular parcel of land. (*Lessieur v. Price*, 12 How. 59; *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Terry v. Megerle*, 24 Cal. 609.) The Legislature of a State must thereafter provide by law for the performance by her officers or agents, of the acts that may be requisite to indicate a selection of the tracts of land which, in the aggregate, will constitute the amount of land granted to the State by the Act of Congress. When a particular parcel of land has been "selected and located" in accordance with the provisions of the Act of Congress—when the selection and location have been made by the proper officers or agents, acting on behalf of the State, in such manner as the Legislature has directed, and on public lands that at the time are subject to such location, and the selection and location have been approved by the proper authorities of the United States, then the identification of the land has made the title perfect and attached it to the particular tract selected. The title, thus perfected and attached to the land, vests in the State, or her grantee, and all the interest the United States had in the particular parcel is held by the State or her grantee, by a title superior to that asserted by the holder of a subsequent patent issued by the General Government.

A person claiming title under the Act of Congress, through the State, would be obliged to show, as against one claiming

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under the United States through a patent issued in accordance with the general regulations for the sale of public lands, the performance of the acts required by law to constitute the selection and location of the land. This the defendant was proceeding to do when objection was made by the plaintiff. We do not undertake to say that the evidence offered by him would have been sufficient to have sustained his claim of title and upheld his patent from the State; but the offer to show that the recital was true, that the land had been "duly and properly located in accordance with the provisions of the said laws of this State," though general in its terms, certainly included several of the steps necessary to be taken in making the selection and location of the land. The refusal of evidence of the character offered would subject every title to portions of the five hundred thousand acres of land derived from the State to the liability of being defeated by subsequent patents issued by the United States.

The patent from the State was also admissible in connection with proof of the due selection and location of the land. We therefore hold that the decision of the Court in excluding the evidence offered by the defendants was erroneous.

Judgment reversed and the cause remanded for a new trial.

**ELIZABETH DE UPREY v. SAMUEL DE UPREY, AND
MARY ANN DE UPREY.**

COMPLAINT IN PARTITION.—In a complaint to obtain partition of land, a general allegation that "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies, to obtain a particular mode of partition.

SAME.—A complaint in partition is good which is silent upon the subject of the mode of partition.

PARTIES TO SUIT FOR PARTITION.—A married woman whose husband is sued in partition is a necessary party if she claims a homestead right to or an interest in the property in dispute.

DISCLAIMER IN PARTITION.—In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms.

Argument for Appellants.

DISCLAIMER SHOULD BE ABSOLUTE.—An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife, is not a disclaimer.

WHAT MAY BE TRIED IN PARTITION.—Under our practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action.

ANSWER IN PARTITION.—A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer.

FACTS TO BE FOUND IN PARTITION.—In an action for partition, if the Court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The affidavits in support of the motion to be allowed to file a supplemental complaint, and make Mary Ann De Uprey a party defendant, stated that she claimed a homestead interest in the property. The supplemental complaint contained the same averment, and did not state that she owned any interest in the property.

The other facts are stated in the opinion of the Court.

Cyril V. Gray, for Appellants.

If the declaration of homestead showed anything, it showed a claim of the property by Samuel and his wife, as not being held by them, or either of them, as tenants in common with any other person, and consequently that it was a case for an action of ejectment, and not for partition. It should not, therefore, have been permitted to bring such a question into an action for partition, for it has repeatedly been held that Courts will not undertake to partition property where the title is disputed. (*Wilkin v. Wilkin*, 1 John. Ch. 111; *Phelps v. Green*, 3 John. Ch. 302; *Cox v. Smith*, 4 John. Ch. 271.)

A. Campbell, for Respondent.

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By the Court, SANDERSON, C. J.

This is an action for the partition of a certain lot and improvements in the City of San Francisco. The plaintiff obtained judgment and a decree directing the premises to be sold and the proceeds divided between the parties on the ground that a partition by metes and bounds could not be made without prejudice. The defendants appeal, and assign several errors which we will notice in the order in which they have been presented.

The action was commenced against Samuel De Uprey alone, who demurred to the complaint, and for cause of demurrer alleged that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled, which ruling constitutes the first error assigned.

The only ground urged in support of the demurrer is that the complaint contents itself with the general allegation that the premises cannot be divided by metes and bounds without prejudice and does not state the facts showing why such a partition could not be made. A complete answer to this is found in the fact that the manner in which the partition is to be made constitutes no part of the cause of action, but is merely a part of the relief. While it is proper and perhaps advisable to ask for a particular mode of partition—there being two provided by the statute—and to that end allege the facts upon which the plaintiff relies for the particular mode which he seeks; yet this is not indispensable, and a complaint which is silent upon the subject is good. No facts need be stated in the complaint except such as are found enumerated in the two hundred and sixty-fourth section, which provides for the cause of action in question and defines the facts upon which it rests; and a specification of the interest of each party interested in the land, so far as known to the plaintiff, as provided in section two hundred and sixty-five. If these sections left the question in doubt, such doubt is entirely removed by the two hundred and seventy-fifth section, which provides that: "If it be alleged in the complaint, and be established

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by evidence, or if it appear by the evidence *without such allegation in the complaint*, to the satisfaction of the Court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof." But were it otherwise, and were the theory of the appellant the correct one, we should still be of the opinion that his theory is fully satisfied by the complaint in this case. Whether a partition can or cannot be made by metes and bounds is purely a question of fact, and is the ultimate fact to be found, and therefore the only fact necessary to be averred under any system of pleading with which we are acquainted. The constituent facts, or those which lie behind, are merely probative, and need not be averred. But independent of all that has been said, it may be safely affirmed that the bare description of the premises contained in the complaint sufficiently shows that a partition by metes and bounds could not be made without prejudice. It is a city lot fronting on an alley, measuring only twenty-three feet front and extending back sixty. We think it would be difficult to divide such a lot by metes and bounds without great prejudice to the owners.

After the demurrer to the complaint was overruled the plaintiff, upon affidavit and notice, moved the Court for leave to bring in the wife of the defendant by a supplemental complaint. The motion was allowed by the Court against the exception of the defendant, and it is next contended that this order of the Court was erroneous.

We cannot but regard this point as frivolous. Mary Ann De Uprey, as appears by her own answer, not only claimed a homestead right to the premises, but claimed that the entire legal estate was in her, and the Court found that the legal title to an undivided half was in her. She was, therefore, not only a proper party, but a necessary party to the complete determination of the case. All persons having or claiming any interest in the land are not only proper but necessary parties to a suit for partition; and it was not only proper for the Court to allow the motion in question, but it would have been

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error not to have done so. (Practice Act, Secs. 17 and 68.) Admitting, for the sake of the argument, that the showing in support of the motion was insufficient, subsequent events clearly demonstrated the fact that she was a necessary party, and that the ends of justice had been subserved by allowing the amendment. Such being the case, this Court will not disturb an order resting very much in the discretion of the Court below and exercised under a statute containing very liberal provisions upon the subject of amendments.

After the amended and supplemental complaint was filed the defendants separately demurred upon the grounds following: First—Misjoinder of parties defendant, because Mary Ann De Uprey was improperly joined. Second—Because several causes of action had been improperly united. Third—Because the complaint did not state facts sufficient.

The demurrers were overruled, which ruling constitutes the third error assigned.

These demurrers were not only frivolous but, under the circumstances of the case, impertinent. The Court had already decided that Mary Ann was a proper party and therefore making her such could not result in a misjoinder. The Court had also decided that the original complaint stated a cause of action and it is clear that it, together with the amended and supplemental, does not state less facts than at first. And so far as the second ground alleged is concerned we cannot perceive that the demurrer has even a respectable pretext to stand upon. It is obvious upon inspection that there is but one cause of action stated in the complaint, and but one kind of relief sought.

This case was certainly contested with a pertinacity worthy of a better cause. After all the demurrers, five in number, had been overruled and the defendants had both answered separately, denying all the allegations of the complaint, their counsel next moved to dismiss the case upon the pleadings without any trial of the issues of fact thus joined between the parties. In view of the fact that the sufficiency of the complaint made by the plaintiff had undergone the test of five

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demurrers, and the further fact that answers, in the absence of all evidence either way, are entitled to no more faith and credit at the hands of the Court than complaints, this motion has at least the merit of novelty.

But it is argued in support of the motion that the pleadings show no cause of action as against Samuel De Uprey, because he disclaimed any interest in the land. Such, however, does not appear to be the fact. His answer does not contain an absolute and unqualified disclaimer. Less than that the plaintiff was not bound to accept. He only disclaims all interest except such as he may have under the Homestead Law by virtue of the dedication of the land to homestead uses by himself and his wife. It may be that such interest did not amount to anything in law, but that was one of the questions which he had helped to make and which the plaintiff had a right to have determined and put to rest by the judgment of the Court. But be that as it may, he could not claim a dismissal of the action upon the ground of a disclaimer unless he made that disclaimer in absolute and unconditional terms. Instead of doing that he denied all the allegations of the complaint as to the plaintiff's title, pleaded two statutes of limitations and averred title in his wife and claimed for himself a right of homestead in the premises, but disclaimed any further interest. It is a misnomer to call such an answer a disclaimer.

The issues made by the answer of Mary Ann De Uprey are:

First—Has the plaintiff any interest?

Second—Has Samuel De Uprey any interest?

Third—Is Mary Ann sole owner of the premises?

Fourth—Has the plaintiff possession?

Fifth—Has the plaintiff been in possession within five years?

Sixth—Has she been in possession within four years?

We are asked if the foregoing questions are such as are cognizable in an action for partition and it is argued that they are not, but are such questions as must be tried in an action of ejectment or to quiet title, if at all, and therefore this case ought to be dismissed on the pleadings without first ascertain-

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ing by a trial whether there is a word of truth in the answer which raises those questions — a conclusion both lame and impotent. The action being confessedly for a partition, so far as the complaint is concerned, we are certainly unable to perceive how the defendants can defeat the action by the mere force and effect of their answers, no matter what they contain. Nor, admitting such to be the fact, are we able to perceive by what rule of law or logic the plaintiff is to be held responsible for what appears in the answer and sent out of Court because the defendants have seen proper to raise questions not cognizable, as they alleged, in an action for partition. On the contrary, if the questions made by the answer are not cognizable in this action it is not the fault of the plaintiff, but of the defendants, and they ought not to have been allowed to make them. But there is nothing in the idea that these questions are of “strange countenance” in an action for partition. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties *in the land* may be put in issue, tried and determined in such action. (Prac. Act, Sec. 271.) Such is one of the fruits of the new system of practice which we have adopted, and when contrasted with the practice in such cases at common law, serves to illustrate its superiority.

It is next insisted that the findings negative the averments of the complaint, and the doctrine that the *allegata* and the *probata* must correspond is invoked for the purpose of establishing an error in that respect. The complaint averred that Samuel De Uprey was the co-tenant of the plaintiff, and owned an undivided half of the premises, but upon the trial the Court found that this undivided half did not belong to Samuel but to Mary Ann, and for that reason we are asked to reverse the judgment. This is substantially the same question which we have already twice considered in a different form, and which seems to play the part of Banquo’s ghost in this judicial drama. We know of no rule of law which requires the Court, in an action of this kind, to find the facts as alleged or the contrary and not otherwise, nor any rule which cuts off the plaintiff’s

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right to a partition because it turns out on the trial that he was mistaken as to the condition of the title of his co-tenants. The plaintiff is required to set forth the interests of all parties known or unknown as far as they are known to him (Sec. 265), and each defendant is required to set forth in his answer, fully and particularly, the nature and extent of his interest. But suppose that either, or both, through mistake or otherwise, set forth their interests incorrectly, it does not follow that no partition can be had. The partition follows all the same, and is to be made according to the finding regardless of the fact whether such finding corresponds with the allegations of the complaint in that respect. The doctrine invoked is applicable to this kind of an action only so far as the facts upon which the right to a partition is founded are concerned, and which are set forth in the two hundred and sixty-fourth section of the statute. The finding must correspond with the allegations of the complaint so far as to show that the parties — plaintiff and defendant — hold and are in possession of the land in question as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance, or for life or lives, or for years. Such are, so to speak, all the issues which are directly and in chief involved in this action, and upon them, if found in favor of the plaintiff, the judgment of the Court is that partition be made. But in order that this judgment may be executed, it is necessary to ascertain what the interests of the respective parties are, if there is any controversy touching them. These latter issues are collateral to the former merely, and do not enter into and become a part of the action within the scope of the rule which counsel have invoked. Whether the finding upon them corresponds with the issues made by the parties or not, is void of legal consequence. The object is not to ascertain whether the allegations of either party in respect to their interests are true or false, but to ascertain what their interests are *according to the evidence*, in order that the decree of the Court directing a partition may be carried into effect.

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The record contains no error, and the judgment must be affirmed.

Ordered accordingly.

EVAN JENKINS v. DANIEL FRINK, G. W. MOODY,
JAMES C. BRALEY, JACOB SHUMWAY, WESLEY
GALLIMORE, AND DANIEL L. MOODY.

ORDER GIVING TIME TO FILE STATEMENT.—An order of Court allowing a party twenty days within which to file a statement on motion for a new trial must be construed as giving twenty days from the date of the order, and not twenty days beyond the time of giving notice, or twenty days beyond the time allowed by statute.

FILING STATEMENT FOR NEW TRIAL.—If a statement on application for a new trial is not filed within the time required by law, the right to move for a new trial is waived, and if a motion to that effect is made, the statement should be stricken out.

PROCEEDINGS TO OBTAIN A NEW TRIAL.—There are three distinct steps recognized by the Practice Act, in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: *Firstly*—a notice of intention to move for a new trial; *Secondly*—Filing and serving statement or affidavits; *Thirdly*—The motion for a new trial. An order extending the time for taking either of these steps should express with precision the object to be attained.

Query?—Should an order allowing time within which to file a motion for a new trial be construed as allowing time to file a statement?

APPEAL from the District Court, Third Judicial District,
Santa Clara County.

The facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

Patterson, Wallace & Stow, for Respondent.

By the Court, SAWYER, J.

This case was tried by the Court without a jury, and the findings were filed on the 12th of May, 1864. On the same day notice of the filing of the findings was served on defendants' attorney. On the 13th of May, on motion of defendants' counsel, it was "ordered by the Court that said defendants

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have twenty days within which to file a motion for a new trial herein." On the 16th of the same month the defendants Braley and Gallimore filed a notice of motion for a new trial, and served the same on plaintiff's counsel. On the 3d of June following, the same defendants filed and served their statement on motion for new trial. On motion of plaintiff's counsel this statement on motion for new trial was struck out, upon the ground that it was filed too late, and for that reason the motion for new trial was waived under section one hundred and ninety-five of the Practice Act. The appeal is from the order striking out the statement, and the only question is, Was the statement filed in time? We think it was not. Conceding that the order gave the defendants twenty days within which to file a statement, there can be no doubt that the time commenced to run from the date of the order. It does not say twenty days from the date of giving notice of intention to move, or twenty days beyond the time allowed by statute, but simply that "said defendants have twenty days within which to file a motion for a new trial herein." The obvious construction is, that defendants were to have twenty days in all from that time, and so the Judge below construed his own order. This construction was given to a similar order in *Esterby v. Larco*, 24 Cal. 179. The twenty days expired June 2d, and the statement was, therefore, not filed in time.

But the order does not in terms extend the time to file a statement, and it is at least doubtful whether it can be so construed. The statute recognizes three distinct steps in a proceeding to obtain a new trial. Firstly—A notice of intention to move for a new trial, which must be given within five days after the rendition of the verdict, when the case is tried by a jury, and within ten days after receiving written notice of the rendering of the decision of the Judge, or of the filing of the report of the Commissioner or referee, when tried by such officers, unless the time for giving notice is extended by the Court for a period not exceeding thirty days, when the parties do not consent to a longer period, as provided in section five hundred and thirty. Secondly—Filing and serving

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statement or affidavit; which must be done within five days after giving notice of intention to move, unless the time is extended by the Court for a period not exceeding twenty days, or by consent of parties (Practice Act, Section 195); and Thirdly — The motion, or in the language of the statute, "the application for new trial;" which "shall be made at the earliest period practicable after filing the affidavits or statement." (Section 196.) "An application for an order is a motion." (Section 515.) The motion, then, is a distinct and separate step in the proceedings, and subsequent to the notice of intention to move, and to the filing of the statement. The order does not in terms purport to give time to serve a notice of intention to move for a new trial, or to file and serve a statement, but only time "within which to file a motion for a new trial." This language is strictly applicable to the last step in the proceeding only. Doubtless the defendants intended to procure time to file statement. But as the statement was not filed within the twenty days given, it is unnecessary to decide this question. We refer to the form of the order for the purpose, only, of again calling attention to the necessity of seeing that orders procured are entered in such terms as to express with precision the object to be attained. (See *Bear River and Auburn Water and Mining Company v. Boles*, 24 Cal. 355, on this point.)

The order appealed from must be affirmed. The first fifty printed pages in the transcript might have been omitted. All that was necessary to constitute the transcript on appeal was the order appealed from, affidavit of Wallace, the notice of motion to strike out, statement on appeal and notice of appeal, which are all comprised in about eleven pages of the transcript.

Order striking out statement on motion for new trial affirmed with costs.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE v. PRESTON HODGES.

PLACE OF TRIAL OF ACCESSORY.—An accessory before or after the fact in the commission of a public offense must be indicted and tried in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

WANT OF JURISDICTION APPEARING ON TRIAL.—When it becomes manifest in the course of the trial of a person indicted as an accessory, that the offense of the accessory was committed in another county than that where the indictment was found, the Court should, on its own motion, discharge the jury and commit the accused to await a warrant from the proper county.

ARREST OF JUDGMENT IN CASE OF ACCESSORY.—If the evidence shows that the offense of the accessory was not committed in the county where the indictment was found, the Court should arrest the judgment without a motion to that effect being made.

DISTINCTION BETWEEN ACCESSORY AND PRINCIPAL.—A person who incites, counsels, hires, or commands another to commit a crime, but is not within such convenient distance as to be able to come to the immediate assistance of his associates, if required, or to watch to prevent surprise, is an accessory, and not a principal in the second degree.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

J. G. McCallum, J. M. Williams, and Coffroth & Spaulding,
for Appellant.

J. G. McCullough, Attorney-General, and J. O. Goods, for
Respondent.

By the Court, SHAFER, J.

Thomas B. Pool was indicted, jointly with three others, by the Grand Jury of the County of El Dorado, for the murder of Joseph M. Staples, which murder was alleged to have been committed in said county, July 1, 1864; and it was further charged in the indictment that Hodges, the appellant, within said county, "incited, counselled, hired and commanded" the said Pool and others to commit the said murder.

The appellant, on a separate trial, was found guilty by the jury of murder in the second degree, and he was thereupon sentenced by the Court to confinement in the State Prison for the period of twenty years.

There is only one question in the case necessary to be considered.

It appeared from all the testimony introduced at the trial, that the acts wherewith Hodges stood charged, were performed by him in the County of Santa Clara, over two hundred miles distant from the scene of the murder; and on that ground, it is now insisted for the appellant that the District Court for the Eleventh Judicial District, in which the trial and conviction were had, had no jurisdiction of the offense charged against him.

We consider the objection to be well taken. Section ninety-three of the Criminal Practice Act is as follows: "In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county." By section two hundred and fifty-five, all persons connected in the commission of a felony, whether they directly commit the act constituting the offense, or aid and assist in its commission, though not present, are to be indicted, tried, and punished, as principals. To that extent "all distinction between an accessory before the fact and a principal, and between principals in the first and second degree," is expressly abolished by the section.

There is no conflict between these sections. The latter (Section 255) requires that an accessory should be indicted, tried and punished in the same manner as principals; and section ninety-three fixes the place at or in which those events are to transpire.

Though the common law distinction between principal and accessory is in the main obliterated, yet it is retained for the purposes of venue. Sections eleven and twelve of the Act entitled "Crimes and punishments," define the term "accessory." Section two hundred and fifty-five of the Criminal Practice Act relates to the frame of the indictment against an accessory, the method of trial, and the measure of punishment; and section ninety-three determines the forum having juris-

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diction of the offense. It is suggested, however, on behalf of the People, that the evidence establishes that Hodges was a principal in the second degree and not an accessory. This position is not tenable, for there was no evidence tending to prove that Hodges, at the time when the murder was committed, was "at such convenient distance as to be able to come to the immediate assistance of his associates if required, or to watch to prevent surprise, or the like." (Arch. Crim. Prac. 11.) It is further insisted that the objection to the jurisdiction on the part of the appellant comes too late, no motion in arrest on that ground having been made in the Court below. When it became manifest, in the progress of the trial, that the Court had no jurisdiction of the offense, the jury should have been discharged, (Crim. Prac. Act, Sec. 382,) and the Court, on its own motion, should have committed the accused to await a warrant from the proper county for his arrest. (Ib. Sec. 383.) Again, by section four hundred and forty-three the Court was authorized, "on its own view of the jurisdictional defect, to arrest the judgment without motion." As it is apparent on the face of the record that the whole of the proceedings were *coram non iudice*, the judgment cannot be permitted to stand, even though the motion in arrest was not, in terms, based upon that objection.

Judgment reversed and cause remanded.

DAVID MAHONEY v. JAMES E. NUTTMAN, MARCUS
HARLOW, JOS. P. AMES, AND JAMES BYRNES.

TOLL ROAD IN SAN MATEO COUNTY.—The Act of March 24, 1863, entitled "An Act to allow James E. Nuttman, Marcus Harlow, and their associates or assigns to construct a toll road in the County of San Mateo," does not confer upon said Nuttman and Harlow, and their associates or assigns, the right to appropriate the county road then in use in San Mateo County to their use and purposes for such toll road.

APPEAL from the District Court, Twelfth Judicial District,
San Mateo County.

Opinion of the Court.

The facts are stated in the opinion of the Court.

G. F. & Wm. H. Sharp, and Sharp & Lloyd, for Appellants.

T. J. & M. Bergen, for Respondent.

By the Court, CURREY, J.

This action was brought to enjoin proceedings under an Act of the Legislature entitled "An Act to allow James E. Nuttman, Marcus Harlow and their associates or assigns to construct a toll road in the County of San Mateo," passed in March, 1863. (Laws 1863, p. 99.) Upon filing the complaint a preliminary injunction was granted, and by final decree the same was made perpetual.

The portion of the Act on which the appellants allege the right to appropriate the county road for their use as a toll road reads as follows: "The right to construct and maintain a toll road in San Mateo County is hereby granted to James E. Nuttman, Marcus Harlow and their associates or assigns, for the period of twenty-five years from the passage of this Act; said road to begin at the point of intersection where the present road crosses the northern boundary line between San Mateo and San Francisco Counties, and thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County." The parties were required, within a year after the passage of the Act, to open, grade and construct the road, to the width of at least thirty feet, and at all times to keep and maintain the same in thorough repair, taking and receiving for the use of said road from the public the tolls therein specified. Further, by the third section of the Act they were empowered to take, condemn and appropriate such lands as might be necessary for the construction of the road, or the right of way thereof, upon payment to the owners or claimants of such lands the ascertained value thereof, according to the provisions of the Act of May 20, 1861. (Laws 1861, p. 607.) Subsequently, in April, 1863, at the same session, another Act was passed,

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entitled "An Act supplemental to and explanatory of an Act entitled 'An Act to allow James E. Nuttman, Marcus Harlow and their assigns, to construct and maintain a toll road in the County of San Mateo, passed March twenty-fourth, eighteen hundred and sixty-three,' which reads: 'That portion of section one of the above entitled Act, which reads as follows, to wit: Said road to begin at the point of intersection where the present county road crosses the northern boundary line between San Mateo and San Francisco Counties, and thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County,' shall not be so construed as to grant or confer any rights or privileges to the said James E. Nuttman, Marcus Harlow or their assigns, to construct, build or maintain a toll road over or upon the whole or any portion of the county road running through the County of San Mateo, from the northern to the southern line of said county, and known as the San José and San Francisco County Road; nor shall any part or parts of said Act be so construed as to authorize or empower the said James E. Nuttman, Marcus Harlow or their assigns, to charge and collect any toll upon the whole or any portion of said county road; nor shall the said James E. Nuttman, Marcus Harlow or their assigns, acquire any rights or privileges under and by virtue of the above entitled Act to obstruct, in any manner or way whatsoever, the full enjoyment and free use of said county road, or any portion of the same, to the public." (Laws 1863, p. 361.)

The appellants claim that, under the first Act referred to they have the right to appropriate the county road named in these Acts, and acting upon this construction of their rights under the grant of the franchise, were appropriating the same until enjoined in this action; and further, that the supplemental and explanatory Act cannot vary, alter or impair the rights acquired, as they allege, under the first Act.

What was granted by the Act of March, 1863, is the subject first to be considered, and the determination of this ques-

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tion against the appellants' pretensions will make an end of the case.

The grantees named in the Act were authorized to construct a road—not to appropriate to their own use the county road which was already constructed. And in the construction of this road the right was granted to Nuttman, Harlow and their associates or assigns to take, condemn and appropriate such lands as might be necessary for its construction, or the right of way thereof, upon paying to the owners or claimants of said lands its value to be ascertained as provided by law. The county road was recognized by the Legislature as existing when the Act was passed; and hence it cannot be fairly presumed that it was intended the lands over which it passed and which were already condemned, to every practical intent, and appropriated by the public as a highway, were the lands to be condemned and appropriated for the construction of the new road. The subject matter granted is distinctly expressed by the Act of the Legislature, and is set forth therein as the aggregate thing of paramount prominence and importance. The effect of the Act cannot be controlled by the fact that it is therein provided that the road to be constructed was to begin at the point of intersection, "where the present county road crosses the northern boundary line between San Mateo and San Francisco Counties," and was to run "thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County." Primarily, the word "at" expresses the relations of presence, nearness in place or time, or direction toward, and it is less definite than "in" or "on." (Webster's Dic.) The precise sense in which the word may be used, must be ascertained from its connection with the other and more substantive words of the sentence of which it is a part. Here the words "at the point of intersection" should be read in connection with the words of the grant in the statute, to wit: the grant of the right to construct a road which was to run *with* the county road and not *upon* it, and which was to pass over lands which it was contemplated by the Act should be condemned and appropriated

Points decided.

upon paying to the owners or claimants thereof the just value of the same.

We are of the opinion that a fair construction of the Act of March, 1863, gave to the grantees or donees named therein, no right to appropriate the county road to their use and purposes, and that the Act of April, 1863, was not necessary to explain its object and meaning, and therefore we deem it unnecessary to pass upon the effect of the last Act.

Decree affirmed.

Mr. Justice RHODES expressed no opinion.

EDWARD P. REED v. JAMES ELDREDGE.

SPECIFIC CONTRACT ACT.—The Act of April 27th, 1863, commonly called the "Specific Contract Act," does not authorize the rendition of a judgment to be paid and collected in a specific kind of money, except in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity or to the use of another.

ACTION ON JUDGMENT RENDERED PRIOR TO APRIL 27th, 1863.—In an action upon a judgment rendered prior to the passage of the Act of April 27th, 1863, commonly called the "Specific Contract Act," the Court has no power to annex to the judgment rendered an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment.

JUDGMENT AT COMMON LAW.—At common law, the judgment of the Court was, that the plaintiff recover his debt or damages, or debt and damages, as the case might be, without any order or direction specifying how the money should be paid by the debtor or made by the officer. After judgment, the law, and not the Court, directed what proceedings should be had for the purpose of satisfying the amount adjudged to be due.

COMMON LAW.—Upon the adoption of the common law in this State, the Courts became subject to all its provisions, except in so far as the statutes worked a change in the common law rules.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

Opinion of the Court.

By the Court, RHODES, J.

The plaintiff alleges in his complaint that in 1861 he recovered a judgment in the District Court against the defendant for the sum of one thousand and fifty-nine dollars and costs of suit, which judgment remains in full force, and that he has not obtained any execution or satisfaction of the judgment, whereby an action accrued to him to demand and have of the defendant the several sums of money mentioned in the judgment, wherefore he prays for judgment for the amount of principal, interest, and costs of the judgment of 1861, "to be paid in the current United States gold and silver coin only," and for costs of suit, payable in the like current gold and silver coin only. The action was commenced December 5, 1863, and, the defendant having made default, judgment was rendered by the Court at the January term, 1864, for the amount of the former judgment and interest, together with costs of suit, the whole amount "to be paid by said defendant in current gold and silver coin only," and the Sheriff was directed to receive, in satisfaction of the execution to be issued, nothing but current gold and silver coin.

The defendant appeals from the judgment alone, and the question is, do the facts stated in the complaint authorize the Court to annex to the judgment for the recovery of the amount due, the direction that it be paid in a particular kind of money?

The counsel for the plaintiff have directed their efforts mainly to prove that the judgment of 1861 was payable in the gold and silver coin of the United States only, because it was contracted before the passage of the Legal Tender Act of Congress of July 11, 1862, and because, as they hold, a debt existing at the passage of the Act is not included within the words of the Act, "all debts," according to their true meaning, when interpreted by the recognized rules of legal construction. But that question is not necessarily involved in the case.

The first point to be determined is: had the Court the power

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to annex to the judgment rendered upon the facts stated in the complaint, an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment? If the Court did not possess the power the judgment is erroneous.

The judgment upon which the action was brought, was a contract for the payment of a sum of money evidenced by the record of a Court. The debt secured by it differs in no manner from a simple contract debt, though the evidence of the existence of the debt is of a higher and more solemn character than that by which a simple contract debt is proven. Upon proof being made in either case of the existence of the debt it becomes the duty of the Court to render judgment for the amount found due. In either case an action at law is brought to recover a sum of money alleged to be due the plaintiff in the action. The cause of action is simply a demand for the payment of a sum of money. At common law, when an action was brought on a judgment or any contract for the payment of money, the judgment of the Court was that the plaintiff recover his debt or damages or debt and damages, as the case might be, without any order or direction specifying how the money should be paid by the debtor or made by the officer. The Court adjudged that the plaintiff do have and recover of the defendant the specified sum of money, and from that point the law—not the Court—directed what proceedings should be had for the purpose of satisfying the amount adjudged to be due. Upon the adoption of the common law in this State the Courts became subject to all its provisions, both as to their powers and the mode of procedure, except in so far as the statutes worked a change in the common law rules. We doubt if an instance can be found where a Court possessing common law jurisdiction has assumed, in rendering judgment in an action for the recovery of a debt, to add to the judgment a direction similar or even analogous to that found in this case. No facts are stated in the complaint that would require a different judgment to be entered than was required at common law in any case on a contract for the payment of

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money only; and if the necessary facts had been stated in the complaint, no Court but one possessing and exercising equity powers could, in the absence of authority conferred by statute, grant the relief prayed for. The plaintiff has not cited any rule of the common law or provision of the statute conferring upon the Court authority to make the order in this case. The statute did not confer the power to make an order in an action at law, requiring the money recovered to be paid or collected in a specific kind of money, until the passage of the Act of April 27, 1863, commonly called the "Specific Contract Act." The statute engrafted upon the remedies of a general nature, that Courts of common law jurisdiction could afford, in an action at law, one of the remedies peculiar to Courts of equity, which in its nature is analogous to a decree for a specific performance; and it restricted the additional relief to a specified class of cases. That Act is not applicable to this case, for it provides, that a judgment of the character of the one before us may be entered in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity, or to the use of another, and no authority is given to the Court, in any other case, to render a judgment in an action at law, to be paid in a specific kind of money.

That portion of the judgment that requires the amount of the judgment and costs to be paid and collected in current gold and silver, is erroneous.

It is ordered that the cause be remanded to the Court below with directions to modify the judgment, by striking out those portions of it requiring the defendant to pay the sums therein specified in gold and silver coin only, and ordering an execution to be issued, and requiring the Sheriff to receive in its satisfaction nothing but current gold and silver coin.

Argument for Appellant.

MOSES ELLIS v. CHARLES B. POLHEMUS, ADMINISTRATOR OF THE ESTATE OF H. P. JAMES, DECEASED.

RATE OF INTEREST ON CLAIMS AGAINST INSOLVENT ESTATES.—If the estate of the deceased is insolvent, the administrator cannot pay more than ten per cent interest per annum, from and after the time of issuing letters, on any claim against the estate contracted after May 20th, 1861, even if the rate of interest specified in the contract is more than ten per cent per annum, and the claim is secured by a mortgage.

CLAIM AGAINST AN ESTATE.—*Per Sanderson, C. J.*—The word "claim" as used in the Act concerning the estates of deceased persons, when it speaks of claims against an estate, is broad enough to include a mortgage.

CASES COMMENTED ON.—The cases of *Fallon v. Butler*, 21 Cal. 24, and *Hilsson v. Halleck*, 6 Cal. 386, and *Faulkner v. Folsom's Executors*, 6 Cal. 412, commented on.

Per Rhodes, J.—A note secured by mortgage is a claim against the estate, but the mortgage given to secure the note is not such claim.

Per Shafter, J., Sawyer, J., concurring.—The word "claim," as used in the one hundred and thirty-first section of the Act concerning the estates of deceased persons, includes mortgages as well as claims at large against the estate.

APPEAL from the Probate Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Mastick & Gray, and John T. Doyle, for Appellant.

The question presented is simply whether the Act of May 20, 1861, section forty, (Laws, p. 637,) applies to such a case as this or not. The words of the statute are broad enough to cover it, if such was clearly the intent; and, on the other hand, no violence will be done to the words of the Act by excluding it, if such was not the intent. The meaning and intent, then, of that amendment to the Probate Act are what we have to ascertain. To arrive at the true intent of the amendment here in question, we must read it in connection with the rest of the Act, and the decisions of this Court expounding and interpreting its other parts. The question naturally resolves itself into a consideration of the import of the words "*claim against the estate*," and the term "*insolvent*," as used in this Act. Is a mortgage or lien on specific property a "*claim against the estate*" within the meaning of this Act? Is the estate of the deceased "*insolvent*" *quoad* this

Argument for Appellant.

claim within the meaning of the Act? These are the questions.

A mortgage is not a claim against the estate, because it may be and frequently is less than a claim. For example: A mere dry mortgage, not founded on or collateral to a debt to be paid, but simply a mortgage of the land conditioned for the payment of so much money, for which there is no personal promise. Suppose the appellant's mortgage had been of this character—he would not have had a claim against the estate, for he would not have had a right to receive from the administrator anything save out of the proceeds of the land mortgaged. Suppose a note secured by mortgage, and the mortgagee afterwards releases the personal liability of the mortgagor, agreeing to look to the land alone for his payment; in such case, if the mortgagor dies insolvent, the mortgagee's right to his interest cannot be affected; because, by express contract, he has renounced and released all claims against the deceased, his heirs, executors, and administrators. If the learned Judge below was right in his decision, it would appear to follow as a corollary from it, that an administrator would have no right to accept a release of the personal liability of the deceased on a debt secured by a mortgage, or that in doing so he took the risk of the solvency of the estate. If this be so, it is about the only imaginable case wherein a release would, in effect, become a cause of action in favor of the releasor against the releasee.

The decision of the Supreme Court in *Fallon v. Butler*, 21 Cal. 24, is, in our judgment, conclusive of the question here involved. The meaning of the words, "claim against the estate," as used in the Probate Act, are there examined, and it is held that they are to be deemed synonymous with "debts and demands against the decedent, which might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which only a money judgment could have been rendered."

W. H. L. Barnes, for Respondent.

Argument for Respondent.

It is urged that this claim is not subject to the provisions of section one hundred and thirty-one of the Probate Act, because it is a claim which was secured by mortgage, and did not run against the body of the estate in the first instance; that, therefore, it is not a claim against the estate within the meaning of the Probate Act.

Nothing can be found in the Probate Act itself to justify this view. In providing the mode in which claims against estates shall be presented and allowed, it makes no distinction between secured and unsecured claims, except that it requires, in the case of a claim secured by mortgage of real estate, a description of the security, and a reference to the date, volume, and page of its record in the office of the County Recorder of the county where the land mortgaged lies. (Probate Act, § 133.) This being done, and the claim having been allowed, approved, and filed, it is ranked among the acknowledged debts of the estate, to be paid in the due course of administration. (Ib.) The claim, thus filed, may be paid as a claim against the body of the estate in the due course of administration, and the lien discharged or released, as would of course be the proceeding in a solvent estate; or, if a sale is made of land subject to mortgage, or other lien, which is a valid claim against the estate of the deceased, the purchase money shall be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue in the course of administration. (Ib. § 136.) So that, so far as the Probate Act is concerned, there is no discrimination between unsecured and secured debts; both are claims against the estate and the whole of it, save that the secured debt shall have the proceeds of the security applied to its payment, if the security is sold. The secured debt is still a *claim* against the estate, having rights as to a specific portion of it in certain contingencies, but which, it is presumed, will be paid in the due course of administration. The presentation, allowance, and filing of such a claim are not steps to foreclose a specific lien on a part of an estate in the control of the Probate Court, with no reference to anything but the

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lien and its foreclosure. These acts simply place such claim before the Court, precisely as any other. The language of the section in question (§ 181) is very broad, "broad enough to cover the present case, if such was clearly the intent," say the learned counsel on the other side. We may add to this that while the statute is broad enough to cover this case, there is no provision to be found which takes the case out of the operation of the rule so broadly laid down.

By the Court, SANDERSON, C. J.

On the first day of April, 1862, Horace P. Janes gave to Moses Ellis his promissory note for twenty-five thousand dollars, payable one year from date, with interest at the rate of one and one quarter per cent per month, payable monthly; and to secure its payment gave a mortgage on certain real estate in the City of San Francisco. Janes died before the note matured. It was duly presented to the administrator of the estate of Janes, was allowed by him, and approved by the Probate Judge, and thereupon filed in the Probate Court, on the 12th of August, 1863, as a valid claim against the estate.

The administrator paid the interest on the claim, at the rate of one and one quarter per cent per month, to December 28, 1863. Subsequent to the last payment of interest, the administrator sold the mortgaged premises, and the proceeds of the sale were more than sufficient to pay the debt and interest at the rate specified in the note. Whereupon Moses Ellis filed his petition in the Probate Court, and sought to compel the administrator to account for his proceedings in the matter of the sale, and to pay to the petitioner twenty-five thousand dollars, with interest at the rate of one and one quarter per cent per month from the 28th day of December, 1863.

The foregoing facts were admitted by the administrator; but it further appeared that the estate of the deceased was insolvent; and that the fact of such insolvency was not discovered by the administrator until the 6th day of January, 1864. The Court ordered the administrator to pay the peti-

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tioner twenty-five thousand dollars, with interest at the rate of ten per cent per annum only, from the date of the letters of administration, to wit: November 9, 1862, less all sums of money which had been paid as interest since that day. The petitioner appealed, and now claims that the Court below erred in holding that he was entitled to ten per cent per annum only instead of one and one quarter per cent per month according to the terms of the note.

The one hundred and thirty-first section of the Probate Act provides, among other things, that "In case the estate is insolvent, no claim contracted after the passage of this Act shall bear greater interest than ten per cent per annum from and after the time of issuing letters." The foregoing became a part of the law of the land on the 20th of May, 1861 — nearly a year before the note and mortgage in question were made.

But it is insisted that this note is not a claim within the meaning of the foregoing provision, and is not subject to it, because it is secured by mortgage, and therefore does not run against the body of the estate in the first instance; and in support of this view the case of *Fallon v. Butler*, 21 Cal. 24, is cited. Whether that case states the law as correctly as *Ellison v. Halleck*, and *Faulkner v. Folsom's Executors*, 6 Cal. 386 and 412, which it overrules, admits of serious doubt. The meaning of the word "claim" is broad enough to embrace a mortgage or any other lien, and in the one hundred and eighty-sixth section of the Act, mortgages and other liens are expressly mentioned as valid claims against the estate. This section received no special notice, though it was cited in the brief of counsel, at the hands of the Court in *Fallon v. Butler*, yet it seems to have a very significant bearing upon the question there discussed and determined. But be that as it may, it is clear that *Fallon v. Butler* does not decide that a note when secured by a mortgage is not a claim against the estate. On the contrary, it goes no further than the naked lien of the mortgage, which, for the purposes of the question then before the Court, was regarded as something "distinct" from the note, and I am not disposed to extend the doctrine of that case

Opinion of Rhodes, J., concurring specially.

beyond its exact limits. The word "claim" is not only broad enough to include a mortgage, but if there was any doubt upon that point it would seem to be removed by the language of the one hundred and thirty-third section, which provides that "if the claim be founded on a bond, bill, note or *other instrument*, the original shall be presented," etc. This language was added to the section in 1861. When the case of *Fallon v. Butler* was tried in the Court below does not appear from the report, and it is possible that it was tried before section one hundred and thirty-three was so amended.

The note in question was presented for allowance to the administrator and the Probate Judge, and thereupon filed in the Probate Court. It was a valid claim against the estate, and having been allowed and filed, took rank, in the language of section one hundred and thirty-three, "among the acknowledged debts of the estate, to be paid in due course of administration," under the direction of the Probate Court. The estate being insolvent, this claim, as well as all others, became subject to the provisions of section one hundred and thirty-one, and the petitioner only entitled to interest at the rate of ten per cent per annum, from and after the date of the letters of administration, and there was no error on the part of the Court in so holding.

Per RHODES, J., concurring specially.

I concur in the judgment affirming the order of the Probate Court; and I agree with the Chief Justice in the opinion that a promissory note, executed by the deceased in his lifetime, whether it is secured by a mortgage or not, is a claim against the estate; but, in my opinion, the mortgage, which is but a security for the payment of the note—a mere incident to the debt—is not, in any just sense, a claim against the estate to be presented for payment.

The mortgage debt is required to be presented for payment, and when paid either by the administrator or on proceedings to foreclose the mortgage, it operates as a satisfaction—not

Opinion of Rhodes, J., concurring specially.

payment—of the mortgage. The mortgage or an abstract thereof may be required to be filed in the Probate Court with the debt, for the purpose of enabling the Court to make the proper order for the payment of the claims, and give the requisite preference to liens upon any of the assets of the estate. The statute as amended in 1861 (Probate Act, Sec. 133) seems to recognize the distinction between a claim and its security, for it says: "If the claim or any part thereof be secured by a mortgage or other lien, such mortgage or other evidence of lien shall be attached to the claim and filed therewith, unless the same be recorded," etc.

The provisions of this section may at first view seem to conflict with section one hundred and eighty-six, where provision is made for the appropriation of the proceeds of the sale of "land subject to any mortgage or other lien, which is a valid claim against the estate of the deceased," but the apparent conflict vanishes when it is remembered that a mortgage is not, in fact, a debt against the estate. The meaning and evident intent of the Legislature was to provide for the appropriation of the purchase money arising from the sale of "lands subject to any mortgage or other lien [given to secure the payment of a debt] which is a valid claim against the estate of the deceased," etc. It is further provided in the section that the money arising from the sale of the land, after the payment of the expenses, shall be first applied to the payment of the mortgage or lien, meaning, of course, the debt, the claim secured by the mortgage or other lien.

The judgment affirming the order of the Probate Court, directing that the note should bear interest at the rate of ten per cent per annum from the date of the letters of administration, does not conflict with the opinion of the Court in *Fallon v. Butler*, 21 Cal. 24, which holds that a mortgage is not a claim in the sense in which that term is employed in the Probate Act. The note was filed as a claim against the estate, and payment was sought from the administrator out of the general assets of the estate, and as the note was made after the passage of the amendments of 1861, and the estate was

Opinion of Shafter, J., Sawyer, J., concurring.

insolvent, the note must be subject to the same rule, in respect to the interest to be paid, as other notes filed as claims, which are to be paid by the administrator in due course of administration. Although such is the law in respect to the note and the interest to be paid, in case the estate is insolvent, I see no inconsistency in holding at the same time that the mortgage is not a claim against the estate, and that an action may be brought in the District Court for the enforcement of the mortgage lien by a foreclosure and a sale of the premises for the payment of the debt and interest, but what rate of interest, I do not undertake to determine.

Per SHAFTEE J., SAWYER J., concurring.

There is, in my judgment, no ambiguity affecting the word "claim" as used in the one hundred and thirty-first section of the Probate Act. However it may be in other sections, still in that section it is not limited to claims against the estate at large, as distinguished from claims secured by mortgage upon a part or upon the whole of it. The substance of the provision is that all claims having their origin in contract shall draw only ten per cent per annum, after letters of administration have been issued, if the estate of the decedent shall have been insolvent. The appellant in this case had two distinct claims — the note and the mortgage — and as each of them had its origin in contract, both of them are within the scope of the word "claim" as limited in the section; and whether considered severally, or in their relations to each other, they are directly within the ten per cent provision of the section; and as no other question than that has been raised by counsel for our consideration I concur in the affirmance of the order, on the ground stated in this opinion.

Opinion of the Court.

R. H. VANCE v. GEO. OLINGER AND JOS. LAYCOCK.

FORMER SUIT PENDING AS A DEFENSE IN EJECTMENT.—A defendant in an action to recover the possession of land is not entitled to a judgment of dismissal on the ground that a former suit between the same parties, brought for the recovery of the same land, is still pending, unless it is averred in the answer that the second action is for the same injury as the first, and that the same matters are in issue that were in issue and might have been tried in the first action.

SUITS IN EJECTMENT.—A party may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Wheaton, and *Hartley*, for Appellants.

John Reynolds, for Respondent.

By the Court, SAWYER, J.

This is an action for the recovery of land.

The complaint was filed December 29, 1859. The defendant, Olinger, in his answer, alleges that, "on or about the 2d of March, 1857, the said Robert H. Vance brought an action of ejectment in this Court against this defendant and one John McComb for the same tract or parcel of land now sued for in this action, and to which the said defendants appeared, and this defendant says the former suit so brought by the said plaintiff is still pending in this Court, and has never been determined," and he prays to be hence dismissed.

The jury found a general verdict for plaintiff, and in addition thereto found specially as follows, to wit: "We, the jury, find that the plaintiff commenced a former action in this Court, on the 7th day of March, 1857, to recover possession of the same land described and sued for in this cause, against the defendant, George Olinger, and one McComb; that said action is still pending and undetermined in this Court. That both

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defendants in that action appeared in that action, and filed the answers which appear on file in that action."

Both parties moved for judgment on the verdict. Plaintiff prevailed, and defendants appealed. It is claimed, that, on the special finding, defendants were entitled to judgment of dismissal, on the ground that there was another action pending for the same cause of action. The case of *Caperton v. Schmidt*, 26 Cal. 479, is relied on as settling the law in this State, that in an action to recover lands, as well as in other actions, a former recovery is a bar. But the difficulty is, neither the answer, nor the special verdict, states facts sufficient to show that the cause of action in the second suit, is the same as that involved in the first. It is a suit to recover the same land, it is true, but it nowhere appears that the same title is in question, or that the same injury is complained of. There is no averment to that effect in the answer, and nothing of the kind appears in the special verdict. For aught that appears, the plaintiff may have acquired the title since the commencement of his former action. Suppose the first action had been tried and determined in favor of the defendants, and the answer had averred that fact, instead of averring that the suit was still pending, but averred nothing more. It certainly would not be pretended that such an answer would be sufficient to show, that the matters in controversy in this action had been adjudicated. The second action was commenced nearly three years after the first. The plaintiff might not have had the title at the time of the commencement of the first action, and for that reason he might have failed to recover; yet he may have acquired the title since, and, upon such newly acquired title he may be entitled to recover in his present suit. It is not sufficient that the second action is brought to recover the same land. It must be for the same injury, and the same matters must be in issue that were in issue and might have been tried in the first action, otherwise the causes of action are not identical. If a judgment in the first suit would not be conclusive in the second, the pendency of the former action cannot defeat the second. Neither the answer, nor the special

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verdict states facts sufficient to show that the causes of action in the two suits are the same, and judgment was properly entered upon the verdict for the plaintiff.

This is the only error assigned on the judgment roll. The appeal is from the judgment only, and there is no statement on appeal. As we are confined to the judgment roll on this appeal, the questions arising on the motion for new trial are not before us.

Judgment affirmed.

Mr. Justice CURREY, being disqualified, did not participate in the decision of this case.

THE AMERICAN COMPANY v. G. F. BRADFORD, A. J. McGUIRE, JAMES MOYLE, A. McCORMICK, D. McKINNE, FRED. W. PARKER, SAMUEL HARRIS, WILLIAM STEGEMAN, AND THOMAS WHITE.

SPECIAL VERDICT OF A JURY.—It is the province of the Court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury.

ACQUISITION OF RIGHT TO USE WATER BY PRESCRIPTION.—The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title to the same in the person enjoying the same as against a right in any other person, which might have been but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a claim of title with the knowledge and acquiescence of the person having a prior right, and must have been uninterrupted.

BURDEN OF PROVING RIGHT TO WATER BY ADVERSE USE.—The burden of proving an adverse uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is cast on the party claiming it; and if he leaves it doubtful whether the use was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor.

FAILURE TO PLEAD FIVE YEARS ADVERSE USE OF WATER.—The party claiming a right to the use of water by five years adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the Court instruct the jury in relation to it.

DECREE ENJOINING USE OF WATER.—A decree enjoining the owners of a mining claim, situated on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of

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the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Williams & Johnson, for Appellants.

We admit that in the case of lands adverse possession only affects the remedy; and that a party could never, by adverse possession, acquire the legal title, though he could acquire the legal right to possession, and that therefore the Statute of Limitations would have to be pleaded.

But we contend the rule is very different in case of the use of the waters of a running stream. In case of such use, the right thereto is by lapse of time ripened into an absolute title; and as we need not plead the kind of title, or the number of titles we have and rely on, it is not necessary to set up the Statute of Limitations. It is only where the remedy is affected by adverse enjoyment that we must plead the Statute of Limitations; we need do no such thing where an absolute right is conferred.

We contend, also, that under the doctrine "that the jury may presume a grant," we may set up title in ourselves, or right by purchase; and if our deed is lost, or if we never had one, we may show by the evidence that we have enjoyed the use of the waters for a time corresponding to the local Statutes of Limitation, and that is of itself evidence that such deed was given, and is just as good evidence as the deed itself would be. And again, if we show a deed was given, as in this case, and then show that we, under that deed, used the water for five years, plaintiffs acquiescing in our right under that deed, that will be conclusive that the party making the deed had the power to sell and convey all the rights we enjoyed under that deed.

Mr. Washburne, in his able work on Easements and Servitudes, (p. 20,) says: "It may therefore be stated as a general

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proposition of law, that if there had been an uninterrupted user and enjoyment of an easement—a stream of water for instance—in a particular way, for more than twenty-one or twenty, or such other period of years as answers to the local period of limitations, it affords conclusive presumption of right in the party who shall have enjoyed it; provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it.”

Then it would seem from the law that if we have a deed, and that we have used the waters in question for a time corresponding to our Statute of Limitations, that our right to continue the use of the waters is perfect, unless we had first ignored our deed, or unless we had began the use of the waters by an agreement with the plaintiffs. (*Crary v. Union Water Company*, 25 Cal. 504.)

Vanclief & Gear, for Respondent.

By the Court, CURREY, J.

The plaintiff, composing a joint stock company, under the name and style of the “American Company,” brought its action in June, 1863, against the defendants, alleging in its complaint that for more than ten years then last past it had been the owner and in possession of a certain ditch called the “Deadwood Ditch,” leading and extending and conducting the waters from Deadwood Creek, in Sierra County, to Craig’s Flat and Morristown, in the same county, for mining purposes. The plaintiff alleged that by means of the ditch and a dam at the head of it across the creek, it had, during the period named, except when wrongfully prevented by the defendants, diverted, as it lawfully might, from the creek, at the dam, sufficient of its waters to fill the ditch, which quantity of water had been, during all such period, appropriated and used by the plaintiff for mining purposes; and further alleged that plaintiff was still entitled to the rights which the company had so acquired.

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The rights and property thus acquired, the plaintiff alleged, had been obstructed by the defendants, who had from time to time, without right, entered upon the ditch and dam, and upon the creek above the dam, and by ditches, sluices and dams of their construction, diverted large quantities of the waters of the creek from the ditch, by reason of which a sufficient quantity of water to fill the plaintiff's ditch could not and did not flow through it, whereby the plaintiff had sustained damage in a sum specified. The plaintiff also alleged a threatened continuance by the defendants of the wrongs of which they complain, and they show by allegations that remedies at law were inadequate for the redress of the injuries threatened, and then pray for judgment for damages and for an injunction restraining the defendants pending the suit, and that such injunction might, on the final determination of the case, be made perpetual.

All the defendants but one appeared and answered. They first admitted that plaintiff owned the ditch described, and then denied that plaintiff was at any time entitled to so much of the water of the creek as would fill its ditch, except when there was sufficient in the creek for that purpose after supplying the defendants' mining claims below the dam. The defendants also denied that during "the whole" of the period of ten years the plaintiff had diverted as much of the waters of the creek as would fill its ditch, or ever was entitled to divert therefrom that quantity, except when a surplus sufficient therefor remained after the defendants were supplied. The defendants further denied that they or either of them at any time "wrongfully, injuriously or unlawfully," diverted or turned any water of the creek out of or from the ditch, and in the same connection they denied that any water by them at any time diverted from the creek of right ought to have flowed into or through plaintiff's ditch, and in conclusion they denied that the plaintiff had sustained any damage by the acts of the defendants.

For an affirmative defense, the defendants answered that long prior to the location of the plaintiff's ditch and dam,

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certain mining claims were located and worked in the bed and banks of Deadwood Creek, by persons from whom the defendants have derived their right and title whereby the defendants' grantors became and were entitled to the use and possession of all the waters of the creek, or so much thereof as might become necessary to the working of these mining claims, as the prior appropriators of the waters of the creek. And they also averred that the waters diverted by them from Deadwood Creek naturally flowed down its bed upon defendants' mining claims until wrongfully obstructed and diverted by the plaintiff, and that the same were necessary to the working of such mining claims.

A preliminary injunction was granted in the case, and when the cause was tried a judgment was rendered for the plaintiff, and the injunction was made perpetual. The appeal is from the judgment and from an order of the Court overruling a motion made by the defendants for a new trial.

The questions of fact in issue between the parties were tried by a jury. At the trial the defendants requested the Court to instruct the jury to find specially in respect to certain facts. This the Court refused to do, but submitted to them the following questions, with directions to respond to them in writing:

First—Is plaintiff entitled to all the waters of Deadwood Creek at the point where the same is diverted by its ditch?

Second—Are defendants entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff, and if they are so entitled, to how much and at what times?

The Court also directed the jury to return a general verdict, and to fix the amount of damages if their verdict should be for the plaintiff.

The defendants excepted to the Court's refusal to submit to the jury the questions of fact propounded on their behalf, and also to the submission of the two propositions set forth and to the direction to the jury to fix the amount of damages in case their verdict should be for the plaintiff.

The jury rendered a general verdict for the plaintiff and assessed the damages at three hundred dollars, and to the first

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question they answered: "That plaintiff is entitled to all the waters of Deadwood Creek at the point where the same is diverted by its ditch," and to the second question they answered: "That defendants are not entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff."

The one hundred and seventy-fourth section of the Practice Act defines the nature and character of a general verdict, and also of a special verdict; and the next section provides that in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. But in all other cases, the Court may direct the jury to find a special verdict upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon.

It is the Court's province to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to the jury, and for refusing to comply with such a request no error can properly be assigned.

At the request of the plaintiff, the Court gave to the jury certain instructions, which it is not necessary to notice in detail. The instructions so given are, in our judgment, a just exposition of the law on the subjects to which they relate.

The defendants on their part requested the Court to instruct the jury to the effect that if they believed from the evidence that the ditch was located before the defendants' mining claims, and that plaintiff had a good title to the waters of the creek above the dam, and had never entered into any agreement as to the quantity of water to be used by each of the parties, but also still believed from the evidence that the defendants had used a portion of the waters adversely to the plaintiff for more than five years before the commencement of the action, that then, to the extent of the water so used by the defendants, the jury should find in their favor. The Court refused to so instruct the jury, and the defendants excepted.

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The instruction requested proceeds upon the theory that the plaintiff acquired by prior appropriation of the waters of the creek a property therein of which it could not be divested otherwise than by a grant or by operation of law; and assuming this, the defendants claimed that by their adverse use and enjoyment of a portion of the waters of the stream for the period stated, the presumption had arisen that they had derived from the plaintiff by grant the right to the use of the water to the extent which they had during such period used the stream.

The general and established doctrine is that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not asserted. (8 Kent's Com. 441 to 446; *Bealey v. Shaw*, 6 East, 214; *Shaw v. Crawford*, 10 John. 236; *Johns v. Stevens*, 3 Vermont, 316; *Union Water Co. v. Crary*, 25 Cal. 504.)

The right which the defendants claim under the grant, which they assumed to exist, as evidenced by their adverse use and enjoyment of the water for five years, they denominate an easement. An easement or servitude may be created by grant or prescription, and when created it will pass by conveyance with the dominant estate (that is, with the estate to which it is appurtenant, as an incorporeal hereditament) attached to the servient estate, subjecting the latter to the benefit of the former. But the owner of the easement or servitude has no general property in nor seizin of the servient estate, though he may, by holding a fee in the dominant estate, have an estate of inheritance in the easement or servitude. (Wash. on Easements and Servitudes, Ch. 1, Sec. 1; Ersk. Inst. 352; *Wolf v. Frost*, 4 Sand. Ch. R. 89.)

A grant of an estate in lands, whether corporeal or incorporeal, may be presumed from an adverse enjoyment for the

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period corresponding to the Statute of Limitations within which an action might have been maintained against the person holding and enjoying adversely. But what must be the circumstances under which such presumption may arise? In order that the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been *adverse* in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner and uninterrupted, it is not conclusive in his favor. (2 Greenleaf's Ev. Sec. 539; Greenleaf's Cruise, Tit. 31, Ch. 1, note 1 to Sec. 21, and cases therein cited.)

According to the common law system of pleading a defendant could not give in evidence under the general issue, in excuse or justification of an alleged trespass, a right of common, or a public or private right of way or a right to an easement, nor any interest in land short of property or right of possession. (*Saunders v. Wilson*, 15 Wend. 338; *Babcock v. Lamb*, 1 Cow. 239; *Rouse v. Bardin*, 1 Hen. Black. 352; 2 Saund. Pl. and Ev. 856; 1 Chitty Pl. 505.) A defense of the kind mentioned had to be pleaded specially. The reason of the rule was to prevent surprise. (*Demick v. Chapman*, 11 John. 182.)

The rule of the common law here referred to has not been changed so as to obviate the necessity of pleading specially such defense. By the law of this State the defendants were bound to interpose their alleged right by answer as well as by evidence, provided it be conceded that plaintiff had the prior right and title to the waters of the creek, as the requested instructions assumed as the predicate for the presumption that a grant of a portion of the waters had been made to the defendants. This defense was, within the language of the forty-sixth section of the Practice Act, *new matter*, which it was necessary to plead in order to become available for the defendants. (*McKyring v. Bull*, 16 N. Y. 307.) The defend-

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ants having failed to tender by answer an issue as to their right to a portion of the water as an easement or servitude derived from the plaintiff by grant to be presumed from an adverse user and enjoyment of it for five years, the Court properly refused to instruct the jury as requested.

But the requested instruction was properly refused on another ground. All the conditions on which a grant may be presumed were not stated. The defendants may have used a portion of the waters to which the plaintiff was of right entitled, adversely to the company for five years before the action was commenced, but still without the knowledge or acquiescence of the plaintiff, and not without interruption. If the jury had been instructed as requested it would have been erroneous, aside from the objection that the defense was not pleaded, because an adverse use and enjoyment may have been interrupted or may have been without the knowledge and acquiescence of the plaintiff, in either of which events no presumption of a grant could have arisen. (Wash. on Easements and Servitudes, 86.)

The remaining alleged error is, that the decree in the case goes beyond the relief sought by the complaint. By the complaint the plaintiff makes no claim of right to the waters of the creek beyond an amount sufficient to fill its ditch; and the wrongful acts of the defendants, of which the plaintiff complains, are limited to an invasion of its right to the water to the extent stated. The creek may furnish an amount of water in excess of the quantity necessary to fill the ditch, to which the plaintiff has no right but to which the defendants may be entitled as the owners of mining claims on the stream below the dam. The decree of the Court forever enjoins and restrains the defendants from diverting any water from or in any manner interfering with the waters of the creek that rise above the plaintiff's dam, and from diverting any of the waters of the creek that would otherwise flow into and through the ditch, and from in any manner interfering with the plaintiff's ditch and dam.

The decree enjoining the defendants against interference

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with the waters of the creek which rise above the dam, we understand to mean, as the language fairly imports, not to prohibit the use and enjoyment by the defendants of the waters of the creek which may remain and flow down the creek after the plaintiff's ditch is supplied with the quantity necessary to fill it, but to prevent them from interfering with the water above the dam or disturbing the plaintiff's right to a quantity sufficient to fill and supply the ditch; as to the surplus, it does not appear the plaintiff has the right to detain or divert it from the defendants.

Judgment affirmed.

TOWNSEND BAGLEY v. GEORGE R. WARD, AND
FREDERICK MEBIUS.

LIEN OF A JUSTICE'S JUDGMENT ON REAL ESTATE.—A judgment rendered by a Justice of the Peace does not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the Justice, has been recorded in the office of the County Recorder.

RECORDING OF DOCKET ENTRIES OF A JUSTICE.—The filing and recording in the Recorder's office of the copies of docket entries made by a Justice of the Peace, does not constitute the judgment a lien on the real estate of the judgment debtor.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment, and defendants appealed.
The other facts are stated in the opinion of the Court.

Stanley & Hayes, for Appellants.

The alleged transcripts do not themselves profess to be "a transcript of the judgment;" they are certified to be "a true and correct transcript of the judgment *docket*." A Justice of the Peace has no authority by law to keep a book denominated a "judgment docket;" the only book he is authorized to keep is one called a "docket," and the statute specifies in detail what entries are to be made in it. (Practice Act, Sec.

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604.) None of these entries correspond with the alleged transcripts.

G. F. & W. H. Sharp, for Respondent.

By the Court, RHODES, J.

This is an action of ejectment to recover the undivided half of a lot in San Francisco. The complaint is in the usual form, and the answer denies most of the material allegations of the complaint, and sets up title in the lessor of one of the defendants, but the parties have narrowed the issues by their stipulation made August 30, 1860, by which it was agreed "that on the 5th of November, 1855, Sanders and Brenham owned and possessed one equal undivided half of hundred vara lot Number Two Hundred and Fifty-Three. That plaintiff claims to have Sanders' and Brenham's title to said undivided half of said lot under attachments and judgment sales against Sanders and Brenham, and not otherwise; and said defendant claims to have Sanders' and Brenham's title to said undivided half of said lot under attachments and judgment sales against said Sanders and Brenham, and not otherwise; and that the sole issue to be tried herein is—which party to this suit has succeeded to the title of Sanders and Brenham?"

The plaintiff introduced in evidence two judgments against Sanders and Brenham, rendered January 14, 1856, by a Justice of the Peace, under each of which the premises were sold January 20, 1858; also a judgment in the case of *Center v. Sanders and Brenham*, rendered by the District Court, January 25, 1856, under which the plaintiff redeemed the premises from the sales made under the Justice's judgments. A Sheriff's deed was executed to the plaintiff as such redemptioner, October 19, 1858.

The plaintiff, in order to show that the *Center* judgment was a lien on the premises, subsequent to that of the two judgments rendered by the Justice of the Peace, introduced in evidence copies of the record in the County Recorder's

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office, which were copies of original papers filed and recorded therein as transcripts of the judgment docket of the Justice of the Peace, of the two judgments rendered by him, the transcripts being in form quite similar to the docket entries required to be made in the judgment dockets kept by County Clerks of judgments rendered in the District Court, but they were *not copies* of the judgments of the Justice of the Peace. The defendants objected to the admission of the Recorder's copies of the Justice's docket entries on several grounds, and among others that they were not transcripts of the judgments which were required by law to be filed in the Recorder's office, to constitute liens upon the real estate of the judgment debtor, but the Court overruled the objections. We consider the objection well taken. The law does not recognize a Justice's judgment docket for any purpose, and in order to create a lien upon the real estate of the judgment debtor, a transcript of the judgment — which is a copy of the judgment — certified by the Justice, must be filed and recorded in the County Recorder's office. (Practice Act, Sec. 599.) The filing and recording in the Recorder's office of the copies of the Justice's judgment docket entries did not constitute the judgment a lien on the real estate of Sanders and Brenham. It follows, therefore, that the Center judgment was not a lien upon the premises, subsequent to that of the judgments rendered by the Justice of the Peace, and that the holder of the Center judgment was not a redemptioner from the sales made under the Justice's judgments. (Practice Act, Sec. 230.) The deed executed by the Sheriff to the plaintiff as such redemptioner was without authority of law and is void.

It appears from the statement that the Court found for the plaintiff on the ground that the filing in the Recorder's office of the copies of the Justice's judgment docket created a lien upon the premises, and it is therefore improper for us to attempt to ascertain whether the remaining evidence introduced by the plaintiff was sufficient to have authorized the

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Court to find for the plaintiff, for it is the province of the Court below to find the facts in the case.

Judgment reversed and cause remanded for a new trial.

Mr. Justice CURREY expressed no opinion.

WILLIAM A. ELGIN v. JAMES HILL.

DATE OF CERTIFICATE TO DEPOSITION.—If, at the end of a deposition taken by a Commissioner out of the State, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the Practice Act should be dated.

DEPOSITION TAKEN BY STIPULATION.—If the parties stipulate that a Commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the Commissioner, it is not necessary that the Commissioner state in his certificate the day the same was taken.

INTERESTED WITNESS.—One whose interest is equally balanced between plaintiff and defendant is a competent witness.

PURCHASE OF NOTE PAST DUE.—One who purchases a promissory note past due, but which has been paid before the purchase, takes it subject to the defense of payment, even if he was ignorant at the time of his purchase that it had been paid.

APPEAL from the District Court, Seventh Judicial District, Napa County.

The deposition spoken of in the opinion was taken in the Territory of Nevada by a Commissioner for this State, pursuant to the following stipulation:

“It is hereby stipulated and agreed, by and between the parties hereto, that the deposition of Wm. H. James, a resident of Nevada Territory, be taken in answer to the interrogatories, direct and cross, hereto attached, before some person authorized to take depositions, subject to all legal objections and exceptions, except as hereby waived. Notice, order, commission and channel of conveyance are not required to be in accordance with statutory provisions, and all objections to any

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omission, informality or irregularity in those regards, are hereby waived.

"Feb. 16th, 1864.

WHITMAN & WELLS, for Plaintiff.

"WALLACE & RAYLE,

"Attorneys for Defendant."

The suit was brought on a promissory note given by defendant Hill to one William Hudson or order, at Napa Valley, on the first day of April, 1859, payable on the 15th day of April, 1859.

The complaint averred the endorsement of the note by Hudson, and that plaintiff Elgin was the owner and holder. The action was commenced September 8th, 1862.

The answer averred that the note was paid by the defendant after it became due, and before plaintiff received it.

The deposition of James tended to show, that after Hudson had received Hill's note, the two firms of W. H. James & Co. and L. H. Murray & Co., who were doing business as merchants in Napa County, purchased the same from Hudson, and gave him their note in exchange therefor, and that afterwards, and about April, 1860, and while the firms still owned the note, Hill paid W. H. James & Co. the full amount due on the note, and that Hill asked to have his note delivered up, but James told him it was at the store of L. H. Murray & Co., and he would get it. Elgin, the plaintiff, afterwards received the note from Murray.

Defendant recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

Wallace & Rayle, for Respondent.

By the Court, SANDERSON, C. J.

The Court below did not err in admitting the deposition of W. H. James. The omission of the Commissioner before whom it was taken to append a date to his final certificate, was of

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no consequence. At the end of the deposition there is a certificate signed by the Commissioner, in the ordinary form to the effect that the deposition was sworn to and subscribed by the witness on the 5th day of March, 1863. Then follows immediately thereafter, without further date, a further certificate as to a compliance with the provisions of the four hundred and thirtieth section of the Practice Act, which directs the Commissioner to read the deposition to the witness, in order that he may have an opportunity to correct it if any mistake has been made. The two are to be read together, and if it was important to have the date at which the deposition was taken appear, it is clearly and sufficiently shown by the first certificate, and a repetition of the date in the last was wholly unnecessary. But, independent of the foregoing, the date was a matter of no consequence. The deposition, as appears upon its face, was taken pursuant to settled interrogatories direct and cross, and a stipulation between the parties annexed thereto, in which there is no mention of any date at which the same should be taken. The date, doubtless, was designedly omitted, in order that the deposition might be taken at such time as might suit the convenience of the witness and the Commissioner. Such being the case, we are unable to perceive how the date could have been of any consequence to either party, or how its absence from the certificate, had such been the fact, could affect any question as to the admissibility of the deposition.

Nor was the witness James incompetent on the ground of interest. As we understand the evidence the plaintiff received the note in suit in payment of a debt due to him from the firms of W. H. James & Co. and L. H. Murray & Co., of both of which the witness was a member. His interest, therefore, if he had any, was equally balanced between the plaintiff and defendant. If his testimony tended to discharge him from liability to the defendant, it also tended to charge him with liability to the plaintiff, and *vice versa*.

The deposition of James being in, the correctness of the verdict does not admit of debate. The jury could not have

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found otherwise without a total disregard of the evidence. The note was paid long before it came into the hands of the plaintiff, and there can be but little doubt but that he knew it had been paid when he received it. But, be that as it may, the note was long past due when he became the holder, and he therefore took it subject to all existing defenses.

The exceptions to some of the instructions upon the ground that they were irrelevant and calculated to mislead the jury, are not well taken.

Judgment affirmed.

BRIDGET McEVOY v. JAMES IGO.

COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—A complaint in an action under the Forcible Entry and Detainer Act, other than actions against tenants holding over as provided in said Act, does not state facts sufficient to constitute a cause of action, unless it allege a forcible entry or a forcible detainer.

APPEAL from the County Court, City and County of San Francisco.

Plaintiff recovered judgment, and defendant appealed.
The other facts are stated in the opinion of the Court.

William M. Pierson, for Appellant.

Gardner & Woodson, for Respondent.

By the Court, **SAWYER, J.**

The complaint in this case does not state facts sufficient to entitle plaintiff to recover in an action under the Forcible Entry and Detainer Act. If plaintiff is entitled to recover in this action on the evidence introduced, it is on the ground, that, there was a forcible entry, or a forcible detainer after an unlawful entry, or both. The evidence was, perhaps, sufficient to show a forcible entry within the principle of *Minturn v. Burr*. 16 Cal. 107, and 20 Cal. 49, but no force, either in the

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entry, or detainer, is alleged. After stating possession of the land, the complaint proceeds as follows: "Plaintiff further alleges, that, being so in quiet and peaceable possession of said described premises, and entitled to the possession of the same, the said defendant, on or about the 25th day of February, 1863, unlawfully entered upon the said described premises, and took possession of the same, and the said defendant has ever since illegally and unlawfully detained possession of the same from the plaintiff against the form of the statute in such case made and provided, to her great damage, to wit, the sum of fifty dollars." This is the entire averment with respect to the character of the entry and detainer. The facts alleged are sufficient to authorize a recovery in the action formerly denominated ejectment—nothing more. It is unnecessary to add, that neither a Justice of the Peace, nor the County Court on appeal, has jurisdiction in such an action.

Judgment reversed and cause remanded.

GEORGE T. CROWTHER v. THOMAS ROWLANDSON,
AND ELIZA J. D. ROWLANDSON.

PROOF OF INSANITY.—Proof that at the time a grantor delivered a conveyance of property to the grantee, he was incapacitated from taking a rational care of his property by reason of mental delusion, is sufficient to justify a Court in setting aside the conveyance on the ground of the insanity of the grantor. A total loss of understanding is evidence of an imbecile rather than of an insane mind.

LIMITATION OF ACTION TO SET ASIDE DEED OF INSANE MAN.—If a person, while insane, is fraudulently induced to execute a conveyance of his property to another, the Statute of Limitations will not commence running against the grantor's right to commence an action to set aside the deed, until he recovers his reason and discovers what he has done.

MOTION FOR NEW TRIAL AFTER REFERENCE.—If, after the Court has filed its findings of fact, and made an order sending the case to a referee to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee.

WHEN NOTICE TO MOVE FOR NEW TRIAL SHOULD BE GIVEN.—If the case is tried by the Court, and findings of fact are made and filed, and the case is then sent to a referee to take and state an account, the necessary steps to apply for a new trial should not be taken until the final report of the referee is filed.

STATEMENT MUST SPECIFY ERROR.—On appeal from an order denying a new

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trial, the appellate Court will not entertain an objection, however well founded, unless it is specified as an error in the statement.

TAKING AN ACCOUNT BY A REFEREE.— If a conveyance is set aside at the suit of the grantor, because of his insanity at the time of its delivery, the account taken under the decree should include such property only as passed into the hands of the grantee under the transfer.

ESTOPPEL IN RELATION TO DEPOSITION.— If a commission to take the deposition of a witness out of this State is issued, on the application of one party without the consent of the other, to a person who is not a Judge, or Justice of the Peace, or a Commissioner appointed by the Governor of this State, and the party who does not consent, after the appointment, files cross interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the Commissioner was improperly appointed.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint in this case sets forth substantially that the plaintiff, after a residence of some years in the City of San Francisco, was, on the 15th of April, 1856, possessed of real and personal property to the amount of about forty thousand dollars. That the defendant, Eliza J. D. Rowlandson, is the sister of the plaintiff, and the defendant, Thomas Rowlandson, her husband. That the defendants emigrated from England to California, and arrived in San Francisco about the first of March, 1856; that they were poor when they left England, and when they arrived in San Francisco were destitute of means; that when they arrived the plaintiff was in ill health, which affected his mind, and that he, soon after their arrival, became insane; that while in this condition the defendants instigated him to embark in the steamship for New York, on the 21st of April, 1856; that he reached the East in that situation, and did not recover so as to be fit for business for a period of two and a half to three years from that time; that he returned to San Francisco in November, 1860; that at the time he left, his property consisted: First—Of the stock in a store carried on by him in San Francisco, with a lease of the same, amounting in all to about ten thousand dollars in value, and bills receivable amounting to about fifteen thousand dollars. Second—A piece of land at San Francisco, near Mission

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Dolores. Third — A house and improvements on Sutter street. Fourth — Some articles of household furniture.

The plaintiff avers that a bill of sale of the stock, or first item mentioned, was executed by him, while he was insane, to Thomas Rowlandson a few days before he left, or on the day he left; that on the same day he executed a deed of the land near Mission Dolores, the second piece of property above mentioned, to the other defendant, Eliza J. D. Rowlandson, and also the bill of sale of the house and improvements on Sutter street, and of the articles of household furniture, being the third and fourth pieces of property above mentioned.

He further states that no consideration was paid for those instruments; that he was insane when they were executed; that the defendant knew him to be then insane, and fraudulently procured him to execute those instruments, and when he left took possession of the property.

The consideration expressed on the face of those instruments is as follows, viz:

In the bill of sale to the defendant, Thomas Rowlandson, of the stock in trade, five thousand dollars. In the bill of sale to Mrs. Rowlandson of house and improvements on Sutter street, and the furniture, one thousand dollars, and in the deed of the real estate near Mission Dolores, to Mrs. Rowlandson, one dollar.

The complaint prays that those instruments be declared null and void; that the defendants be adjudged to reconvey the property thereby granted or transferred, and that they account for all moneys received by them for the rents, and from the personal property.

The answer of the defendants denies their pecuniary inability in England, or their want of means on their arrival in San Francisco. They deny the alleged insanity of the plaintiff at the time of the execution of the several instruments; they aver that the bill of sale of the house and improvements was executed on the 15th August, 1855, instead of the 15th April, 1856, and was delivered to defendant, Mrs. Rowlandson, immediately on her arrival. The consideration for the sale

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of the stock is particularly set out, and they deny that the several instruments were executed without any consideration; they deny that the plaintiff became insane before he left San Francisco, and that instead of inducing him to leave, he went away against their urgent request and remonstrance. It is also alleged that the plaintiff recovered the entire use of his reason in 1857, and they plead the Statute of Limitations, the action not having been commenced till the 2d October, 1861, more than three years from the time of his recovery.

A replication was filed in which plaintiff admits that he made a mistake in the complaint as to the date of the bill of sale of the house and furniture to Mrs. Rowlandson, but he denies on his information and belief that it was delivered to her immediately on her arrival at San Francisco.

The other facts are stated in the opinion of the Court.

P. G. Buchan, for Appellants.

The law on the question of insanity or mental imbecility affecting civil contracts, is well settled.

No degree of physical or mental imbecility which does not deprive one of legal competency to act is of itself sufficient to avoid a contract. (*Farnham v. Brooks*, 9 Pick. 212.)

A contract with a man of weak mind is binding, if no fraud or undue advantage is taken of his situation. (*Somes v. Skinner*, 16 Mass. 358.)

In order to avoid a deed, an entire loss of the understanding must be shown. Proof of a weak or impaired mind, or a want of understanding on some occasion only, is not enough. (*Person v. Warren*, 14 Barb. N. Y. 458; *Jackson v. King*, 21 Cowen, 207; *Petrie v. Shoemaker*, 24 Wend. 45.)

Mere imbecility is not sufficient. (*Blanchard v. Nestle*, 3 Denio, 37; see also the celebrated Parrish case in the 25th New York Reports, recently published, where the whole doctrine is fully discussed.)

Hoge & Wilson, for Respondent, referred to Stock on Non

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Compos Mentis, 25 Law Lib. 1-12; and Shelford on Lunacy, 1-49; and Halsam on Madness, 41, 42.)

By the Court, SHAFER, J.

The plaintiff executed to his sister, Mrs. Rowlandson, a deed of a lot situate near the Mission Dolores, in the City and County of San Francisco, and a bill of sale of a house, and other improvements, on a lot on Sutter street, including also certain household furniture. The conveyance bears date April 15, 1856, and the bill of sale, August 15, 1855, but both were acknowledged on the same day, viz: April 15, 1856. The plaintiff also sold to Thomas Rowlandson, at or about the same date, a warehouse situate on Leidesdorff street, together with the plaintiff's stock in trade therein, and assigned to Rowlandson the lease of the lot on which the warehouse stood, and the good will of the plaintiff's business as a wholesale and retail liquor merchant, and certain book debts and bills receivable—all of the aggregate value of twenty-five thousand dollars. The plaintiff left for the East by the steamer of April 21, 1856, and Rowlandson on that day took possession of all and singular the property before named, and proceeded in the conduct of the liquor business, and in the management of all the property, in his own name. The plaintiff returned to this State November 24, 1860, and on the 2d of October, 1861, commenced this action for the purpose of setting aside the conveyance, bills of sale and assignments aforesaid, on the ground that he was incapacitated by insanity from transacting business at the time the papers were executed. The answer denies the allegation of insanity, and sets up the Statute of Limitations in bar. The trial was by the Court, who found for the plaintiff on both issues. The defendants moved for a new trial, on the ground that the evidence did not justify the decision, and also on the ground of certain alleged errors of law occurring at the trial. A new trial was denied, and the defendants' appeal is from the order.

First—As to the sufficiency of the evidence to justify the

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finding that the plaintiff was insane at the time the conveyance and the other instruments were executed.

The appellants insist that there is no evidence in the case tending to prove that the plaintiff was insane at the time the execution of the papers was perfected by delivery; or if there was, still that the evidence on the other side was so overwhelming, as to justify the interposition of this Court under the rules by which its practice in such cases is governed.

The only point which we are here called upon to consider, is, whether there was a sensible conflict in the evidence bearing upon the question of insanity.

The counsel of the appellants is mistaken in supposing that the plaintiff's alleged insanity could be established only by proof that he was "entirely destitute of understanding." Loss of understanding would be proof of an imbecile rather than of an insane or disordered mind. Fatuity is one thing, and madness is another; and an answer to the larger part of the argument submitted for the appellants, is found in the fact, that the distinction between the two has been overlooked. To establish the insanity alleged, it was sufficient for the plaintiff to prove that at the time he delivered the instruments referred to, he was incapacitated from a rational care of his property by reason of mental delusion. (*Bond v. Bond*, 7 Allen, 1.)

It appears that sometime before the instruments in question were executed, the plaintiff became involved in lawsuits, which were pending on the 21st of April, 1856, the day on which he left for the East; and the purpose and drift of the plaintiff's evidence, was, to show that the merely natural concern awakened in his mind by the litigation, in the first instance, had, in the progress of events, taken on the form and impress of an insane fear that he was in danger of losing, or of being "robbed" of his property through the lawsuits so pending against him; and that under the influence of that delusion he transferred all of his property without consideration to his sister and her husband.

It may be true that Crowther, when he first conceived the purpose of transferring his property, was perfectly sane, and

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that he was also sane when he opened a sham account with Mrs. Rowlandson before her arrival here from England; still, if, as matter of fact, he finally executed the papers in question under the influence and ascendancy of the delusion named, it is enough. Though one of the instruments bears date August 15, 1855, and the others April 15, 1856, yet there was evidence introduced tending to prove that they were not in fact delivered until the 21st of that month—the day when they were all acknowledged. On that day, the plaintiff embarked for New York on board the steamer Sonora. A fellow passenger, who had known Crowther for some years, testified, that on the evening of the 21st, his conversation was rambling and incoherent, and was still more so the next day; that he talked about his troubles—asked the witness if “he thought they would rob him,” and said he “did not know but that they would ruin him.” He said he came away all of a sudden—talked about his lawsuits, was confused, and the witness thought he was drunk “because he talked so foolish.” There was no evidence that plaintiff drank anything on board, and none even that he ever indulged in the use of liquor. It further appeared, that on the third or fourth day out, the plaintiff “became a perfect maniac,” stripped himself of his clothing and attempted to jump overboard. After this he was kept in a close room until the arrival of the steamer at Panama. At Panama, Crowther was put in the custody of a man hired for the purpose by the Captain of the steamer, and was accompanied by him to New York and thence to his friends in the State of Maine. On his arrival there, he was placed by his friends in the Insane Asylum at Augusta.

We need not remark upon the tendency of this testimony, nor upon the question of its force. The particular facts which it discloses are recognized indications of insanity—the apparent inebriation being one of the most significant. (Shelford on Lunacy, pp. 49, 67.) And it is to be borne in mind that these indications were developed, and in a remarkable degree, on the very day when the instruments in question were executed, and but two or three days before the plaintiff became

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lunatic beyond question. Were there no other testimony than that which we have referred to, the motion for new trial would have to be denied. But there is other testimony tending to prove that Crowther was under the influence of the particular delusion referred to, at the time when the papers were delivered, and at least for some days before. It was in proof that Crowther was of a highly nervous temperament; that he had been in the charge of his physician for some twelve months before he left for the East; that "his disease was more mental than bodily;" that this mental disease increased gradually; that the disease threatened to terminate in lunacy, and might have been brought on by excitement at any moment; that a judgment for five thousand dollars in a slander suit had been recovered against him, and that he had been confined to his room for some ten days before he left for the East; that he was irritable, wakeful, and given to nightwalking; that "prior to his leaving he was in the most excited state of nervous irritability," and so much so that the defendant Rowlandson "dreaded the effect of the voyage, and opposed it, only ceasing to do so when he found that his staying might probably be productive of more injury than taking the voyage." Rowlandson, in a letter addressed to the superintendent of the Maine Asylum, says: "He (Crowther) was rapidly recovering before he left San Francisco, a relapse being occasioned by the excitement of a forthcoming trial." Crowther's physician testified that he "called on Crowther the day the boat was about to leave. Was sent for by Rowlandson, but came away without seeing him (Crowther). Was told by Rowlandson that Crowther was up stairs, very excitable, and it perhaps would be better not to see him. Heard him walking to and fro overhead." The testimony on the part of the plaintiff further tended to prove that Crowther was worth some forty thousand dollars, and was in good standing and credit as a merchant, and there was little or no proof that his apprehensions of ruin, as the result of his lawsuits, had any rational basis. The evidence of the plaintiff runs largely into detail, but the substance of it is contained in the foregoing summary. This tes-

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timony of the plaintiff, had, in our judgment, a manifest tendency to prove the insanity alleged. The evidence introduced by the defendants in support of their denial of the allegation of insanity, was very far from being destitute of weight, and if the Court had found the point against the plaintiff instead of for him, we could not have disturbed the judgment on the ground of a false finding.

Second — As to the defense of the Statute of Limitations.

The complaint not only alleges insanity on the part of the plaintiff, but contains allegations of fraud on the part of the defendants, and the replication meets the bar of the statute on the ground that the action was brought before the expiration of three years from the time when the fraud was discovered. We have examined the testimony bearing upon the question raised by the replication, and have considered the arguments of counsel. The evidence tends to prove that the plaintiff recovered his reason in February, 1857, and it is admitted that he returned to the State, November 24, 1860. Assuming that the plaintiff was insane at the time when the conveyance and bills of sale were executed, there can be no doubt that the point in controversy might well have been found in the plaintiff's favor on the ground of that fact alone. All, or some at least, of the instruments were recorded, but it cannot be inferred from that that the plaintiff was advised, before his return to the country, of what he had done while insane. Nor does it appear that either of the defendants, in the frequent letters written by them to Crowther, or his friends during his absence, made any disclosures on that subject. A power of attorney, executed by the plaintiff to Rowlandson at or about the 21st of April, 1856, is referred to in the correspondence, and the prominent idea, presented in all the letters, is, that Rowlandson was managing the property and business, as the agent of the plaintiff, to whom it still belonged, and to whom he held himself accountable. There was also evidence tending to prove that the defendants had availed themselves of the plaintiff's insanity to procure the execution of the instruments in question. The weight of this evidence was with the Court

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that tried the cause, and, under the settled practice of this Court, we cannot review its finding.

Third—The findings were filed March 19, 1863, and the case was referred to a Master to take and state an account. On the 30th of the same month, the defendants filed and served a notice of motion for a new trial. On the 27th of April following, the defendants moved for a stay of proceedings then pending before the referee, on the ground of the pendency of the motion for new trial. The motion was denied, and the denial is assigned for error.

By the one hundred and ninety-fifth section of the Act of 1863, it is provided that when "an action has been tried by the Court, or by a Commissioner or a referee," the party intending to move for a new trial shall give a written notice thereof within ten days after receiving written notice of the findings of the Judge, or the report of the Commissioner or referee. The issues in this case were tried in part by the Court and were in part committed for trial to a referee; and therefore, the case does not fall within either of the express allotments of the section. But it is apparent that the intention of the Legislature, was, that proceedings in new trials should be postponed until cases had been "tried." The trial of this case was not complete until the final report of the referee was filed. As the defendants renewed their notice of motion for new trial after the report was filed, and on a new statement, a decision of the point upon which we have just passed, is of no practical consequence, except, as it bears upon the regularity and effect of the referee's report as a proceeding in the case.

Fourth—It is objected that, on the evidence in the case, the plaintiff was entitled to an allowance of five hundred dollars only as advance to the defendants by Brown Brothers & Co., in New York. This objection cannot be entertained, however well founded it may be, for the reason that it is not specified as an error of fact in the statement on motion for new trial.

Fifth—As to the seven hundred dollars advanced by the plaintiff to the defendant Rowlandson before he left England

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for this country, it was improperly allowed. The only account that could be taken, in the theory of the action, was of the property which passed into the hands of the defendants under the transfer, or by virtue of the power of attorney, made by the plaintiff while insane.

Sixth—It is urged that the Court erred in overruling the objection taken to the deposition of J. W. Crowther.

We are satisfied that the transactions connected with the taking of the deposition preclude the defendants from saying that the Commissioner was not a person competent to take it. Cross interrogatories were filed after the order designating the Commissioner was made, and were, together with the interrogatories in chief, annexed to the commission. Subsequently the defendants stipulated that the commission "authorizing the Hon. George Evans to take the deposition of John W. Crowther, at the City of Portland, in the State of Maine, to be read in evidence on the trial of said action," should be returned by Wells & Fargo's Express. The defendants also obtained a stipulation from plaintiff's attorneys granting further time within which to file cross interrogatories, and themselves stipulated that the deposition might be opened by the plaintiff without prejudice to his right to read it in evidence at the trial of the action. The filing of the cross interrogatories after the Commissioner had been appointed, coupled with the first stipulation, in our judgment estopped the defendants from saying that the Commissioner was improperly appointed.

In the event that the plaintiff shall, within fifteen days, file with the Clerk of this Court a release of the personal judgment against the defendants of sixteen thousand seven hundred and ninety-nine dollars and forty-two cents, to the extent of seven hundred dollars parcel thereof, the judgment will stand as affirmed, otherwise the judgment is reversed and new trial granted.

And it is so ordered.

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Mr. Justice SAWYER being disqualified did not participate in the decision of this case.

By the Court, SHAFER, J., on petition for rehearing.

Motion for rehearing.

In the opinion filed in this action at the last term, we held there was evidence in the case tending to prove that the bill of sale of the house and improvements on Sutter street, though dated August 15, 1855, was not in fact delivered until the 21st of April, 1856. We so held under the impression that it appeared by the record that the instrument was in the hands of Crowther on the day named, and that he then personally appeared before a notary and acknowledged its execution. We were mistaken, in that particular, however. The bill of sale, instead of being acknowledged by Crowther, was proved before the notary by the attesting witness. A rehearing is granted, in so far as the question of the validity of said bill of sale is concerned, unless the plaintiff within fifteen days shall file with the Clerk of this Court a release fully discharging the property embraced in said bill of sale from the operation of the decree; whereupon the decree will be and stand as reversed in so far as it avoids and annuls said bill of sale, and will be and stand as affirmed as to the residue thereof, except in the particular wherein it has already been modified—the appellants to recover the costs of appeal.

And it is so ordered.

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In order to entitle a party to the relief sought in this case, upon the ground alleged, it must be made to appear, by satisfactory evidence, that he was, at the time of the execution and delivery of the several instruments sought to be cancelled, *non compos mentis*, within the legal meaning of those words. It is not sufficient to show a partial want of reason or understanding, for an entire and total absence must be shown in

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order to authorize the avoidance of a deed where there is no fraud apparent on the part of the grantee. In *Osterhout v. Shoemaker*, (reported in Note a to *Blanchard v. Nestle*, 3 Denio, 37,) Mr. Chief Justice Bronson said: "Our law does not distinguish between different degrees of intelligence. It does not deny to a man of a very feeble mind the right to make contracts and manage his own affairs. In the absence of fraud, proof of mere imbecility of mind in the grantor, however great it may be, will not avoid his deed. There must be a total want of understanding."

The legal presumption is that every man is *compos mentis*, and the burden of proof that he is *non compos mentis* rests on the party who alleges it. Unless, therefore, it appears from the testimony in the case that the plaintiff was a lunatic, or entirely deprived of his reason and understanding at the time the several instruments mentioned in the complaint were executed and delivered by him to the defendants, he has failed to sustain his action, for the charge of fraud is, in my judgment, without foundation in the evidence. It is agreed that all the evidence bearing upon the question is contained in the transcript.

The plaintiff alleges that his insanity commenced soon after the first of March, 1856, which was the date of the defendants' arrival in San Francisco. The bill of sale of the house and improvements on Sutter street to the defendant Mrs. Rowlandson was made on the 15th of August, 1855, more than six months prior to the alleged date of the plaintiff's insanity. The only testimony as to the delivery of this bill of sale is that of the defendant Thomas Rowlandson, who stated that the plaintiff delivered it to his wife at breakfast on the morning after their arrival in San Francisco, which was the second of March, 1856, and according to the plaintiff's own statement, prior to the date of his insanity. The other instruments were executed on the 15th of April, 1856, and acknowledged on the 21st of the same month, the latter being the same day on which the plaintiff sailed for New York.

The only witness examined by the plaintiff for the purpose

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of establishing his insanity at or prior to the 15th of April, was Dr. Mackintosh, who had known the plaintiff for about twelve years, and for several years prior to his departure for the Atlantic States in 1856 had been his attending physician. Dr. Mackintosh stated that he last saw the plaintiff in 1856, about fifteen days before his departure; that plaintiff had been confined to his bed about ten days some short time prior to his departure East; that his disease was more mental than bodily; that his symptoms were alarming, showing a tendency to insanity. Upon cross examination Dr. Mackintosh stated that he could not say that the plaintiff was *non compos mentis* during any portion of the time he saw or attended him; but on re-examination he testified that his condition was such that he might have become insane at any moment from any exciting cause; that any prostration in his business or change in his property might have brought on mental alienation. Dr. Mackintosh was examined not only as the plaintiff's attending physician, but as a medical expert. The most that can be claimed for his testimony is that it establishes a condition of health on the part of the plaintiff, at or about the time of his departure for the East, threatening future insanity upon any exciting cause affecting his business; but his testimony utterly fails to show that at any time prior to his departure the plaintiff had passed from sanity to insanity. If there is any other testimony than that of Dr. Mackintosh tending to establish insanity prior to the plaintiff's departure for the East, it has escaped my notice.

On the part of the defense, several witnesses were examined for the purpose of showing that up to that time the plaintiff was perfectly sane. Among them was Mr. Richards, the confidential clerk, bookkeeper and business man of the plaintiff, who drew the instruments in question, and Thibault, the notary who took the acknowledgments. Also, Clement Nixon, who was the plaintiff's barkeeper, and William McDonald, who was his drayman, and several others, who, as is shown, were on terms of intimacy with the plaintiff up to or within a short time of his departure, all of whom testified that they never

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saw anything in the plaintiff's manner or conduct indicative of insanity. It is true that the testimony of these witnesses is of a negative character, but in view of their long acquaintance with the plaintiff, and their means of observation and knowledge, it is entitled to great weight, especially when sustained by the evidence of a medical attendant who negatives the idea of present insanity. In this connection, it is well to call attention to the following note, written by the plaintiff four days after leaving San Francisco, and addressed to the steward of the steamship Sonora, on board of which the plaintiff sailed:

"MR. THOMAS HARRIS — Dear Sir: Should anything happen to me on this passage, you will please take charge of all my things and deliver them to my brother-in-law, Mr. Thomas Rowlandson, of San Francisco, on your return. He will pay you any charge you have on them. I send my best love to my dear sister and all the folks.

"I am, dear sir, yours truly,

"GEORGE T. CROWTHER.

"Friday morning, steamer Sonora, on her passage to Panama."

The plaintiff was certainly sane when he wrote this note, but seems to have had at that time a presentiment of the calamity which soon after befell him.

For the purpose of showing that the plaintiff was insane when he sailed from San Francisco, or became so soon after, Joseph H. Lyon, a fellow passenger, was examined on the part of the plaintiff, who testified to what are shown to have been symptoms of insanity, commencing with the day of his departure and continuing until the third or fourth day, at which time he became, in the language of the witness, "a perfect maniac." On the part of the defendants the purser of the ship, Mr. Goddard, was examined, who testified that he had been previously acquainted with the plaintiff. That he saw him on the second day out and two or three times a day thereafter until he became insane, and did not observe for the first

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five days of the voyage anything in the manner and appearance of the plaintiff different from what he had observed in his previous acquaintance with him. It was his impression that the ship was approaching the tropics, about five days after starting, before anything was discovered or appeared to be the matter with the plaintiff. According to the testimony of both these witnesses there was a cabin passenger by the name of Lazard on board who, according to Lyon, occupied a room adjoining that of the plaintiff, and according to Goddard a room in the same part of the ship. Lazard had a keeper and was very violent and noisy. As to the effect of going into a warm climate and a close proximity with a raving maniac upon a person having a tendency to insanity, Dr. Mackintosh was examined as an expert, and testified that these circumstances would have a tendency to produce an exaltation of the disease, and also to confirm it. Such is, in substance, all the testimony bearing upon the question of insanity except the fact that the instruments were executed without consideration.

The Court below found that the plaintiff conveyed the property in question to the defendants without any consideration, and I think that the finding in this respect is sustained by the evidence. The fact that a man has conveyed away, without consideration, all or nearly all of his property, unexplained, might afford ground to suspect his sanity, and if the other testimony in this case failed to explain the plaintiff's conduct in this respect, I should be strongly inclined to hold that the finding of the Court below was correct. It is very difficult, if not impossible, to show by testimony the precise point of time at which sanity ends and insanity begins; and where it is clearly shown, as in the present case, that insanity actually existed within a short time after the events alleged to have been produced by it occurred, we should be justified in holding that the actor was at the time insane, when his acts are contrary to human experience and can be explained upon no rational theory. But I think that the conveyance of nearly all of his property by the plaintiff to his sister and her husband can be explained upon a rational theory deducible from the

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evidence in the case, and that it can be shown that such theory is consistent with a sane, though not with an honest purpose, and that such conveyance, instead of being one of the effects of insanity, was a link in the chain of circumstances by which it was induced.

It appears from the evidence that at the time these conveyances were made there were several suits at law pending against the plaintiff for large amounts of money, one of which had already ripened into judgment for the sum of five thousand dollars and was standing on appeal. These suits were a source of constant annoyance and apprehension to the plaintiff and the staple of his thoughts and conversation. Suffering more or less from illness and the depression of spirits thereby induced it is not surprising that he should have regarded them, as he seems to have done, as threatening financial ruin. Nor is it altogether contrary to human experience to find him, under such circumstances, preparing to avoid the consequences of the coming storm in a manner in which neither law nor good morals can justify. It further appears, as we have already seen, that he commenced the work of transferring his property as early as August, 1855, by executing to his sister a bill of sale of the house and improvements on Sutter street, at a time when there is no pretense that he was insane, and without any consideration, as he himself alleges. And in January, 1856, he caused his bookkeeper to open an account with his sister, who had not yet arrived in the country, and from whom, according to his own account, he had never received a dollar, commencing with a credit of one thousand five hundred and thirty-seven dollars, cash loaned. He also bought a buggy for the sum of three hundred and fifty dollars in his sister's name; also, some property at the sale of the Folsom estate; all of which was done at a time long prior to the date at which he alleges he became insane. When his sister arrived, he delivered the bill of sale, and afterwards proceeded and fully executed the design which he seems to have formed six months previous, by conveying his real estate to his sister, and transferring his mercantile busi-

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ness, including stock in trade, to her husband, and soon after departed from the State. Bodily illness, care and anxiety on account of his business affairs, apprehension of ruinous results following from the pending lawsuits, in connection with the fear that he had placed himself too much in the power of his sister and her husband, soon thereafter resulted in temporary insanity.

This theory, that the plaintiff transferred his property to his sister and brother-in-law for the purpose of placing it beyond the reach of his creditors, is moreover fully sustained by letters written by Rowlandson to the brother of the plaintiff, residing in Maine, and introduced in evidence by the plaintiff. In those letters Rowlandson represents himself as carrying on the business for the plaintiff, and desires that the plaintiff may be assured that his affairs are not suffering in consequence of his absence. This language, used at a time when the pending controversies could not have been anticipated, is in perfect harmony with the view which I have taken of this transaction, but it is widely at variance with the theory upon which this action is sought to be maintained. Had Rowlandson fraudulently taken advantage of the plaintiff's alleged insanity for the purpose of robbing him of his estate, under the pretense of a purchase, he would not afterwards have spoken in letters to the brother of the plaintiff of the business and estate as being conducted and managed by him as the agent of the plaintiff and for his use and benefit.

Thus, the fact that the conveyances were made without consideration is explained by the testimony in the case, and shown to be consistent with the idea of sanity. Leaving this fact, therefore, out of view, the question of insanity is made to depend for its solution solely upon the testimony of Dr. Mackintosh, and Lyon, on the part of the plaintiff, and Goddard, Richards, Thibault, Nixon, McDonald and others, whose testimony was of a like character with that of the last four named, and the plaintiff's note to the ship's steward, on the part of the defendants. This testimony shows that the plaintiff became insane four or five days after he left San Francisco, but

Points decided.

in my judgment utterly fails to show that he was insane on the 15th of August, 1855, when he executed the bill of sale of the house on Sutter street, or on the 2d of March, 1856, when he delivered it to his sister, or on the 15th of April, 1856, when he executed the other papers, or on the 21st of the same month, when he acknowledged their execution. On the contrary, there is in this testimony no conflict, and it all tends to prove, if it proves anything, that the plaintiff at these several dates was sane, or at least that he was not *non compos mentis* within the legal meaning of those words.

Such being my views upon the controlling question involved in this case, I am compelled to dissent from the judgment pronounced by a majority of the Court.

I think the judgment should be reversed and a new trial ordered.

THE PEOPLE v. JAMES A. SHOTWELL.

DISCHARGE OF JURY IN CRIMINAL CASE.—If, after the jury in a criminal case have retired, to deliberate on their verdict, the Court directs the Sheriff to discharge them if they do not agree on their verdict by a certain hour, and then adjourns, and at the hour named the Sheriff discharges the jury, this will not operate as an acquittal of the defendant, but another trial may be had.

CHARGE OF TWO OFFENSES IN INDICTMENT.—If an indictment for forgery contains two counts, in each of which a copy of the instrument alleged to have been forged is set out, and the copies are alike, it will not be presumed that each is a copy of only one and the same original instrument, without an allegation to that effect in the second count.

WHEN SEVERAL DISTINCT OFFENSES MAY CONSTITUTE A SINGLE CRIME.—A person guilty of forging a check, and also of an attempt to pass it, or of passing it as true and genuine with intent to damage and defraud another person, may be indicted, tried, and convicted for all these connected and consecutive acts as constituting one transaction and one crime; or if guilty of but one of such acts, he may be indicted, tried, and convicted for its commission as constituting a distinct crime.

HOW OBJECTION TO INDICTMENT TO BE TAKEN.—If there is more than one offense charged in the indictment, the defect should be taken advantage of by demurrer. If the objection be not taken by demurrer, it cannot be considered on motion in arrest of judgment.

ELECTION AS TO COUNT ON WHICH ACCUSED SHALL BE TRIED.—If the indictment contains more than one count, each charging a distinct offense, the Court is not required to compel the prosecutor to elect upon which count of the indictment he will try the accused.

Argument for Appellant.

SENTENCE WHEN INDICTMENT CHARGES TWO OFFENSES.—If the indictment contains more than one count, each charging a distinct offense, and the verdict is general, finding the defendant guilty, the presumption will be that the Judge who tried the case pronounced judgment for the offense to which the evidence was directed and was properly applicable.

APPEAL from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. Vanarman, for Appellant.

The practice in criminal cases in California is very minutely regulated by statute, leaving very little scope for the operation of the common law in mere matters of practice.

A jury once charged with a criminal case shall not be discharged before verdict except for reasons specified in the statute, (Wood's Digest, Sec. 410, p. 302,) "unless by consent of both parties, entered in the minutes, or unless after such a time as the Court shall deem proper, it satisfactorily appear that there is no reasonable prospect of an agreement."

The reasons specified in said section are, in brief, inability from sickness or other inevitable accident. No such accident is here pretended, and the only question is whether the jury were discharged regularly on account of inability to agree.

"After such time as the Court shall deem proper, it must appear (to the Court) that there is no reasonable probability of an agreement."

The discretion here vested is given to the Court to decide whether there is a probability of agreement, not to the Sheriff or any other officer. It is a judicial discretion as much as any other required to be exercised in the course of the trial, and according to elementary principles, cannot be delegated or executed by proxy.

Suppose the Judge should leave the whole question of how long the jury should be kept together, and when it had become apparent that the jury could not agree, and should direct the Sheriff to keep the jury together until he was satisfied that they could not agree, and then discharge them. Would this

Argument for Respondent

constitute a compliance with the law? The duties of the Sheriff and of the Judge cannot be thus confounded consistently with either law or the safety of the citizen.

The question of discharging or retaining the jury is a judicial question, and cannot be delegated or decided by proxy.

Hoge & Wilson, for the People.

It was originally doubted whether at common law, a jury, when once given in charge of a case, could be discharged by the Court without a verdict. But the dictum of Coke to the effect that the Court had no such power, has been long since overruled and held not to be law. And it is now settled, both in England and the United States, that the Courts may, in their discretion, discharge a jury without verdict, when satisfied that the proper administration of justice requires it. The whole doctrine rested upon the principle of the common law, that no man should be twice put in jeopardy of life or limb for the same offense. This principle of the common law has been made the subject of constitutional provision in our organic law as well as in that of the United States. It is at this day well settled, that the discharge of a jury in a criminal case, and putting the prisoner upon a second trial, is not a violation of the constitutional provision, is not a putting in jeopardy a second time, and does not entitle him to a discharge. It was at one time thought that a distinction existed between capital cases and other felonies, but that distinction has not been maintained, and the better authority sustains the power of the Court to discharge the jury for want of agreement, or other proper cause, without regard to the character or magnitude of the offense. As has been well said, to admit it in any case, or for any cause, is to yield the whole principle, and, of necessity, leave it discretionary with the Court when and under what circumstances the power should be exercised.

The Court will find the whole doctrine thoroughly discussed and settled in the following cases: *People v. Goodwin*, 18 John. 199, and fol.; *People v. Olcott*, 2 Johns. Cases, 301; *People v. Green*, 13 Wendell, 55; *United States v. Haskell*,

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4 Wash. C. C. 408, 410; *United States v. Perez*, 9 Wheaton, 579; *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick, 521; *Commonwealth v. Roby*, 12 Pick. 496; *United States v. Shoemaker*, 2 McLean, 114; *Commonwealth v. Townsend*, 5 Allen, Mass. 216; *United States v. Coolidge*, 2 Gallison, 363; *People v. March*, 6 Cal. 546.

By the Court, CURREY, J.

The defendant was indicted for forgery, to which he pleaded not guilty. He was twice tried. At the first trial the jury disagreed and were discharged; on the second trial he was found guilty and sentenced to be imprisoned in the State Prison for the term of six years. The indictment consists of two counts. By the first count the defendant is accused with having on the 26th of January, 1864, at the City and County of San Francisco, in the State of California, feloniously and falsely forged and counterfeited a certain check—a copy of which is set forth in such count—with intent to prejudice and defraud the drawees therein named. The second count of the indictment charges that the defendant, on the same day and year, and at the same place, did feloniously and falsely attempt to pass, and did alter and pass, as true and genuine, a certain forged and counterfeit check—a copy of which is set forth in said second count, and is in the identical words and figures of that described in the first count—with intent, well knowing the same to be forged and counterfeit, then and thereby to prejudice, damage and defraud the drawees therein named.

The defendant relies on three grounds for a reversal of the judgment, as follows:

First—That the jury first impanelled to try the defendant were irregularly and illegally discharged.

Second—That the indictment charges against the defendant the commission of several distinct offenses, and that the Court refused to require the prosecution to elect on which charge to try him, though requested to make such order.

Third—That the verdict of the jury is general, convicting

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the defendant of several distinct offenses, while the evidence is confined to one of the charges.

We will examine these points in the order in which they are stated.

I. Upon the first trial the cause was finally submitted to the jury at four o'clock in the afternoon of the day when they retired, and, not having agreed upon a verdict at eleven o'clock in the night of the same day, the Court, in the absence of the defendant, but in the presence of one of his counsel, directed the Sheriff that in case the jury failed to agree by two o'clock of the following morning, then to discharge them. The jury not having agreed at that hour, they were discharged as directed. The defendant's counsel claims that this operated as an acquittal of the defendant. The course pursued in this particular is not to be commended. It was an irregularity, but it does not therefore follow that the effect of it was to acquit the defendant. The four hundred and eleventh section of the Criminal Practice Act reads as follows: "In all cases where a jury are discharged, or prevented from giving a verdict by reason of any accident or other cause, except when the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

By subjecting the defendant to the trial at the time he was found guilty, it cannot be said he has been twice put in jeopardy for the same offense in violation of a constitutional right. On this point Courts have been often called upon to interfere for the protection of persons accused of crimes, where upon the first trial the jury has been discharged without having rendered a verdict. In the case of *The People against Goodwin*, 18 John. 187, the subject was ably and elaborately considered by Mr. Chief Justice Spencer, and the conclusion to which he arrived was that, where a jury in a criminal case is discharged without having found a verdict, the accused may be tried again by another jury, and that he is not thereby put in jeopardy the second time for the same offense. To the same effect are many other judgments of high authority.

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(*United States v. Shoemaker*, 2 McLean, 114; *United States v. Perez*, 9 Wheat. 517; *United States v. Haskell*, 4 Wash. C. C. R. 402; *People v. Olcott*, 2 John. Cas. 301; *Com. v. Purchase*, 2 Pick. 521; *Com. v. Roby*, 12 Pick. 496.)

In the case of *Com. v. Townsend*, 5 Allen, 216, the jury after having been out seven hours, were discharged in the absence of the Judge, as in this case, by the officer having them in charge, who acted by order of the Court; but the jury did not accept the discharge, but continued together and afterward found a verdict of guilty, sealed it up, and the next morning brought it into Court. The defendant moved to set it aside because it was made after the jury were discharged. The Court, in which the trial was, denied the motion, but on writ of error the Supreme Court of Massachusetts held that the verdict ought to have been set aside for the reason that before the jury agreed upon it they had been lawfully discharged from the consideration of the case. The Court in the case here cited say: "We do not doubt the authority of the Court in its discretion to make the order for the discharge of a jury after seven hours disagreement, yet a much preferable course would be to direct the officer, who had charge of them, that if they would not agree by a certain hour he should inquire of them whether they were likely to agree, and if told by them that they were not, then to discharge them." The authorities cited and the reasons on which they are founded, is a full answer to the defendant's objection and application for a discharge.

II. The seventy-third section of the Act concerning crimes and punishments (Laws 1850, p. 237) declares the forging or counterfeiting of a check for the payment of money by any person with intent to damage or defraud any person or persons, to constitute the crime of forgery. The same section also declares the uttering, publishing, passing, or attempting to pass as true and genuine a forged or counterfeit check by any person, knowing the same to be forged or counterfeited, with intent to prejudice, damage or defraud any person or persons, to constitute the crime of forgery also, and that the

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offender, upon conviction of the crime, shall be punished by imprisonment in the State Prison for a term not less than one nor more than fourteen years.

The defendant is accused by the indictment of having committed each of these distinct criminal acts, without showing that the check described in the first was the same as that described in the second count. But it would seem upon reading the second count of the indictment that the check which it is alleged that the defendant attempted to pass and did pass was a different check from the one described in the first count, for it is distinguished as the "last mentioned" check. It is not possible, from the face of the indictment, to say that the same check was intended to be described in both counts; and though the copies are alike *verbatim et literatim*, it is not to be presumed that each is a copy of only one and the same original instrument.

If it appeared from the indictment that the check described in the second count was the same as that described in the first, the objection that several offenses were charged in the indictment could not be maintained; for if the same person be guilty of making a forged or counterfeit check, and also of attempting to pass it, or of passing it (which involves the attempt), as true or genuine, with the intent to damage or defraud another, he might be indicted and tried for all these connected and consecutive acts as constituting one transaction, or he might be indicted and convicted for each distinct crime of which he might be proved to be guilty. The doctrine on this subject is laid down in Wharton's Criminal Law (141), as follows: "Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled, they may be coupled in one count. Thus setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same per-

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son, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." (*Com. v. Eaton*, 15 Pick. 273; *Com. v. Tuck*, 20 Pick. 360; *Com. v. Hope*, 22 Pick. 1; *State v. Johnson*, 3 Hill's S. Car. R. 1; *Buck v. State*, 2 Harr. & John. 426; *State v. Coleman*, 5 Porter, 40; *Hinckley v. Com.*, 4 Dana, 518.)

The two hundred and forty-first section of our Criminal Practice Act provides that an indictment shall charge but one offense, but it may set forth that offense in different forms under different counts.

According to the common law the defendant could not properly be charged in the same count with two or more distinct offenses. (Wharton's Cr. Law, 139; *Com. v. Eaton*, 15 Pick. 274.) Such a defect would be fatal on motion to quash or on demurrer, but it is said the better opinion is that it would not be ground for arresting the judgment. (Wharton's Cr. Law, 141 and 683; *Commonwealth v. Tuck*, 20 Pick. 360-362.)

By the two hundred and eighty-ninth section of our criminal code of procedure it is provided that the defendant may demur to the indictment on various grounds appearing on the face of it, among which is "that more than one offense has been charged in the indictment." The two hundred and ninety-seventh section provides: "When the objections mentioned in section two hundred and eighty-nine appear upon the face of the indictment they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the Court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial under the plea of not guilty, and in arrest of judgment." If this section is to have full force and effect, then the objection that the indictment charged the defendant with having committed several distinct offenses cannot be supported. He failed to demur and the statute says this objection so appearing on the face of the indictment can only be taken advantage of by demurrer.

But after verdict of guilty, the defendant may move in arrest of judgment; and the four hundred and forty-second sec-

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tion of the same Act provides in terms that such motion "may be founded on any of the defects in the indictment mentioned in section two hundred and eighty-nine." If to the language here employed the fullest effect be given, it necessarily works a complete abrogation of section two hundred and ninety-seven—a consequence which should be avoided, if consistent with legal rules of construction and interpretation. It is a familiar doctrine that an Act of the Legislature should be so construed and expounded as to give some effect, if possible, to every portion of it; and it is the duty of Courts, as far as practicable, so to reconcile the different provisions as to make the whole Act consistent and harmonious. (*Com. v. Duane*, 1 Binney, 601; *Com. v. Alger*, 7 Cush. 53 and 89; *Attorney-General v. Road Company*, 2 Mich. 138.) Every interpretation that leads to an absurdity ought to be rejected; or, in other words, a construction should not be put upon a statute from which an absurd consequence would follow. (Vattel B. 2, Ch. 17, Sec. 282; Smith's Com. Sec. 486.) It is not to be presumed that the Legislature intended that the two hundred and ninety-seventh section before quoted should prove of no effect, or practically a nullity. We repeat that where a particular interpretation would be attended with such a consequence, it should be rejected, and that construction adopted which, in consonance with the true office of interpretation, will avoid the entire sacrifice of one portion of the statute for the purpose of giving the broadest effect to another. (Smith's Com. Sections 487, 488.)

If the four hundred and forty-second section which provides that a motion in arrest of judgment may be founded on any of the defects of the indictment mentioned in section two hundred and eighty-nine, be read without any reference to section two hundred and ninety-seven, its language, it may be conceded, is comprehensive enough to embrace the objection made. But we are not at liberty to disregard the two hundred and ninety-seventh section of the Act, inasmuch as the four hundred and forty-second section may be interpreted as refer-

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ring only to the causes for arresting the judgment, which stand unaffected by section two hundred and ninety-seven.

The defendant having omitted to demur to the indictment for the defect objected to, it cannot properly be considered on motion in arrest of judgment.

The defendant also complains that the Court erred in refusing to compel the public prosecutor to elect upon which count of the indictment he would try the accused. If the Court has the right to require the election to be made, the exercise of the authority is a matter of discretion, (2 Russ. on Crimes, 774; *People v. Baker*, 3 Hill, 159,) and where it does not appear that the defendant sustained any injury by the ruling of the Court in this respect, it cannot be held erroneous. But under our statute it may be doubted whether the Court has the right to compel the prosecution to elect in such cases, because the statute is positive that the objection suggested can only be taken advantage of by demurrer.

III. The point is made that the verdict of the jury is general, convicting the defendant of several distinct offenses, while the evidence is confined to only one of the offenses charged.

In *Crowley v. Commonwealth* and *Kite v. Commonwealth*, 11 Metcalf, 575 and 581, Mr. Chief Justice Shaw holds that where an indictment charges in one count a breaking and entering a building with intent to steal, and in another count a stealing in the same building, on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not show whether one offense only, or two, were proved on the trial; and as this must be known by the Judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved.

If the defendant was proved to be guilty of both offenses charged, he cannot justly complain of the judgment. If he was proved to be guilty of only one of them, it must be presumed the Judge who tried the case pronounced judgment

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against him as upon a verdict for the offense to which the evidence was directed and was properly applicable.

Judgment affirmed.

THE PEOPLE v. JUAN ANTONIO.

ACT CONCERNING INDIANS.—The Act of April 22d, 1850, for the protection and punishment of Indians, was intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living among white men.

REPEAL OF ACT PRESCRIBING WHIPPING FOR LARCENY.—The Act of April 22d, 1850, conferring on Justices of the Peace the power to punish Indians convicted of larceny by whipping, is repealed by the Act of 1856, which prescribes the punishment for both grand and petit larceny.

JUSYICE'S JURISDICTION TO TRY INDIAN FOR GRAND LARCENY.—The Act of April 20th, 1863, concerning Courts of Justice in this State, takes away from Justices of the Peace the power to try and punish Indians for grand larceny conferred upon them by the Act of April 22d, 1850, for the protection and punishment of Indians.

BURDEN OF PROVING HOW STOLEN PROPERTY WAS OBTAINED.—The burden of proving that stolen property found in his possession came honestly into his hands is not cast upon a defendant in a criminal case, unless the prosecution has introduced evidence, either direct or presumptive, sufficient to prove that he came dishonestly by it.

GENERAL OR SPECIAL VERDICT IN CRIMINAL CASES.—The Court cannot direct a jury, in a trial for larceny, to render a special verdict, but, upon the request of either party, it should instruct them that they have the discretion to render either a general or special verdict.

APPEAL from the County Court, Santa Cruz County.

The facts are stated in the opinion of the Court.

D. E. Allison, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, RHODES, J.

The defendant was indicted and convicted of grand larceny. It was admitted by the District Attorney and was proven that the defendant was an Indian.

The most important question in the case arises upon the

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refusal of the Court to give the jury the following instruction: "That the defendant cannot be convicted of larceny under the law as it is applied to Indians." The counsel for the defendant claims that the defendant, being an Indian, is liable to be prosecuted and punished for the offense charged against him, according to the provisions of an Act for the protection and punishment of Indians, passed April 22, 1850, and not under the general statutes concerning crimes and punishments. The Act of 1850 for the protection and punishment of Indians was, in our opinion, obviously intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living, as in this case, for years among white men.

But if this view is incorrect, there are other reasons militating against the defendant's proposition.

The first section provides that "Justices of the Peace shall have jurisdiction in all cases of complaints by, for or against Indians, in their respective townships in this State," and the sixteenth section provides that "an Indian convicted of stealing horses, mules, cattle or any valuable thing, shall be subject to receive any number of lashes not exceeding twenty-five, or shall be subject to a fine not exceeding two hundred dollars, at the discretion of the Court or jury," and section seventeen gives the Justice the discretion to appoint a white man or an Indian to do the whipping in his presence.

The Attorney-General asks if the punishment prescribed is not "cruel and unusual," and therefore unconstitutional? We think it is liable to that objection, notwithstanding it is directed by the Act that the Justice "shall not permit unnecessary cruelty in the execution of the sentence."

Besides this, the Act of 1856, (Wood's Digest, 337,) defines both grand and petit larceny and prescribes the punishment to be inflicted upon conviction; and as the Act by its terms is applicable to all cases of larceny, it repeals by necessary implication previous Acts providing a different mode of punishment. The Act of April 20, 1863, concerning Courts of justice of this State organized under the amended Constitution,

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confers upon the County Courts jurisdiction to try and determine indictments for grand larceny, and does not confer upon Justices of the Peace jurisdiction in such cases, and thus in effect it takes from Justices of the Peace, whose powers it is provided in the Constitution "shall not in any case trench upon the jurisdiction of the several Courts of record," the jurisdiction of grand larceny attempted to be conferred upon them by the sixteenth section of the Act of 1850, for the protection and punishment of Indians.

The defendant also assigns as error the refusal of the Court to instruct the jury "that proof of possession of property recently stolen is not of itself sufficient evidence upon which to convict the prisoner of larceny." This instruction is marked "given," and the record shows that the Court instructed the jury that "if the horse was stolen and immediately after being stolen, was found in the possession of the prisoner, and the prisoner failed to account for such possession, or to show that such possession was honestly obtained, it is a circumstance tending to show his guilt." If the instruction upon that point had there closed, the prisoner would have had no cause of complaint, but the Court immediately added, "in fact, in such a case, the burden of proof is on the prisoner to show the possession to be lawful." The burden of proof, in respect to any point in the case, is cast upon the prisoner only in consequence of a *prima facie* case having been made against him. The people must make out their case by evidence that will amount to proof of the facts alleged in the indictment, and the defendant is not required to produce evidence to rebut such evidence on the part of the prosecution, as merely tends to prove the fact in question; but when evidence has been introduced, either direct or presumptive, sufficient to prove the fact in issue, then the defendant is called upon to rebut the *prima facie* case made against him.

The learned Judge of the Court below was not without authority to sustain that portion of his charge, for it is said in 2 Wharton's Am. Crim. Law, Sec. 1,777, that "the possession of property recently stolen is *prima facie* evidence of guilt in

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the possessor of the property." But that doctrine has been modified in this State. In *People v. Chambers*, 18 Cal. 382, it is held that the possession by the defendant of property recently stolen, is not of itself sufficient to authorize his conviction, but is a circumstance to be considered in determining his guilt. (See 3 Greenl. Ev. Sec. 31.) In *People v. Ah Ki*, 20 Cal. 177, the instruction of the Court below, stating that the burden of proof was thrown upon the defendant, of explaining his possession of goods recently stolen, was under consideration, and the Court held the instruction to be erroneous. Mr. Justice Norton, in delivering the opinion of the Court, after holding that the instruction was erroneous, says: "If this charge could be understood as only stating that the accused was bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, it would not be erroneous." The proof of possession, together with proof of other circumstances indicative of guilt, would make a *prima facie* case against the defendant, and thereupon the burden of proof would be shifted to the defendant. It will be readily seen that under the rule laid down by the Court below, a person who had honestly come into possession of property recently stolen, might be convicted of larceny from the accidental circumstance that no one was present when he found the property dropped by the thief in his flight, or bought it from the thief.

It is to be regretted that this inaccuracy is found in the instructions, which, in other respects, are expressed in terms of commendable clearness and precision.

Section four hundred and seventeen of the Criminal Practice Act provides that the jury may render a general or special verdict, except on an indictment for libel, in which case it shall be general. It would have been improper for the Court to have directed them to render a special verdict, as asked for the defendant; but the Court, upon the request of either party, should direct them that they have the discretion

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as to rendering a general or special verdict, in accordance with the provisions of that section.

The other errors assigned do not require any consideration.

Judgment reversed and cause remanded for a new trial.

PETER H. BURNETT v. R. PACHECO, TREASURER OF
STATE.

STATEMENT ON APPLICATION FOR NEW TRIAL.—A statement on application for a new trial, which does not specify the particular errors relied on, or if it is claimed that the evidence is insufficient to warrant the verdict, the particulars in which the evidence is alleged to be insufficient, should be disregarded by the Court.

STATEMENT ON APPEAL.—A statement on appeal from the judgment, which does not specify the errors relied on, is insufficient.

APPEAL FROM JUDGMENT.—On an appeal from a judgment, the Court will not review the evidence for the purpose of determining whether the findings of fact are warranted by the evidence.

PLACE FOR ASSIGNMENT OF ERRORS.—The place for an assignment of errors is in the statement, and not in the notice of appeal.

APPEAL ON JUDGMENT ROLL.—If there is no statement on appeal, no specification of errors is required.

AGREED STATEMENT OF FACTS.—If the parties agree to a statement of facts, and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts becomes a part of the judgment roll.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This action was brought against the State Treasurer to recover possession of ten State bonds.

The other facts are stated in the opinion of the Court.

George R. Moore, for Appellant.

C. T. Ryland, of counsel for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

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By the Court, SHAFER, J.

The complaint states that the plaintiff, in the year 1858, was the owner of ten State bonds of the State of California, issued under the Act of April 28, 1857; that in the year 1858, he deposited the bonds with one John H. Gass, of Sacramento, for the sole purpose of collecting and receiving the coupons, or interest, as the same should from time to time fall due; that thereafter, in September, 1860, Gass, without plaintiff's knowledge or consent, and against the statute in such case made and provided, and with intent to steal said bonds and the coupons attached thereto, converted the same to his own use; that such conversion first became known to the plaintiff in February, 1863; that in January, 1862, the bonds came wrongfully and unlawfully into the possession of D. R. Ashley, who, on demand made, refused to deliver them to the plaintiff. It is further averred that said Ashley, at the time when he became possessed of the bonds had full notice of the plaintiff's title, and that all other persons through whose hands said bonds passed, had like notice.

The answer denies all the allegations in the complaint, and avers that the bonds and coupons are the property of the State, and have been since the 7th of September, 1860; that the instruments were negotiable, and that the property in them passed by delivery; that the bonds had been redeemed and purchased by the State, after due proceedings, for eight thousand four hundred and seventy-eight dollars and seventy-five cents, which was their full value, and that immediately thereafter, and on said 7th of September, 1860, they were cancelled and deposited in the office of the Treasurer of the State, as a part and portion of the archives and records. At said date Thomas Findley was State Treasurer, from whom defendant Ashley, as his successor, received and has ever since held the papers.

Ashley having gone out of office, Pacheco, his successor, was made party defendant by stipulation.

The trial was by the Court. The decision was in favor of

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the defendant, and judgment was entered thereon December 18, 1863. Notice of motion for new trial was given in due season, based on the following grounds set forth in the notice :

First—Error in law occurring at the trial and duly excepted to by the plaintiff.

Second—Because the judgment is against law.

Third—Because the evidence in the case is insufficient to justify the judgment of the Court, and that said judgment is contrary to the evidence.

A statement of the case on motion for a new trial and on appeal, was prepared and filed. The statement contained a full report of the proceedings at the trial, including a report of the evidence; but the statement did not "specify the particulars in which the evidence was alleged to be insufficient;" nor the "particular errors of law occurring at the trial" upon which the plaintiff would rely in support of his motion, as required by the one hundred and ninety-fifth section of the Practice Act, as amended in 1863. The motion for new trial was denied, and the appeal is taken from the order of denial and from the judgment.

1. The motion for new trial was properly overruled. Under a positive provision of the one hundred and ninety-fifth section of the Practice Act, as amended in 1863, the Court was bound "to disregard the statement," for the reason that it was no statement under the rule established by that section. The statute is peremptory; the rule is one of great practical consequence, and the respondent insists upon its non-observance in this case as a point against the appeal. (*Hutton v. Reed*, 25 Cal. 478.)

2. The remaining questions arise under the appeal from the judgment.

The statement on new trial stands as a statement on appeal from the judgment, but the specification of grounds therein contained is as imperfect, when considered as a specification of errors on appeal from the judgment, as when considered as a specification of grounds on motion for new trial. (Practice Act, Sec. 338; *Wixon v. Bear River Co.*, 24 Cal. 367.) Fur-

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ther, on an examination of the record, we do not find that there were in fact any "errors in law occurring at the trial and excepted to by the plaintiff;" and as to whether the findings of fact were justified by the evidence, it is a question which cannot be reached, under any circumstances, through an appeal from the judgment. (*Gagliardo v. Hoberlin*, 18 Cal. 394.) The notice of appeal contains what it calls an "assignment of errors." The place for the specification of errors, in an appeal from a judgment, is in the statement, if there be one, (Prac. Act, Sec. 338,) and not in the notice of appeal; and if there be no statement, then as the questions must necessarily arise upon the judgment roll, no specification of errors is required. The second assignment contained in the notice of appeal is as follows: "Because said District Court erred in holding and deciding that the indorsement 'This bond not for sale; Peter H. Burnett,' on the back of each of the bonds in dispute, was not sufficient notice to subsequent purchasers and others to put them upon inquiry." The defendant's counsel has stipulated that the assignment of errors, contained in the notice of appeal, is a true copy of the original document, but refuses to admit the proposition of fact contained in the foregoing specification. As the parties do not agree that the Court made the decision recited in the specification, and as we cannot discover from any portion of the record that any such decision was made, nor even that the Court had occasion to consider the question, it would be aside from our office in error to pass upon a point lying thus in hypothesis.

Aside from the testimony of witnesses, there was an agreed statement of facts used on the trial, and it was stipulated that the statement might be used by either party "*in any and all proceedings in the action.*" We consider this agreed statement of facts as annexed to the judgment roll by the effect of the stipulation, and the question is, whether the judgment in favor of the defendant is to be considered as erroneous in view of the facts set forth in the statement. The statement gives the number, date and amount of each of the ten bonds, the title and date of the Act under which they were issued; states that

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the bonds and coupons attached were payable to *bearer*; that on the 7th of September, 1860, after due notice, the bonds and coupons were redeemed from D. O. Mills & Co. at eight thousand four hundred and seventy-eight dollars and seventy-five cents, paid in coin; that the bonds and coupons were thereupon cancelled, and have since that time remained in the office of the State Treasurer, and in his possession; that at the time of the redemption there was on the back of each and every of the bonds the following indorsement in the handwriting of the plaintiff, to wit: "This bond not for sale. Peter H. Burnett."

The statement further contains an admission of demand and refusal, and then closes as follows: "The legality of the aforesaid redemption is reserved for the determination of the Court; and the admissibility of the fact in evidence, as to whom said bonds were originally issued by the State, is reserved for the Court."

We find from the record that the plaintiff offered evidence tending to prove that the bonds when first issued, were the property of the plaintiff, and that they were delivered to Gass as his agent. This evidence was admitted by the Court, and if admitted improperly, the error was to the advantage and not to the prejudice of the plaintiff. As to the question of the "legality of redemption:" when tried by the facts of the statement, we can see no reason to doubt its legality. The statement of facts does not disclose, nor does the Court find, nor do the parties stipulate, nor does it appear in any manner as a *fact*, that the plaintiff was ever at any time the owner of the bonds; nor that he ever had any interest in them; nor that Gass was ever his agent, nor even that such a man as Gass ever existed. If it appeared as a fact that the plaintiff was originally the owner of the bonds; that while holding them in possession he put the indorsement mentioned in the statement upon the back of each of them, and that the bonds came to the hands of D. O. Mills & Co. without the knowledge or consent of the plaintiff, then the question might be presented as to what effect the indorsement would have to

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protect his title to the bonds as against the redemption; but as the case stands, that question is not presented, and therefore it cannot be considered.

Judgment affirmed.

SOLOMON ECKSTEIN v. DAVID CALDERWOOD, DUNCAN F. McDONALD, AND J. CAVIS.

DILIGENCE IN MOVING FOR NEW TRIAL.—If a motion for a new trial is not prosecuted with due diligence it should be dismissed on the application of the opposite party.

APPEAL from the County Court, City and County of San Francisco.

Defendant Calderwood moved for a new trial and appealed. The other facts are stated in the opinion of the Court.

P. G. Buchan, for Appellant.

G. F. & W. H. Sharp, for Respondent.

By the Court, CURREY, J.

In August, 1862, the plaintiff commenced an action of forcible entry and detainer in a Justice's Court against the appellant and two other persons for the recovery of a lot of land described in the complaint. The defendants appeared and answered. From the judgment rendered in the Justice's Court an appeal was taken to the County Court, in which the action was tried and a verdict and judgment rendered in favor of the plaintiff against the defendants on the seventeenth of January, 1863. The appellant Calderwood in due time gave notice of his intention to move for a new trial, and prepared a statement to be used on such application, to which the plaintiff proposed amendments. The statement was settled by the Court on the eleventh of May, 1863, by allowing certain of the amendments proposed, and then the appellant's attorneys

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obtained leave to take the statement proposed, and the amendments allowed for the purpose of engrossing the same. On the twenty-ninth of July thereafter the appellant served on plaintiff's attorneys a notice challenging the loyalty of the plaintiff to the Government. The plaintiff was at that time absent from the State, and time was granted to procure his affidavit of loyalty. This was obtained and filed on the twelfth of November, and on the twentieth of that month the plaintiff's attorneys gave notice to the appellant's attorneys that they would move the Court on the thirtieth day of said November to dismiss the motion for a new trial on the ground that appellant had failed to prosecute the same with diligence. On the twenty-seventh of November the appellant obtained from the County Judge an order that the plaintiff show cause before him on the first of December, 1863, why a resettlement of the statement on motion for new trial should not be made to conform to the facts stated in the affidavits and the minutes of the trial on which the order was made. This order was served on the plaintiff's attorneys on the same day. On the second of December both motions came on to be heard, the motion of the plaintiff being first taken up. The motions were argued by the respective parties, and afterwards, on the twenty-eighth of December, the Court made an order, first reciting that it appeared from the minutes and files of the Court that on the eleventh of May, 1863, the appellant's statement on motion for a new trial was settled, and that his attorney on the same day took from the files of the Court the proposed and amended statement for engrossment, and had retained them in his possession without engrossing them up to the time when the motion to dismiss was made, and therefore decided that the application for a new trial had not been diligently prosecuted, and granted the order dismissing the application for a new trial. The appeal is from this order and from the judgment in the case.

If the order was correct, then the judgment must be allowed to stand, because by the judgment roll, without a statement of the evidence, there appears to be no objection to it.

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After the statement was settled by the Judge, until the plaintiff's loyalty was questioned, over two months and a half elapsed in which the appellant might have engrossed the statement as settled and placed it on file with the Clerk of the Court. During the time the plaintiff's loyalty stood challenged the cause was suspended (Laws 1863, page 566); but after his affidavit was filed the appellant still remained inactive, with the statement and amendments which were allowed in his hands, and there they remained until the motion to dismiss his application for a new trial was made, and it appears that even then the ordered engrossment had not been made. The appellant's excuse for this omission and delay is that at the time of the allowance of the amendments the Judge made a memorandum upon the margin of the proposed amendments, declaring that they were "subject to any revision which may seem proper, on hearing of counsel, if a hearing shall be desired." The effect of this declaration was not to suspend the proceedings to an indefinite extent, nor to give to either of the parties an unlimited period within which to express his desire to be heard. If the appellant desired a revision of the amendments, and wished to be heard in reference thereto, he should have moved in the matter with due diligence. This, in our judgment, he did not do, and therefore we cannot overrule the discretion of the Court in the premises.

Judgment and order affirmed.

PETER G. PARTRIDGE v. CITY AND COUNTY OF
SAN FRANCISCO.

STATEMENT ON APPLICATION FOR NEW TRIAL.—If a new trial on the ground of errors occurring at the trial is asked for, the statement should specify the particular errors relied on, and if it does not it should be disregarded by the Court.

ACT GOVERNING STATEMENTS FOR NEW TRIAL.—The Act of 1863, amending the one hundred and ninety-fifth section of the Practice Act, is the law governing the preparation of statements on motion for new trial made after its passage.

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APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellant.

Delos Lake, and *John W. Dwinelle*, for Respondent.

By the Court, RHODES, J.

This is one of the class of cases usually called the *City Slip Cases*. The complaint contains two counts: the first being for money had and received by the defendant to and for the use of the plaintiff; and the second, for money paid, laid out and expended by the plaintiff for the defendant. Suit was commenced in April, 1855, and was brought on to trial in 1863; and on the 23d of June, 1863, the finding of the Court for the defendant was filed, and on the 2d of February, 1864, judgment was entered *nunc pro tunc* as of the 27th of February, 1863. The plaintiff moved for a new trial, and the grounds of the motion were, first, "Errors of law occurring on the trial of said cause and excepted to by the said plaintiff;" and second, "That the said decision was against law." The motion and statement were filed August 22d, 1863, and the motion being denied, the plaintiff, on the first day of October, 1863, appealed from the order denying the new trial and from the judgment.

The plaintiff now assigns for error the decision of the Court refusing to permit him to amend his complaint. It appears from the papers copied into the transcript that the plaintiff, upon his affidavit filed April 12, 1862, moved the Court for leave to amend his complaint, and that the motion was denied May 31, 1862. It appears also from the statement on the motion for a new trial, that William H. Taylor purchased the lot, that the deed was executed to him, and that he paid the purchase money which is sought to be recovered back by the plaintiff; that "on the 10th day of March, 1855,

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William H. Taylor assigned his right of action to plaintiff;" and that, on the testimony being closed, the defendant's counsel insisted that there was a material variance between the case presented by the pleadings and the evidence, the complaint alleging that the defendant received the money to the use of the plaintiff, and the evidence tending to prove that it was received to the use of Taylor. The statement proceeds: "The plaintiff's counsel contended that the variance should be disregarded, or that he should be allowed to amend. The Court ruled that it could not entertain a motion to amend, it appearing that the plaintiff had moved for leave to amend in the particular named, in the Twelfth District Court, while said action was pending regularly therein, and before said action was transferred to this Court, and that said motion had been denied by said Twelfth District Court. The Court then took the case under advisement, and afterwards rendered the decision that the said variance was fatal, and therefore directed a finding for the defendant, to which decision the plaintiff excepted." This is all that is contained in the statement respecting the proposed amendment.

The counsel for the defendant, in answer to the error assigned, contends that the plaintiff's affidavit and notice of motion to amend, and the amended complaint proposed to be filed, if the amendment should be permitted, must be disregarded, because they are not included in the statement on motion for a new trial, and because no statement on appeal was made or settled; that the error complained of was not excepted to; and that the statement does not specify the particular errors upon which the plaintiff intended to rely. These objections are fatal to the plaintiff's position. The first and second objections are apparent upon an inspection of the record in this Court. The third objection depends upon section one hundred and ninety-five of the Practice Act as amended in 1863, and which took effect July 1, 1863. That section provides, among other things, that "when the notice designates as the ground of the motion, errors in law accruing [occurring] at the trial and excepted to by the moving party,

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the statement shall specify the particular errors upon which the party will rely. If no such specification shall be made, the statement shall be disregarded." The amended section of 1863 repealed by necessary implication the same section as amended in 1861, and was the law governing the preparation of the statement on motion for a new trial in this cause; and accordingly it became the duty of the Court below to disregard the statement on account of its failure to comply with the requirements of the section.

Judgment affirmed.

Mr. Justice SAWYER and Mr. Justice SHAFER, having been of counsel, did not sit in the case.

JACOB ELIAS v. JULIO VERDUGO, MARIA JESUS VERDUGO, HIS WIFE, FRANCISCO P. RAMIREZ, AND FERNANDO SEPULVEDA, *et als.*

EVIDENCE CONTRADICTING ADMISSIONS IN PLEADINGS.—If the complaint in an action against husband and wife to foreclose a mortgage executed by the husband alone, avers that the mortgagor, at the time of its execution, owned the land described in the mortgage as a tenant in common with another person, each owning an undivided one half, and the defendants in their answers admit this allegation, but set up as an affirmative defense a claim to a homestead, evidence to show a parol partition prior to the execution of the mortgage is irrelevant.

PAROL PARTITION OF LAND.—A parol partition of land owned by tenants in common, could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty.

HOMESTEAD.—A homestead cannot be carved out of land held in joint tenancy or by tenancy in common.

DECREE IN FORECLOSURE SUIT.—If any of the parties defendant in an action to foreclose a mortgage claim title to the mortgaged premises, or any portion thereof, adversely to the title mortgaged, their rights under such adverse title should be saved in the decree.

APPEAL from the District Court, First Judicial District, Los Angeles County.

Ramirez and Sepulveda, two of the defendants, answered,

setting up title to several portions of the land claimed to be included in the mortgage, adversely to the mortgagor.

The Court decreed the sale of any portion of the southern half of the Rancho San Rafael which might remain after the assignment of a homestead of the value of five thousand dollars.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellant.

A parol partition of land not carried into effect by possession of each party of his respective share according to the partition, is not valid and binding on the parties. (*Jackson v. Hardee*, 4 Johns. 202; *Jackson v. Duncan*, 14 Johns. 224, and cases cited in note a.)

Exclusive possession of one tenant in common of a particular part, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of partition having been made. (*Lloyd v. Gordon*, 2 Har. & McH. 254.)

No parol partition is effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases. (*Porter v. Hill*, 9 Mass. 34; *Porter v. Perkins*, 5 Mass. 232; *Snively v. Luce*, 1 Watts, 69; *Gratz v. Gratz*, 4 Rawl. 411.)

Volney E. Howard, for Respondents.

There is a sufficient part performance shown in this case to take the division out of the Statute of Frauds in equity. Julio settled, built on and improved his part. His sister settled and occupied her part of the land. Neither party, and especially Catarina, could refuse to execute the agreement without a fraud upon the other. The principle applies to a parol purchase under the Spanish law. (*Tohler v. Folsom*, 1 Cal. 207.)

Taking possession is such part performance. (*Arguello v. Edinger*, 10 Cal. 158.)

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The fact that the cattle ran from one part to the other, does not affect the question of possession, especially when it is shown that Julio built houses and planted vineyards according to the division, and has resided on his part for about twenty years.

The position that there can be no homestead in land held in a tenancy in common, or joint tenancy, is an unfounded assumption, and all our decisions on that subject go on that ground. (*Wolf v. Fleischacker*, 5 Cal. 244.)

It is perfectly easy to ascertain the respective parts of each tenant. It is capable of mathematical ascertainment and certainty. It is a direct and palpable violation of the statute, which declares "the homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof," etc. There can be no doubt as to what tract is intended. And if two or more tenants in common had built different dwelling houses on the same tract, a Court, on division, would assign to each his improvements, with an equitable division of the quality and quantity. If the land had to be sold to effect a division, the proceeds could be divided with equal facility. (*Brookfield v. Williams*, 1 Green's Ch. R. 341; *Thompson v. Hardman*, 6 J. Ch. R. 436; Wood's Digest, 202.)

By the Court, SAWYER, J.

This is an action to foreclose a mortgage executed by Julio Verdugo on the second day of January, 1861, upon the land described in the complaint. A portion of the lands were known as the "Rancho of San Rafael." The principal question in the case is, as to whether the defendants, Verdugo and wife, are entitled to have a homestead reserved from the operation of the mortgage and decree. The case was tried by the Court without a jury, and the fourth and fifth findings are as follows:

"4. The Court also finds that, at the time of the execution

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of said mortgage, the southern portion of the Rancho of San Rafael was the residence and homestead of said Julio Verdugo and wife and family; that said Rancho of San Rafael was acquired by Julio Verdugo and his sister Catarina by inheritance from their father, and that there was a parol division of said Rancho of San Rafael between said Julio and Catarina before the acquisition of California by the Government of the United States, followed by immediate possession of their respective portions, and continued for a long series of years anterior to the execution of the mortgage, and for more than ten years previous to the change of Governments. That by said division Catarina received and possessed the upper or northern half of the rancho, and Julio the southern or lower half. That said Catarina resided on and held the northern half containing the old family residence. That Julio moved to, and built on and resided, with his wife and family, on the southern half, where he resided with his family at the time of the execution of the mortgage, and which was the homestead of himself and wife at the time, under the Act of the Legislature of 1851; and that the same was duly recorded as their homestead on the 13th day of April, 1861, in compliance with the Act of April 28, 1860."

"5. That there was a division of the whole mortgaged property between Julio and Catarina in 1861; but that, as to that portion of the property, to wit, the Rancho of San Rafael, acquired by inheritance, it was merely a confirmation of the ancient verbal division."

Upon these findings the Court decreed, that a homestead of the value of five thousand dollars should be selected and set apart. Plaintiff moved for a new trial, which was denied, and the appeal is from the order denying the motion.

After setting out the note and mortgage, the plaintiff, in his complaint, avers, "that at the time of the execution, delivery and record, as aforesaid, of the said mortgage, the said mortgagor, Julio Verdugo, was the owner, in the tract described in said mortgage, as tenant in common with Catarina Verdugo — the said Julio and said Catarina each owning one undivided

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one half; that after the execution, delivery and recording, as aforesaid, of the said mortgage, the said Julio Verdugo and Catarina Verdugo, on the 13th day of April, 1861, by deed of that date partitioned and divided said tract of land in the mortgage described between them." These allegations are not in any manner denied, or put in issue in any of the answers in the case. On the contrary they are in express terms substantially admitted. Defendant Julio Verdugo, in his answer avers, "that said defendant and his wife, being the owners of one half of premises in complaint described, recorded their declaration setting apart a certain portion including the dwelling house as their homestead," and the wife, Maria Jesus Verdugo, in her answer, alleges "that her husband, Julio Verdugo, being seized in fee of one half of premises as set out in said pretended mortgage, the said Julio Verdugo and this defendant, his wife, made their declaration according to law, setting apart certain portions, including their dwelling house, of said premises as their homestead," etc. They do not here aver a seizin in severalty of any particular portion of the land, but a seizin of one half of the whole, a very remarkable allegation in view of the averment of a tenancy in common in the complaint and a failure to deny that allegation, if the defendants intended at that time to rely upon a seizin of the entirety of a specific portion in severalty. There is no attempt in either answer to deny, or take issue upon any allegation of the complaint. The defendants set up, as an affirmative defense, a claim to a homestead, and rely upon the invalidity of the mortgage to the extent of the homestead value, on the ground that it was not executed by the wife. Upon the pleadings, the tenancy in common of the lands covered by the mortgage was not in issue, and the evidence to show a parol partition was irrelevant to the issues, and contrary to the facts as they stood admitted by the pleadings. But independent of this, the testimony to show a parol partition between Julio and Catarina Verdugo is extremely meagre, vague and unsatisfactory. There are two witnesses, Julian Chavis and Fernando Sepulveda, who testify, that, "for two years before the change

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of Government in California, in the family of the Verdugos the northern part of the Rancho of San Rafael had been recognized and regarded as belonging to Catarina Verdugo, and the southern part as belonging to Julio Verdugo, and that the houses and gardens and other private property and peculiar improvements of each were on such respective parts." Sepulveda also testifies, that since 1843, "there has been a recognized parol division between Catarina Verdugo and Julio Verdugo, by which Catarina retained the old homestead of the family, and the upper, or northern half of the rancho, on which she has resided since 1833. That Julio took possession of the lower, or southern half of the rancho, and has, to the knowledge of the witness, resided on the same since 1843, when he had houses built by himself, a vineyard and cultivated fields. That he has heard both Catarina and Julio state that the ranch was divided and occupied as above stated since 1843; and that the division was always so recognized in the family." And on cross examination it was stated "that Julio Verdugo, the defendant, had always exercised care and control for his sister Catarina, over the northern part of the rancho as well as the southern—they both having cattle, which ranged on the whole rancho, and were all cared for by Julio Verdugo in the same manner, and no difference was made in the rodeo limits."

This is all the testimony to show a valid parol partition, and it may all be true in the general sense stated by the witnesses, and yet there be no parol partition known to the law with an intent to accomplish a division of the land, by which each should hold title to a specific part in severalty. The witnesses gave their general conclusions, without attempting to state any specific agreement or contract between the parties. If there was any definite agreement between Julio and Catarina, it does not appear in the record, and we know nothing of its terms. Whether it was for the purpose of temporary occupation, or with a view to severing their tenancy in common and vesting the title in severalty to a portion in each, does not appear. They lived, it is true, in separate houses, on different portions of the land, and cultivated sepa-

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rate fields, but the other portions of the rancho appear to have been occupied in common by their cattle, all of which were under the control of Julio. Such occupation is very general among tenants in common in this State, in which a very large portion of the valuable lands are held as tenancies in common.

The testimony of the defendants as to the parol partition is of the most unreliable character. On the other hand, all the documentary evidence in the record shows that the parties themselves did not suppose they held specific portions of the rancho in question in severalty. The defendant, Julio, describes the entire rancho in his mortgage—not the southern half merely. So, also, the petition in the record to the Land Commissioners for confirmation of the grant is presented in the names of Julio and Catarina jointly, and the title is confirmed to them according to their petition as coparceners. So also in the deed of partition executed between them since the execution of the mortgage in question, there is no recital of, or reference to any prior partition, but on the contrary the deed recites: "That whereas, the said Catarina Verdugo, and Julio Verdugo do have and hold, and are seized in common and as tenants in common in equal parts of those certain tracts or parcels of land," etc., describing two tracts, one being the "Rancho of San Rafael." * * * * "And, whereas, both of said tracts of land adjoin and are connected one with the other; now, therefore, it is covenanted, granted, concluded and agreed by and between the said Catarina Verdugo and Julio Verdugo * * * * that a partition of said lands seized by them in common be made in the manner and form following," etc. In view of these facts, and the facts that stand admitted by the pleadings, it is manifest that the evidence is insufficient to support the findings.

At the time the pleadings were filed, it is evident, that the defendants did not rely upon a parol partition, for their answers are not framed upon any such theory.

That a valid parol partition might have been made under the law which prevailed in California before the adoption of

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the common law, we have already held in *Long v. Dollarhide*, 24 Cal. 222. But agreements in relation to land resting in parol ought to be very satisfactorily proved.

Respondents insist, that the decisions to the effect that a homestead cannot be carved out of land held in joint tenancy, or by tenancy in common, are erroneous and ought to be overruled. It is now too late to re-investigate the reasons upon which those decisions are based. The first of the series, *Wolf v. Fleischacker*, 5 Cal. 244, was made nine years ago. The decision was affirmed in *Reynolds v. Pixley*, 6 Cal. 167; *Giblin v. Jordan*, 6 Cal. 417; and *Kelleisberger v. Kopp*, 6 Cal. 565; and since that time the construction of the statute upon the point involved has been regarded as settled. The parties in this case may have relied upon those decisions in dispensing with the signature of the wife to the mortgage.

The rights of Ramirez and Sepulveda, held adversely to the title mortgage, should have been saved in the decree. (*San Francisco v. Lawton*, 18 Cal. 478.)

The order denying a new trial is reversed, and the cause remanded for further proceedings.

JOHN AGNEW v. STEAMER CONTRA COSTA.

LIABILITY OF STEAMBOAT AS A COMMON CARRIER.—In an action against a steamboat, as a common carrier, for the loss of a horse by the explosion of the boiler, alleged by the plaintiff to have been caused by racing with a rival steamer, evidence on the part of the defense to show the good condition of the boiler is irrelevant, both on the question of liability and of damages.

SAME.—In such case, evidence on the part of the defense that the engine and boilers were strong, and that extraordinary care was used by the officers and crew of the steamer in their management while racing, is also irrelevant.

LIABILITY OF COMMON CARRIER.—The presumption of the law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Argument for Respondent.

Plaintiff offered no evidence upon the condition of the boilers.

Plaintiff recovered judgment in the Court below for the value of the horse and interest on the amount, and defendant appealed.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

It is a general rule of law that interest is not recoverable on unliquidated demands. (Sedgw. 377; *Holmes v. Rankin*, 17 Barb. S. C. 454.) It was said by Mr. Justice Washington, in *Gilpin v. Consequa*, Peters' C. O. R. 95, that "as to interest this is a question generally in the discretion of the jury. But it is not agreeable to legal principles to allow interest on unliquidated and contested claims, sounding in damages."

An exception to that rule has been allowed in a case where there was proof of negligence and improper conduct.

It was said by the Supreme Court of New York, in *Watkinson v. Lawton*, 8 J. R. 217: "The question of interest depends upon circumstances. The jury may give interest, by way of damages, in cases in which the conduct of the master was improper. But here no bad conduct is to be attributed to him, and interest is not, in every case, and of course, recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury."

That being the rule, it would seem to follow that the Court below erred in excluding the proof offered by the defendant for the purpose of showing that the case did not fall within the exception.

Wm. H. L. Barnes, for Respondent.

The deposition of Coffee was incompetent and irrelevant.

In actions against a common carrier to recover damages for the non-delivery of goods intrusted to him, the measure of damages is the value of the goods at the place of destination, with interest from the day when they should have been delivered. (Sedg. on Meas. of Dam., 354, and cases cited.)

Argument for Respondent.

In such an action, the defendant might prove a part performance of his contract, a late delivery, or a delivery in a damaged condition, of the goods, so as to reduce the amount of damages to which the rule would otherwise subject him; because the action has only one object, viz: to place the parties in the same situation in which they would have been if the contract had been fulfilled, and so limit the recovery to the actual loss sustained. (Story on Bailments, § 582, *a*, and cases cited.)

In the present case there was a total destruction of the property intrusted to the carrier, and no matter what the condition of the boiler of the defendant was, the indemnity to which the plaintiff was entitled for the loss of his property could not thereby be reduced or changed. The deposition was, therefore, incompetent as evidence in mitigation of damages.

The defendant's counsel seemed to be laboring under an impression that the responsibilities of carriers of goods for hire and of carriers of passengers for hire were identical, and that what would excuse the carrier of passengers would also exonerate the carrier of goods. The distinction between them in this respect is manifest. In the case of the passenger carrier, it might be proper to permit him to show, affirmatively, facts which would authorize the conclusion that the utmost care, diligence, and prudence were exercised; because the common carrier of passengers is not in any sense an insurer, but is answerable only for injuries to passengers against which the utmost skill and prudence could not guard. But even the exercise of the utmost skill and prudence has been held immaterial in an action against a common carrier to recover damages for injuries to *passengers*, and he has been held responsible for latent defects in machinery, or the structure of the road, whether discoverable by the exercise of the utmost skill and care on the part of the defendants or not. (*Hegeman v. Western R. R. Co.*, 3 Kernan, 9.)

But the liability of a common carrier of goods, by water, in a vessel propelled by steam, does not end when he has

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placed on board good and sufficient engines and boilers, *capable of sustaining twice the amount of steam sufficient to explode them*. Nor when he has secured a good captain and skilful officers and agents to manage his machinery. Except as against the two classes of accidents of which we have spoken, he is the absolute insurer of the goods intrusted to him—he must deliver them or pay for them. If the offer in question could be considered an offer to prove any *fact*, or present any fact upon which the Court could pass as admissible or otherwise—which is denied—such facts would have been utterly unavailing to show that the damage in question occurred by act of God, or was one towards which no human agency had contributed. It is the most ordinary duty of a common carrier by water, in steam vessels, to supply good boilers and competent engineers. Happily for life and limb they are generally found in such vessels. But their presence cannot prove the absence of human agency in producing a disaster of this description, nor make the liability of the carrier greater, nor diminish it a hair.

By the Court, SHAFER, J.

This action was brought to recover damages for the loss of a stallion, by means of the negligence of the defendant as a common carrier between the cities of San Francisco and Oakland.

The plaintiff introduced evidence tending to prove that on the 3d day of April, 1859, he embarked the stallion on the "Contra Costa," at San Francisco, to be carried for him to the City of Oakland. That the horse was put by the captain of the boat opposite the boiler in the place where horses were usually stationed. That the boiler of the steamer exploded on the passage, and that the horse was so far injured by the explosion that he died on the same day. That the Contra Costa was at the time racing with a rival steamer running between the same *termini*; that there was betting among the passen-

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gers of the Contra Costa, which betting was encouraged by the assurances and conduct of the engineer.

The defendant offered in evidence the deposition of George W. Coffee, "for the purpose solely of showing the condition of the boilers of the steamer." The plaintiff objected to the evidence as incompetent and irrelevant, and the Court sustained the objection. The appellant claims that this ruling was erroneous.

Where the cause of the damage for which recompense is sought is unconnected, as was the case here, with the conduct or propensities of the animal undertaken to be carried, the carrier is subjected to the ordinary responsibilities connected with his vocation. (*Palmer v. The Grand Junction Railway Company*, 4 Mees. and Wels. 749; *Clarke v. The Rochester and Syracuse Railroad Company*, 14 N. Y. 574.) In the case at bar, the boilers were either sufficient or insufficient. If they were insufficient, proof of the fact could have been of no service to the defendant, of course; and if sufficient, the proper deduction from the fact would be, not that the explosion resulted from the act of God, but from some fault in the management—the very cause to which it was attributed in the theory of the plaintiff's case. The defendant was an insurer against all injury not resulting from the act of God or the public enemies, or from the conduct of the animal; and it follows that the good condition of the boilers had as little to do with the question of liability and with the question of damages also, as the condition of the rudder or the general staunchness of the ship, the misconduct charged being assumed or given.

Upon the exclusion of Coffee's deposition, the defendant offered to prove "that all skill and care and prudence were used, as far as human foresight would go, and that defendant did in fact provide and have on board a good and sufficient engine and boilers, capable of sustaining a pressure of steam twice the amount that was in the boiler at the time of the explosion, and that the master, engineer, crew and defendant so conducted themselves that the explosion occurred by inevitable accident or unknown causes, and against which precau-

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tion and skill could not guard." On objection taken by the plaintiff this evidence was also excluded.

As between Court and counsel, the offer lacks the simplicity and directness called for by the occasion.

It is complicated and somewhat confused. The plaintiff's case imputed the explosion to the racing and its incidents, and proof was introduced of that misconduct by him, as we must intend, not so much for the purpose of proving the liability (*Boyce v. The California Stage Company*, 25 Cal. 460,) as for the purpose of enhancing the damages by interest on the value of the animal. (*Watkinson v. Laughton*, 8 Johns. R. 217.) If the defendant proposed to meet the case in this aspect of it, the offer should have been to disprove the particular misconduct imputed. But the offer, as made, does not necessarily impart anything more than an offer to prove that a reckless act was carefully performed.

But there is another aspect under which the question may be presented. Let it be assumed that the purpose was to prove as a proposition of defense that explosion resulted from the *vis major*, and that the proof of the strength of the boilers and of extraordinary care, on the part of officers and crew, was offered for the purpose of supplying grounds of presumption. The answer is that there is no logical connection between the strength of the boilers and extraordinary care in the management on the one hand, and *vis major* propounded on the other—as little indeed as there is between the same facts and the conclusion that the explosion was caused, or that the horse was killed by public enemies. (*Boyce v. California Stage Co.*) Proof that the boilers were sufficiently strong would establish merely that the horse was not killed by reason of their weakness. Proof that extraordinary care was used, would prove simply that the explosion occurred in spite of it, but it would throw no light upon the question of whether it did or did not result *acto Dei*. Between the point at which extraordinary care on the point of a bailee may be said to terminate, and the point at which "superior force" may be said to begin, there is a wide space for the interposition of other agencies, and the

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law *presumes* against a carrier in every case, except it be made to appear that the injury complained of could not have happened by the intervention of human means. (*Forward v. Pittard*, 1 T. R. 27.)

Other errors are assigned, but none that require particular notice.

Judgment affirmed.

By the Court, SHAFER, J., on petition for rehearing.

Petition for rehearing. The rehearing is asked for on the ground that "the attention of the Court has been by some means diverted from the only point presented for consideration in appellant's brief" to wit: the charge of the Court "that interest can be allowed against a common carrier only when it shall appear that there was fraud or gross misconduct in carrying the property or in the transaction." The brief referred to "invites the attention of the Court to the errors numbered four, five, six, and twelve," in the transcript. Number four is as follows: "Error of the Court in refusing to allow the defendant to read in evidence the deposition of George W. Coffee, and refusing to allow defendant to show the good condition of their boilers and steam engine in mitigation of damages." Both of these questions are considered in the opinion, and both, on reasons given, were decided against the appellant, on the ground that the evidence offered was not admissible to mitigate the damages, nor for any purpose. Number five, to which our attention was also specially solicited, is as follows: "Error in the Court in refusing to allow the defendant to prove by competent witnesses that all possible skill, care and prudence was used on the part of the agents and servants of the defendants." That question is also discussed in the opinion and determined against the appellant. It will be observed that the assignment does not bring the error alleged into relation with the point of damages; but we, nevertheless, after disposing of the error as related to the point of the defendant's liability, passed upon it as it stood con-

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nected with the question of damages, as is apparent on the face of the opinion.

Number six is as follows: "Error of the Court in refusing to allow defendant to prove that the boilers of defendant were capable of sustaining twice the amount of steam contained therein at the time of the alleged explosion, and that the engineer, master and crew of defendant were entirely without fault or negligence." This point, also, is not brought expressly into relations with the question of damages, but the "means" by which we were induced idly to discuss and idly to pass upon it, though forgotten by counsel, have now become apparent.

As to the charge of the Court upon the subject of allowing interest by way of damages, we did not discuss it, for two reasons, one of which was that its correctness was indisputable, and the other was that its correctness was not disputed by counsel; and, as already stated, we held, on discussion, that the general evidence which the defendant offered of "care," and "extraordinary care," and "of all possible care," and to the effect that the "boilers were in good condition," etc., was inadmissible, for the reason that the defendant did not undertake to controvert the specific fact of racing with a rival boat for the purpose of winning bets encouraged by the engineer — holding that the theory of mitigation upon which the rejected evidence was offered amounted to this — that if it could be shown that the luxury and recklessness of racing was indulged in with "good boilers," strained to bursting with "extraordinary care," that then, and in that event, the defendant should be let off from paying interest on the value of the stud, by way of damages. On these grounds we consider that, as matter of fact, no question was discussed in the opinion except such as our attention was specially called to by counsel, and that the question which counsel conceives was entirely overlooked, was, on the contrary, entirely exhausted.

Petition for rehearing denied.

Mr. Justice CURREY expressed no opinion.

T. L. BUCKOUT v. FRANCIS P. SWIFT, MARGARET SWIFT, AND JOHN LOWELL.

ISSUES OF FACT RAISED BY ANSWER.—Where there are no findings of fact in an action tried by the Court, all the issues of fact raised by the answer are deemed to have been found in favor of the party who recovers judgment.

REMOVAL OF A HOUSE FROM THE FREEHOLD.—The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man.

MORTGAGEE'S RIGHT TO AN INJUNCTION.—The mortgagee of a lot on which a house is standing, cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot without the house will be an inadequate security for the mortgage debt.

SAME.—The severance and removal of a house from land covered by a mortgage withdraws the house from the operation of the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use.

APPEAL from the District Court, Sixth Judicial District, City and County of Sacramento.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The Court erred in dismissing plaintiff's bill as to respondent, Lowell. The refusal of the injunction, however, made it impossible for the Court, in accordance with its ruling on the motion for an injunction, to do otherwise than dismiss the bill as to the respondent Lowell.

We, however, contend that it was a gross act of spoliation on the part of Swift and Lowell, the one to sell and the other to buy the house as it stood in the street.

We cite generally the following authorities to show that in no event could the Court below have been right: "Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, pass with the realty." (1 Hilliard on Real Property, p. 26.) And pass by mortgage without being specially named. (Ib. 28.) A grant of land carries houses with it. (2 Washburne on Real Property, p. 625.)

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E. B. Crocker, for Respondent.

By the Court, SHAFER, J.

On the 4th of October, 1861, Francis P. Swift and his wife, for the purpose of securing the payment of a promissory note made and delivered by him to the plaintiff, mortgaged a lot in the City of Sacramento, on which stood a dwelling house occupied by Swift and his family, and in which they continued to live until the great flood of 1862, when the house was carried, by the rush of water, into the street a short distance from the mortgaged lot, where it stood when this action was brought. A short time before the commencement of the action, Swift made a contract with the defendant, Lowell, to sell him the house, and Lowell was about to remove it, when the plaintiff brought this action to foreclose the mortgage and to restrain the removal. It was alleged in the complaint that the house, at the date of the mortgage, was affixed to and formed a part of the realty, and that it was chiefly valuable to be used in connection therewith; and that Lowell bought with full notice of all the facts, and that he was destitute of property. The plaintiff obtained upon his complaint, from the County Judge, an order restraining the defendants from selling, taking away, or injuring the house. The order was thereafter dissolved, and an injunction refused by the District Court, upon the complaint alone.

Thereupon, Lowell answered, and, at the trial of the cause, the Court rendered a judgment against the defendant Swift for the amount due on the note, and a decree for the foreclosure of the mortgage and for the sale of the mortgaged property, excepting the house, and as to that, it was ordered and adjudged that the decree should not affect nor authorize its sale; and the Court dismissed the complaint as to Lowell and gave judgment in his favor. The appeal is from the order dissolving the restraining order and refusing to grant an

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injunction, and from that part of the decree which dismissed the bill as to the defendant Lowell.

There is a document in the record headed "Statement on Appeal." Amongst other things, it contains the pleadings in the action, an agreement that certain facts detailed were "proved," and a medley of evidence given by the witnesses of the respective parties. On this appeal we can make no reference to the evidence, for the purpose of determining whether the judgment is right or wrong. There was no motion for new trial, nor are there any questions arising upon the admissibility of evidence. There are no findings in the case, and we must therefore intend that all the issues of fact raised by Lowell's answer were found in his favor; that is to say, we must intend that the Court found that the lot, without the house "was sufficient security for the debt;" that the defendant "purchased the house of Swift and fully paid him therefor," and that "the defendant is possessed of sufficient means to respond in damages at law." There are other issues raised by special denials in the answer, but the denials are either of immaterial averments or involve mere conclusions of law. It is charged in the complaint that the house was standing upon the lot when the mortgage was made and recorded in October, 1861. That the house was thereafter, in 1862, floated by the flood from off the land into an adjacent street. That the house was the one which Lowell bought, and that the fact of their identity was known to Lowell at the time he purchased. All these averments must be taken as true, for none of them are denied. The facts, which by the statement were "proved," may be laid out of account for they do not bear upon any question which we shall have occasion to discuss.

In view of the facts admitted by the pleadings, it cannot be doubted that the house was originally real estate, and was affected, as such, by the mortgage lien. (2 Wash. R. P. 625.) That point we consider to be so fully established by authority as not to admit of discussion. We shall consider the case under two distinct aspects.

First — Upon the hypothesis that the lien of the mortgage

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remained upon the house after it took on the character of personal property by severance and removed from the freehold.

So far as legal effect is concerned, it matters not whether the severance was by the act of God or the act of man. The severance, *proprio vigore*, changed the character of the property from real to personal, irrespective of the means by which it was accomplished. If, while the house was yet upon the land, the mortgagor, or any one claiming under him, had threatened to remove it, and the mortgagee had filed a bill to restrain the removal on the ground of waste, the removal would not have been enjoined, except upon proof, that, as matter of fact, the lot without the house would be an inadequate security. The general rule in equity is, that a mortgagor, in possession, has the right to cut timber on the lands mortgaged, and to do other parallel acts, and a Court of equity will not interfere to restrain him or his assigns in the exercise of that right, until it is made to appear that the cutting, or other like act, is being carried to an extent calculated to render the land an insufficient security for the amount due upon the mortgage. (*King v. Smith*, 2 Hare, 239; *Brady v. Waldrons*, 2 J. Ch. 147; *Hampton v. Hodges*, 8 Ves. 105; *Wright v. Atkyns*, 1 Ves. and Beav. 314; *Van Wyck v. Alliger*, 6 Barb. S. Ct. R. 511; 2 Story's Eq. Sec. 915.) Now, if in the absence of the fact named, a mortgagor would have the right to withdraw timber, growing upon the mortgaged lands, from the lien of the mortgage, by severing and converting it to his own use, why should he or his vendee, in the absence of the same fact, be restrained from converting the property after severance, assuming it to be then subject to the lien? The questions are identical. Both bear upon a common point, which is as follows: If the mortgagor is allowed to exercise his equitable right of withdrawing timber, etc., from the operation of an admitted lien, will or will not the security be endangered? No authorities have been cited by counsel bearing directly upon this question, and we have not been able to find any that directly control it; but on the ground of strong and manifest analogy, we consider that both of the cases stated

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should be taken as subject to the same rule. This conclusion disposes of the appeal upon the hypothesis of the appellant that the house was under the lien of the mortgage after its removal from the land.

Second— But we consider that by removal from the land the house was effectually removed from the operation of the mortgage lien.

The mortgage was, by its terms, limited to land as its sole subject matter; and so long as its terms remained unchanged it could not be made to comprehend anything else.

Again: A building, severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is disencumbered of the lien, substantially on the same principle that a building erected upon the lands after the giving of the mortgage is subjected to the lien. In the first case, the building is withdrawn from the operation of the mortgage, for the reason that it has ceased to be a thing real; in the other, mere materials are brought under the lien, for the reason that they have become a structure by combination, and the structure has become a thing real by position. In both cases position is the pivot of judgment.

Again: A mortgagee, as we have already seen, may, under certain circumstances, restrain the mortgagor from cutting and removing timber from the lands covered by the mortgage; but that doctrine goes upon the very ground that if the timber should be cut, or at least cut and carried away, it would, in its new character of personalty, be withdrawn from the operation of the lien by the sheer force of the change.

Again: If the lien of a mortgage should be held to follow things severed and removed from the freehold, the doctrine would involve a series of notable consequences and investigations. Minerals removed from mines under mortgage— crops, timber, buildings, and the materials, even, of which the buildings were constructed, when severed and removed from lands under mortgage, could be pursued under proceedings in foreclosure into the hands of all parties, or, at least, into the hands of all parties taking with notice. And of what avail would

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all this be to mortgagees in the large and in the long run? And under what rule should the lien of the mortgage be enforced? Under that applicable to things real, or the one applicable to things personal? Most probably after the method applicable to things real. But in that event, should the property be sold on view, or without view by the bidders, and in whatsoever hands it might chance to be? If on view, then under what known process could the Sheriff seize, hold, and produce the property at the sale? And if not on view, then could the purchaser call for a writ of assistance if the holder of the property refused to deliver it? And how would it be as to the ordering of redemptions or as to the possibility of any redemption? Would a bill of sale, executed by the Sheriff, pass the title, or would a deed be necessary? and if the latter, then would the things personal be included by indentment in a deed of the *terra firma*, or should they be specially mentioned therein?

But we consider it unnecessary to push the general reasoning further, for the question presented was met and determined in *Codrington v. Johnstone*, 1 Beavan, 520. It was held in that case that a mortgagee taking possession, or a receiver appointed on his behalf, is not entitled to crops of the estate, previously severed and consigned by the mortgagor, though not actually received by the assignee.

We hold, then, on principle and on authority, that when the house in question was removed from the land, it was withdrawn from the operation of the mortgage lien, and that the mortgagor had the right to sell it, and that Lowell had the right to buy and to convert it to his own use.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

WILLIAM NORRIS v. SAMUEL J. HENSLEY.

CONSTRUCTION OF A WILL.—If by the terms of a will the estate is devised to "A," to have and to hold during his lifetime, and then to go to his heirs; if the word "heirs" is used in a general sense to indicate those to whom by law the property would pass by descent, and not in a special or restrictive sense to designate certain particular individuals, the whole estate vests in "A" in fee simple, notwithstanding the language of the will limits him to a life estate.

ISSUE.—The following was the language of the bequest in the will: "I bequeath to Dr. Van Canaghen, one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell." *Held*, that by the terms of the will, the three devisees named took a fee simple estate in the property devised.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

B. F. Morrison, for Appellant.

The question thus arising for adjudication by this Court is, perhaps, a new one, so far as the judicial history of the State is concerned, and its novelty is fully equalled by its importance. There is no doubt that the learned counsel for the defense will invoke an arbitrary rule of construction known as the "Rule in Shelley's Case," and will urge that in England, as well as in several States of this Union, the meaning of the language used in this will has received a judicial construction adverse to the plaintiff's right to recover in this action. But however far the Courts may have gone in establishing the rule in *Shelley's Case*, we insist that where the intention of the testator is so perfectly clear as it is in the will of Elizabeth Townsend, the Courts cannot apply an arbitrary rule of law, and thereby entirely defeat the wishes and intention of the testator as they manifestly appear upon the face of the will. It has been so held in numerous cases, and we doubt not such is the principle now well settled by the authorities. (*Tanner v. Livingston*, 12 Wend. 92.)

The fundamental rule is that the intention of the testator is

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to be collected and allowed, though not expressed in legal language. *Where the intention is clear to give only a life estate, it should govern.* (*Rogers v. Rogers*, 3 Wend. 509.)

The reasons upon which the rule in *Shelley's Case* is founded, never had any application to the entirely different condition of things in this country.

The laws of primogeniture and the doctrines of feudal tenures prevailing in England are unknown to us, and there is no good reason in law or logic for applying to the changed state of affairs here an old, arbitrary rule, such as that laid down in *Shelley's Case*. The foundation of the rule and the reasons why it should not be allowed to interfere with the intention of a testator in this country, are clearly set forth in the opinion of Mr. Justice Barlow. (See case of *Schoonmaker v. Shirley*, 3 Denio, 492.)

Again, the rule in *Shelley's Case* was laid down with reference to a common law conveyance, and although it has been extended in its application to wills, yet there is more latitude of construction allowed in case of wills in furtherance of the testator's intention. (4 Kent's Commentaries, 226.)

These authorities, and the numerous cases to which they refer, clearly show that the arbitrary rule of law laid down in *Shelley's Case*, is by no means of controlling force and effect, regardless of the clear and manifest intention of the testator, but on the contrary, where it is perfectly obvious from the language of the testator that a life estate was intended to be created, only such an estate will pass remainder in fee to others. Indeed, it is a favorite doctrine with the Courts, that in the construction of wills, the intention of the testator shall be the pole star, and the cases in which such intention is rejected constitute the exception and not the rule.

Delos Lake, for Respondent.

The case is directly within the rule in *Shelley's Case*, (1 Coke, 104,) which is stated by Preston thus: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing; and in the same instrument there

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is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." (4 Kent's Com. 215.)

This rule has been the common law of England for near five hundred years, and is stated by Chancellor Kent to be "received and adopted in the United States as part of the system of the common law." (4 Kent's Com. 229.)

In this State the common law of England is, by statute, made the rule of decision. The case of *Tanner v. Livingston*, 12 Wend. 83, is plainly distinguishable from this. In that case the devise was to Le Roy and Anna Livingston for their natural lives. Then, in a separate item, and as a separate devise, the remainder is devised to the *heirs male* of Le Roy and Anna.

Under the law in *Shelley's Case*, Le Roy and Anna Livingston would have taken, under the will, an estate tail, except for a provision in the will that the heirs male should take an estate in fee simple as tenants in common. But as entails had been abolished by statute, the rule in *Shelley's Case*, of course, could not be applied, because it would create an estate forbidden by law.

There are other facts in the case distinguishing it from the present, but it is not necessary to pursue them. It is sufficient that the Court held, not that *Shelley's Case* was not law, but that the case was not within it.

The very gist of the rule is, that if by the terms of the will, or other conveyance, it is provided that the estate should pass in the line of hereditary succession, or according to the laws of descent, the ancestor will take the whole estate. And, therefore, wherever the word "heirs" is used in a general sense, and not in a special or restrictive sense, to designate certain particular individuals, the whole estate vests in the ancestor, notwithstanding the language of the conveyance limits him to a life estate. (4 Kent's Com. 226.)

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In *Horne v. Lyeth*, 4 Harris & John., Maryland, 431, it was held that a devise of a term for ninety-nine years to A. during her natural life, and after her death to her heirs, vested the entire interest in the term in A.

The Court say that the word "heirs," when used alone, without explanation, is always a word of limitation, and not of purchase, and no presumed intention will control its legal operation. (*Stewart v. Kenower*, 7 W. & S. 288; *McFeely v. Moore*, 5 Hammond, 465; *King's Heirs*, 12 Ohio, 390; 5 Conn. 100; 3 Edw. Ch. 1.)

By the Court, CURREY, J.

This action was brought to recover damages in the sum of twelve thousand dollars for the breach of a covenant of seizin contained in a deed of conveyance of a parcel of land in the City of San Francisco, executed by the defendant to the plaintiff.

Elizabeth L. Townsend was the owner in fee of the land described in the deed, and made her will, devising it to Dr. Van Canaghen and to her son, John Henry Townsend, and to her brother, Moses Schallenberger. She died in December, 1850. The devise was in the following words:

"I bequeath to Dr. Van Canaghen one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell it."

The devisees conveyed the premises to the defendant by deed purporting to grant the same in fee, and the defendant in November, 1861, conveyed the same premises to the plaintiff for the consideration of twelve thousand dollars, by deed, in which was contained a covenant of seizin. The question submitted to the Court below was, whether the devisees named took under the will only a life estate in the premises or an estate in fee simple absolute. The Court held that they took

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an estate in fee simple, and gave judgment for the defendant. Whether the Court was correct or not in its construction of the devise set forth is the only question involved in the case.

The doctrine declared in *Shelley's Case*, 1 Coke R. 93, is that where an estate of freehold is limited by gift or conveyance to a person for life, and in the same gift or conveyance there is a limitation, mediate or immediate, to his heirs, or the heirs of his body, the word *heirs* is a word of limitation of the estate, and not of purchase; by which, says Mr. Preston, it must be understood that it is not a designation of persons to take originally in their own right. (1 Preston on Estates, 264.) The rule in *Shelley's Case*, as it is called, Chancellor Kent says, has been established as an axiom in the English law for near five hundred years. (4 Kent's Com. 218.) "The principle of this rule," says Mr. Jickling, "is of much greater antiquity than the name, the former being virtually recognized in the Year Book of 18, Ed. II (1325), the latter not adopted till after the determination in *Shelley's Case*, 32 Eliz. (1590), in which the subject was incidentally discussed." (Jickling on Legal and Equitable Estates, 281.) It has generally been considered as of feudal origin, and introduced to prevent frauds upon tenure (1 Fearn on Contingent Remainders, 113); but Mr. Hargrave, in his observations concerning the rule, considered it as one of the barriers provided by law to guard descent from being confounded with purchase. (Hargrave's Law Tracts, 574, 575.)

In *Perrin v. Blake* in the Court of Exchequer, Mr. Justice Blackstone held it by no means clear that the rule took its rise merely from feudal principles; he was rather inclined to believe it was first established to prevent the inheritance from being in abeyance, and that one principle foundation of it was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Further he said "another foundation might be and was probably laid in a principle diametrically opposed to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land and to throw it into the track of commerce one generation sooner, by

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vesting the inheritance in the ancestor, than if he continued tenant for life; and the heir was declared a purchaser." That the decisions of Courts were influenced by this additional consideration suggested by Mr. Justice Blackstone, has been doubted by high authority, because in the early years of the common law it was the fruits of the tenure rather than the power of alienation, that engaged the attention of the Courts. (1 Preston on Est. 307.) But in modern times the principle suggested has gained ground, and it may be said the tendency of modern decisions has been to discourage and discountenance every contrivance having the effect to operate in restraint of the free alienation of property, or to divert it from the regular course of descent. What may have been the origin of the rule, it is not particularly important to inquire for the determination of the question before us. It is enough that we are satisfied that it has been a settled rule of property in all countries where the common law has been and is in force as the law of the land; and being thus satisfied, our duty is to ascertain if the case in hand comes within or falls without the rule, and to decide accordingly.

In the application of this rule to deeds of conveyance, it has been generally held of more absolute control than when applied to wills. (4 Kent Com. 216; 1 Preston on Estates, 271; 2 Fonb. Eq. 70.) It is certain, says Mr. Butler (Coke Litt. Sec. 719, note 1), that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intentions; and if the object of it is warranted by the established rules of law and equity, will admit of its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that which the rules of law and equity do not admit, neither the Courts of law nor the Courts of equity can allow its operation. The first thing, therefore, to be ascertained is, what the

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object of the testator is; the next, whether it is such as the rules of law and equity admit. In *Perrin v. Blake*, 4 Burr, 2,579, Lord Mansfield said, the rule is not a general proposition subject to no control, where the intention is on the other side, and where the objections may be answered. And he agreed with Justices Wilmot and Aston, that the intention is to govern, and that *Shelley's Case* does not constitute a decisive uncontrollable rule. Mr. Preston says the most strenuous advocates for a proper and legal application of the rule must admit, that the intention is to be collected, and if clearly expressed, to be observed. After the intention is fixed, the law decides on the gift; allowing the intention to govern as often as it is clear that the word *heirs* is not used as descriptive of the class of legal successors, but in designation of an individual or of particular persons. The intention to be observed in exclusion of the rule must be expressed in terms manifestly exhibiting to the mind clear evidence that the heirs are not to take merely in that right, and as answering that description. The inquiry must be directed to discover the intention, and to see whether the gift is clear of the reasons on which the rule depends for effect; for as Lord Hale very pertinently observed, in *King v. Melling*, (2 Lev., 58), in reference to wills, the intention is to be law to expound the testament. "The true ground of decision is the intent, and the true question is, what is the intent? and the interpretation is to show the intent." (1 Preston on Estates, 275.)

The intention, it is to be remembered, is to be sought for not only by consulting the words of the will, but also by the rules of interpretation, which have been from time to time adopted by Courts of law for its ascertainment. (1 Sum. 239.) In *Hodgson v. Ambrose*, 1 Doug. 337, Mr. Justice Buller observed, in a case involving the construction of a will: "There is no rule better established than that the intention of a testator, expressed in his will, if consistent with the rules of law, shall prevail." Mr. Preston, in commenting upon the words "if consistent with the rules of law," says these words are applicable only to the nature and operation of the estate

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or interest devised, and not to the construction of the words. The question whether the intent be consistent with the rules of law or not, can never arise until it is settled what that intention was. This can only be discovered by taking the whole together. (1 Preston on Estates, 276.) It is not sufficient that the intention should depend on inference or presumable reasons; it must be manifested by words which are explicit; by words which, without any infringement of the rule in *Shelley's Case*—at least the reason and spirit of that rule, if not its literal terms—may be construed to be a designation of particular persons. (1 Preston on Estates, 279.) At common law, a devise of an estate to heirs which they would have taken by descent, was void, and the heirs took as heirs and not as purchasers. (2 Wash. on Real Property, 136, 268.)

In *Jones v. Morgan*, 1 Brown's Ch. Cases, 219, Lord Chancellor Thurlow described the outlines of distinction applicable to all the cases in which the rule in *Shelley's Case* had been subjected to judicial and forensic scrutiny. He drew an inference from all the cases, that where the estate is so given, that after the limitation to the first taker, it is to go to every person who can claim as heirs to the first taker, the word *heirs* must be a word of limitation—that all heirs taken *as heirs* must take by descent. His lordship said he thought the argument immaterial that the testator meant the first estate to be an estate for life. He took it, that in all cases the testator did mean so. He rested it on what the testator meant afterwards; if he meant that every other person who should be heir should take, he then meant what the law would not suffer him to give, or the heir to take as a purchaser; and further he said, all possible heirs must take as heirs, and not as purchasers; that in all cases where the limitation of an estate of freehold to a man and afterward to the heirs of his body, whether general or special, so as to give it to the heirs as a denomination or class, the heirs shall be in by descent and not by purchase.

Mr. Fearne, after having given to the subject a thorough

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and masterly examination, in which he noticed especially the decision of Lord Thurlow in *Jones against Morgan*, denominating it "very high authority," said: "Now, if the inference I have drawn from the very operative tendency of the law to hereditary descent, in its mode of approaching it, where the requisite ground for its accomplishment is wanting, be just; if from such premises, unopposed by any single repugnant decision or judicial opinion, the conclusion that the capacity of an heir to take the inheritance by purchase, so as to transmit it through the same line as by descent, is confined to those cases only where the ancestor takes no estate of freehold, be sufficiently founded, Lord Thurlow's doctrine embraces the subject to the full extent of his expression. For then, whenever the ancestor takes the freehold the inheritance will not go to all the heirs, etc., in the course of inheritable succession, unless by an actual descent; and consequently, if after the first taker it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the word *heirs*, etc., as words of limitation. If after him all heirs, etc., are to take as such—that is, as answering that description, they can take only by descent. If the law will not admit of all possible heirs, etc., taking the inheritance after its inception by a freehold in the ancestor otherwise than by descent, it follows that wherever the limitation to the heirs, etc., after a freehold to the ancestor is admitted to reach the whole denomination or class of heirs described, they must take by descent and not by purchase." (1 Fearn's Cont. Rem. 308.)

The principle upon which the rule in *Shelley's Case* is founded being understood, it is next necessary to ascertain if the devise under consideration comes within the rule. The devise was to the three persons named in the will, with the *habendum* "each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns," with the superadded words "but never to sell it." The words "their heirs" do not designate particular persons, but is a *nomen collectivum*, comprehending the whole succession of heirs, lineal

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and collateral, of the three devisees. Here there is not even a limitation to the heirs of the body of each of the devisees, and if it were possible to construe the words "their heirs" as meaning the heirs of their bodies, even then they could not be held a *designatio personarum* without superadded words of enumeration showing clearly and unequivocally that the testatrix intended they should take in remainder an estate in fee in the premises in the character of purchasers and not in the character of heirs of her immediate devisees, and that they should constitute the root of a new inheritance—the stock of a new descent. In the cases wherein it has been held that a devise to one for his life with remainder to the heirs of his body, did not fall within the rule in *Shelley's Case*, there were superadded words of unquestionable intent controlling the direction of the property devised. For example, where the devise was to A., and the issue of her body lawfully to be begotten, as tenants in common, if more than one, but in default of such issue, etc., devise over, it was held that A. took a life estate only, and the limitation to her children was a contingent remainder to them in fee as purchasers. (*Davy v. Burnsall*, 6 Term R. 30.) There are many cases to be found in the books proceeding upon the principle that where there are superadded words, clearly and unequivocally expressing the intention of the testator to invest the first taker or immediate devisee with an estate for life only, with remainder in fee to the children or issue, or heirs of the body of the tenant for life, the intention shall be carried into effect, provided it be not inconsistent with the rules of law so to do.

In *Doe v. Jesson*, 5 Maule and Selwyn, 95, the devise was to W. for life, and after his decease to the heirs of his body lawfully issuing, in such proportions as he should appoint, and for want of such appointment then to the heirs of his body lawfully issuing, share and share alike as tenants in common, and if but one child the whole to such only child, and for want of such issue, then to the testator's right heirs forever. The testator died and W. entered, and afterwards married and had issue. It was held by the Court of King's Bench that W.

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took only an estate for life, and that his children also took only an estate for life; but on writ of error to the House of Lords, where Lord Eldon and Lord Redesdale both delivered opinions, the judgment of the King's Bench was reversed. Lord Eldon placed his judgment on the ground in part at least, that the words of devise to W., for and during his natural life, followed by the words of the devise to the heirs of the body of the said W. lawfully issuing, constituted W. tenant in tail of the freehold, notwithstanding the testator had before given an estate expressly to W. for his natural life only; and his lordship said "in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed," and he then proceeds, "the words 'heirs of the body' will indeed yield to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal"—and further on he says, "the heirs of the body" comprehend all the posterity of the donee in succession. The conclusion to which he came was that no such intent was clearly and unequivocally shown in the superadded words, but on the contrary that the words "for want of such issue" showed that the issue were to take in succession as heirs of the body and not as a mere description of persons. Lord Redesdale in the same case said, "It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication;" and the result of his opinion was that by "heirs of the body" the testator did not mean children alone. In conclusion he said, "if the testator had considered the effect of the words he used, and the rule of law operating upon them, he would have used none of the words in the will." (*Jesson v. Wright*, 2 Bligh, 50, 59.)

The words of the will under consideration do not manifest a clear and unequivocal intention on the part of the testatrix to give to the devisees named therein merely a life estate in the

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premises; nor does it appear that the words "their heirs" were intended as a designation of particular persons who should take an estate in the lands mentioned otherwise than by descent as heirs of their respective ancestors—the first takers under the will. If the words "each and all of them to have and to hold their lifetime and then to go to their heirs and assigns," could be interpreted as a clear and unequivocal expression of the intention of the testatrix to create in the first takers under her will a mere life estate in the premises, and a remainder in fee to their heirs, whoever they might be when the life estate should expire, then before such intention could be carried into effect, it would be necessary to determine the words, "their heirs," to be a *descriptio personarum*. But to do so would be in violation, as we have seen, of settled principles of law, as well as in disregard of the definition of the term "heirs" in its general and accurate legal sense. That the testatrix intended the estate devised to go to the devisees, whom she named as the immediate recipients of her bounty, in fee, seems to us more than probable from the entire language which she employed as an expression of her will. She did not stop with the word "heirs," but added the words "and assigns." We are not at liberty to disregard these added words while seeking for the testatrix's intent. The devise to the persons designated, to have and to hold their lifetime, and then to go to their heirs and assigns, is in substance the same as if the words "to go" had been omitted, because in either case, the estate could not go to the heirs of the immediate donees until there could be heirs to them, to take. No person can become an heir to his ancestor while his ancestor lives. *Nemo est hæres viventis*.

If it is to be presumed the testatrix had in mind any particular object in the use of the word "heirs," it is legitimate to suppose she meant it should have its settled legal effect, as associated with the essential words of devise which she used, which was to transmit to her devisees an estate in fee in the premises. To pass an estate of inheritance or an estate in fee simple absolute to the devisees named, it was necessary to use

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the word "heirs" or its equivalent; for if at the time of her death land was given to a man forever or to him and his assigns forever, without the use of the word "heirs" it vested in him only a life estate (2 Black. Com. 107,) and because this was then the law of the land a reason is apparent for the use of the term "heirs" in the devise.

On the part of the appellant some reliance is placed on the *habendum* "to have and to hold their lifetime," as evidence of the design of the testatrix to invest them with a life estate merely. This, to one ignorant of the law, might produce the impression at least that she so intended. But if she herself had any idea of the force and effect of the language of the devise as a whole, she must have known that the devisees named would take the estate in fee as soon as she should cease to live, and that the words "but never to sell it," coupled with the previous words, would not avoid such consequence. It is not improbable that she desired her devisees to retain the property she was providing to give them, so long as they might live, but that she wished to invest them with a life estate only is not supported by the words of the will, nor is there any evidence which is sufficient to satisfy the law that she intended to create an estate in remainder contingent upon the existence of heirs of her immediate devisees when death might put an end to their tenure.

Judgment affirmed.

CHARLES McLAUGHLIN v. CESAR PIATTI, LIBERATA PIATTI, AND DANIEL MURPHY.

SALE OF CHATTELS.—If goods are sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title remains in the seller until the bargained property is separated and identified.

IDEM.—A sale of a chattel cannot apply to any article until it is clearly designated, and its identity ascertained.

SALE OF A GIVEN NUMBER OF CATTLE RUNNING IN A LARGER HERD.—A sale of a given number of cattle, then running in a herd of a larger number, is an executory contract, and does not apply to any particular cattle until the number sold have been separated from the herd.

Argument for Appellants.

BILL IN EQUITY TO ENFORCE SALE OF PERSONAL PROPERTY.—As a general rule Courts of equity do not enforce the specific performance of contracts for the sale of personal property. When such contracts are enforced by Courts of equity, it is not upon the ground of the insolvency of the defendant, but because the character of the property is so peculiar in itself, or its connection with the complainant's business is such that no adequate damages could be given at law.

IDEM.—A bill in equity will not lie to enforce the specific performance of a contract for the sale of cattle not possessing any especial value, except as merchandise.

ACTION FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.—The action for the "claim and delivery of personal property" under our practice, is at least commensurate with the action of detinue at common law.

BILL OF SALE OF PART OF A HERD OF CATTLE.—A bill of sale of a given number of cattle—part of a herd running on the seller's ranch—giving the purchaser the right to select the number sold and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Hoge & Wilson, and *William T. Wallace*, for Appellant Murphy, and *S. O. Houghton*, for Appellants Cesar and Liberata Piatti.

This bill is brought to enforce the specific performance of an *executory contract*, for the sale and purchase of personal property, to wit: five hundred head of cattle, to be selected by the purchaser out of a much larger herd.

It appears upon the face of the bill, and is so found by the referee, that the five hundred head were not, at the time of the alleged contract, and have never been selected or segregated from the main herd of which they were a part. No property or interest whatever in any specific cattle passed, therefore, to Baker, under whom the complainant claims.

The contract is executory. The complaint is based entirely on the complainant's right to a specific performance of that contract as alleged. If this were not so, we should be at a loss to know for what purpose he has sought the aid of a Court of equity. The ordinary remedies at law would afford him, otherwise, all the relief desirable, inasmuch as upon his

Argument for Appellants.

own showing upon the face of his bill, the property was in the possession of the Piattis at the time of the execution of the contract, and so remained at the commencement of the suit and the rendition of the decree. The whole form and theory of the bill and its prayer, manifest its character and purpose.

That this contract is merely executory, and that no property in any specific cattle passed under it to Baker, (if such a proposition needs authority,) we cite the cases of *Crowfoot v. Bennett*, 2 Coma. 258; *Hutchinson et al. v. Hunter*, 7 Barr's Penn. R. 140, and cases there collected; *Wood v. McGee*, 7 Ohio, 467 (side paging 127); *Simmons v. Swift*, 5 Barn. & Cress. 857 (11 E. C. L. 712); Story on Sales, pp. 197, 198, and following—271 and following.

We think we may safely assert that no Court of equity has ever decreed the specific performance of an executory contract for the sale of mere personalty, of the nature and description of the one set up in the complaint in this case.

The cases in which Courts of equity decree specific performance of contracts in relation to personal property are very rare and exceptional—and in all of them there were peculiar reasons for the interposition of equity; there was either no mode of getting at the damages in an ordinary action of law, or else the damages when recovered would not afford a complete and adequate remedy. (2 Story's Eq. Jur., Section 717, and following.)

Story, in the section above cited, lays it down that the true foundation of the rule for decreeing specific performance of any contract is, that "damages at law may not in a particular case afford a complete remedy."

The rule is not founded upon the idea that the party may not from the insolvency of the vendor be enabled to collect his judgment for damages, upon the breach of the contract, but that damages themselves when ascertained and collected would not afford a complete remedy; or in other words, because the damages, if ascertainable in a suit at law in the particular case,

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would from some peculiar quality or character in the thing itself, afford an inadequate remedy.

The general rule undoubtedly is not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature.

The exceptions to the rule, according to all authority, are rare and peculiar. The case made in this complaint falls within none of the exceptions. The property in question is stock—live stock—five hundred head of cattle—the value easily and certainly ascertained. Compensation in damages for the breach of such a contract, or for a failure in either party to carry it out, would furnish a complete and satisfactory remedy. To hold such a case as this not to be within the rule would be to obliterate the rule itself with its exceptions.

The only ground for appealing to equity for relief is an alleged inability on the part of the defendant, Cesar Piatti, to respond in damages, and that denied by the defendant Murphy, not proved, and not so found by the referee. This is sometimes a ground for *injunction* to restrain a trespass, but even then a very doubtful one. The opinion of Chancellor Kent in *Watson v. Hunter*, 5 John. Ch. R. 172, etc., being the other way.

A Court of equity may very well restrain an irresponsible person, in a case of tort, from committing irreparable injury—from the very destruction of the estate involved. (*McMillan v. Richards*, 9 Cal. 419.) The doctrine has no application to a case of this character. If a want of pecuniary responsibility in a Court of law were a ground of equity jurisdiction in cases of bills for the specific performance of agreements, it is strange that the text books and adjudged cases are not full of it. The books do not attempt to place the equity jurisdiction in such cases upon any such ground. Indeed, such a doctrine would draw to equity the jurisdiction of all matters of contract, always supposed to belong to the exclusive cognizance of the ordinary Courts of law. The jurisdiction would be measured by and depend upon the solvency or insolvency of the parties,

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and equitable relief administered or refused accordingly. Even if the law was not clearly otherwise, the allegation in this case is altogether insufficient.

Cook & Hittell, for Respondent.

In regard to whether the contract was executed or not, we cite the case of *Clark v. Rush*, 19 Cal. 393, which, we think, fully decides the question. McLaughlin's assignor, having been placed in the actual possession of the property, was in a position to select his number from the whole herd; his having left temporarily before making such selection, and being refused permission to re-enter the premises, cannot put him in a worse condition than if he were in the joint possession with the Piattis. The moment he took such possession, it was possession of the entire herd. The Piattis had nothing further to do in the premises; the contract was fully executed on their part. (*Pooley v. Budd*, 14 Beav. 34.) The doctrine that no property passes so long as anything remains to be done, does not apply, nor can a case be found making it applicable in a case like the present. The reason for the rule does not exist in this case, and the contract having been thus executed, could not, by the wrongful acts of the Piattis, be exchanged to an executory contract. The facts stated in the complaint in this action are the usual facts stated to procure a partition of personal property, as contradistinguished from a specific performance.

What difference can it make to the appellants' rights that Baker did not segregate the cattle? It is true that his agent was let into joint possession of the main herd; but it does not anywhere appear in the case, as the late opinion would seem to imply, that an offer or opportunity was given him to select the five hundred head, and certainly no offer was ever made to McLaughlin. The truth of the matter is exactly what it would be in any other case where a person is owner of the undivided portion of a chattel, or rather owner of an undivided certain number of a larger number of chattels, and wants a partition. He is entitled to a partition, and the common law

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is not pliant enough to afford him an adequate remedy. The adverse party in possession is, in a sense, a *trustee* for him, and he can enforce his equitable rights. (See 3 Parsons on Contracts, Boston, 1864, 364, note *t*; *Pooley v. Budd*, 14 Beav. 44; 7 Eng. L. & Eq. 229.)

Campbell, Fox & Campbell, also for Respondent.

The first question to be considered, is — was the contract which is the basis of this action an executory contract? To a limited extent, and perhaps we may say, in a purely technical sense, it was executory. But it seems to us, that in all these points wherein the defendants would have any just or legal right to intervene, it was an executed and not executory contract. It was certainly executed in so far as that the defendants had actually received the entire consideration of the sale made by them to our vendors. All the service which Baker was to render in consideration of the purchase of these cattle, had been rendered. It was executed in so far as that the defendants had deliberately, and in the most solemn manner, complied with all the forms of law in making, executing, and delivering the written evidence of the sale and of the transfer of the title to the property. It was executed in so far as that the defendants had actually delivered to their vendee the possession of the property sold — not the possession in severalty of the five hundred head of cattle, but the joint possession with them of the entire herd from which the five hundred head was to be taken. It was executed in so far as that the defendants, vendors of the property, had nothing further either to receive or to do in the premises. The only act undone, the only thing unexecuted, was the selection and severance of the five hundred head from the balance of the herd, and this was to be done, not by the vendors, nor by the joint action of vendors and vendee, but at the convenience of and by the vendee alone, who had been let into possession for that purpose, and to whom the right had been given to make that selection without let, hindrance, molestation, interruption, assistance, or choice of or from the vendors. Certainly this

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contract has been so far executed as that it was a perfect and binding sale and transfer of the title to the property.

But even if this contract is in any sense an executory contract, we insist that it is such an one as that its specific performance may properly be enforced by decree in equity, and that the circumstances are such as to give Courts of equity jurisdiction in the premises, and to entitle us to equitable relief. The fundamental principle which underlies the whole doctrine of specific performance is, that where a fair, *bona fide* contract has been so far executed, that by reason of its partial execution alone, or in conjunction with other changes which have subsequently taken place, the parties cannot be restored to their original condition or circumstances, or that the failure of one party to comply with its condition would *operate as a fraud* upon the other who was not in default, Courts of equity will interfere and decree a specific performance of the contract. The question as to whether or not the failure would operate as a fraud, enters quite as much into the consideration of the Court in determining the jurisdictional point as does the question whether or not the breach of contract can be compensated in damages. (See *Arguello v. Edinger*, 10 Cal. 150, where this subject is discussed at some length.)

By the Court, SHAFTER, J.

This case comes into this Court by an appeal taken by the defendants from a decree of the Fourth District Court, rendered against them and in favor of the complainant.

The complaint sets out that on the 18th day of December, A. D. 1858, the defendants, Cesar Piatti and Liberata Piatti, were and ever since have been, husband and wife; that on that day they, for the consideration of fifteen thousand dollars, duly signed, acknowledged and delivered their bill of sale to E. D. Baker, as follows, viz:

"Know all men by these presents, that we, Cesar Piatti, and Liberata Piatti, his wife (late Levinia Bull,) for and in consid-

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eration of the sum of \$15,000 to us in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained and sold to E. D. Baker, to whom we make said acknowledgment of the receipt of said money, five hundred head of cattle, part and parcel of our stock of cattle now running on the Laguna Ranch, in Santa Clara County, to be selected and chosen by him or his agents out of said stock or herd, at his choice, hereby guaranteeing to him the right and possession thereof, and authorizing him to select and take the same immediately, fully and absolutely as of his own right and property.

"Given under our hands this 16th day of December, 1858.

"LIBERATA PIATTI,

"CESAR PIATTI.

"Witness: R. E. FULTON."

"STATE OF CALIFORNIA,
"County of Santa Clara, } ss.

"On this 18th day of December, A. D. 1858, before me, Thomas Bradley, a Notary Public in and for said county, personally appeared Cesar Piatti and Liberata Piatti, his wife, personally known to me to be the individuals described in and who executed the annexed instrument, as parties thereto, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned; and the said Liberata Piatti, wife of the said Cesar Piatti, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on an examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she did not wish to retract the execution of the same.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above mentioned.

[L. s.]

"THOMAS BRADLEY, Notary Public."

That by the terms of the bill of sale and as a matter of fact, they then and there sold said cattle to Baker, and he became the owner thereof.

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That on the 20th of August, A. D. 1859, by instrument in writing on the back of the bill of sale, transferred the five hundred head of cattle over to McLaughlin, the complainant, for five thousand dollars, of which instrument the following is a copy:

"For five thousand dollars value received I hereby assign and transfer and sell, and set over to Charles McLaughlin the cattle sold to me in and by the within bill of sale, and authorize him for himself to have, claim and keep the same in full ownership, having all the right of the same vested in me by the above bill of sale, without any recourse on me, on account of said sale or otherwise, which the said McLaughlin hereby accepts.

"August 24, 1859.

E. D. BAKER."

That at the time of the bill of sale, the five thousand head were and are now (to wit: at the commencement of this suit) part and parcel of a large herd of cattle of the same kind on Laguna Ranch, and were at the time of sale in possession of defendant, Cesar Piatti, as the separate property of said Liberata, and are now on said ranch occupied by said Liberata and Cesar, and in their possession.

That at the time of the execution of the bill of sale, the said defendants placed Baker in joint possession with them of the main herd, until a division of said main herd could be made, and said Baker could select and segregate said five hundred head; that Baker, by his agent, continued in such joint possession for about five months, when, after a temporary absence at San Francisco, said agent on returning was refused possession by the said defendants; that there has never been a segregation of said five hundred head from said main herd.

That at the time of the bill of sale, and since, the main herd was, and has been the separate property of the said Liberata, derived by her as a portion of the estate of a former husband, one Fisher, now deceased; that said defendant, Murphy, claims to be the owner of said five hundred head, by some

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pretended sale from said Liberata, but that the same is fraudulent and void; that said Murphy never paid anything for such pretended interest, but that it was a sham sale, made to hinder, delay and defraud creditors.

That the common property of Cesar and Liberata, and the separate property of Cesar, without the property in question, is insufficient to satisfy complainant's demands for damages, in case he cannot obtain a division of said main herd, and the delivery of said five hundred head, under the terms of the bill of sale and assignment; and that if complainant cannot obtain such division and delivery as aforesaid, he will suffer irreparable injury by reason of inability of defendant, Cesar, to respond in damages for breach of warranty in said bill of sale, and the non-liability of the said Liberata on the warranty, she being a married woman.

That, on refusing Baker's agent to re-enter into the joint possession as aforesaid, the said defendants have conspired and confederated to cheat and defraud the complainant, under pretense of said fraudulent sale to Murphy, out of said five hundred head of cattle and the equivalent thereof in damages; and that since the execution of the bill of sale, as complainant is informed, said defendants have sold about three hundred head of said herd, without the knowledge or consent of Baker or of complainant, and are endeavoring to and will sell the balance of the herd to innocent purchasers, etc.; that said ranch being in an isolated location and sparsely settled district, the said main herd may be easily driven off and sold to innocent purchasers during the pendency of this action, unless a receiver be appointed by the Court to take charge of such five hundred head, as may be selected and chosen by the complainant, and the defendants be restrained in the meantime from selling or otherwise disposing of said main herd of cattle; that at the time of bill of sale, and now, said five hundred head were and are worth fifteen thousand dollars; that on the 3d day of September, 1859, complainant demanded of Cesar and Liberata said five hundred head of cattle, as per terms of the bill of sale, they knowing of his ownership, and they

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refused and still refuse to deliver the same, and deny complainant's right to any portion of the same, although there were then and now are over one thousand head of stock on hand, out of which Baker had a right to select, and the same now remain on said ranch in the possession of said Cesar and Liberata; that Baker and the complainant have fully kept and performed the agreement on their part, and the said defendants Cesar and Liberata have wholly disregarded their covenants and agreements, etc.

That complainant is remediless, and can only be protected by the equitable interposition of the Court, etc. The complainant therefore prays that the main herd may be divided by the decree of the Court, and that he be adjudged to be the owner and entitled to the possession of five hundred head of cattle of said large herd on said ranch, to be selected and chosen by the complainant out of said main herd, and that said Liberata and Cesar be adjudged and decreed to specifically perform all and singular their covenants and stipulations as specified in said bill of sale, and for a receiver to take charge of five hundred head to be selected and chosen by the complainant, and in the meantime for an injunction, etc.; and that the Court decree the complainant to be entitled to and that the receiver deliver over to him such five hundred head of cattle, and that the injunction be made perpetual, and for such other relief, etc.; and also that the Court decree that the pretended sale to the defendant Murphy was fraudulent and void, and was intended to hinder and delay the creditors of the other defendants and to defraud this plaintiff, and that said Murphy has no interest in or to said stock.

Upon this bill and in pursuance of the prayer, a receiver was appointed, etc., and injunction issued, etc. The defendant Murphy demurred to the bill on the following grounds, viz:

"1. That this Court, as a Court of equity, has no jurisdiction of the subject matter of this action.

"2. That there is a defect of parties defendant; that is, in

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uniting the defendant with the defendants Piattis in an action for a specific performance of an agreement between the plaintiff and said Piattis, to which the defendant (Murphy) was not a party.

"8. That the plaintiff has not the legal capacity to sue this defendant to set aside the alleged fraudulent sale and conveyance to this defendant referred to in the complaint, because said plaintiff is a subsequent purchaser with notice, and because he is not a judgment creditor of said Piattis, or of either of them.

"4. That several causes of action have been improperly united, viz: a specific performance upon an executory agreement between said plaintiff and said Piattis, and to set aside an alleged fraudulent conveyance to this defendant.

"5. Because said complaint is multifarious, and unites separate and distinct grievances against separate and distinct persons.

"6. That the said complaint does not state facts sufficient to constitute a cause of action against any of said defendants.

"7. That said complaint does not state facts sufficient to constitute a cause of action against this defendant, either separately or jointly with said Piattis, or either of them."

The demurrer having been overruled, the defendants answered separately. The case went to a referee and on his special report of the facts judgment was entered for the plaintiff.

There is a diversity of questions raised by the record, all of which have been fully and learnedly discussed by the counsel of the respective parties, but the only points which we find it necessary to determine in order to dispose of the appeal upon its merits, are the following:

First—In our judgment the contract set up in the complaint was executory at the commencement of the action; that is to say, the plaintiff at that time had not, as the assignee of Baker, become the owner in severalty of any part of the herd of cattle mentioned in the bill of sale. It is a fundamental

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principle pervading everywhere the doctrine of the sales of chattels, that if goods be sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified. The reason is that the sale cannot apply to any article until it is clearly designated and its identity ascertained. In the case under consideration, it could not be said with certainty that any particular five hundred head of cattle belonged to Baker or the plaintiff as his assignee, until a severance of that number from the herd from which they were to be taken. If a part of that herd had died, five hundred head surviving, the loss would neither in whole nor in part have fallen upon Baker. (*Hutchinson v. Hunter*, 7 Barr, 140; *Woods v. McGee*, 1 Ohio, 466; *Crowfoot v. Burnett*, 2 Comst. 258; Story on Sales, Sec. 296; *Horr v. Baker*, 6 Cal. 489—8 Cal. 603; *Adams v. Gorham*, 6 Cal. 68.) These principles are so well settled that no beneficial purpose would be subserved were we to pursue the discussion further.

Second—As a general rule, a bill in equity does not lie to enforce the specific performance of a sale of personal property. There are exceptions to the rule, but the case made by the plaintiff is not within them. The equitable jurisdiction to enforce specific performance in this class of contracts is not based either in whole or in part upon the accident of insolvency, but upon the general principle or truth that in the excepted cases there can be no adequate compensation in damages at law, the solvency of the defendant being given. This consequence sometimes results from the fact that the thing bargained for is of unusual distinction or curiosity, or from the fact that the commodities sold or contracted for are so related to the situation or to the business arrangements of the purchaser that non-fulfilment would greatly embarrass and impede him in his plans and prospects—threatening or involving a loss of profits which a jury could not correctly estimate; or to cases where the contract is not to be presently executed, and the like. (*Taylor v. Neville*, cited in 3 Atk. 384; *Adderly v. Dixon*, 1 Sim. and Stu. 610; 1 Sto. Eq. Juris., Sec. 718.)

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In this case the contract was to be, or at least might have been, executed by Baker immediately after it was concluded upon; and he furthermore had an opportunity to exercise his right of selection and segregation at the time when he was let into joint possession of the herd with the vendor. The cattle were without special value, in themselves considered, nor does it appear that if they had been segregated by Baker and taken into possession that they would or could have been put to any other than the most common uses. On the face of the complaint, as well as on the face of the referee's report, the cattle bargained for were in no manner distinguishable from merchandise at large. (*Buxton v. Lister*, 3 Atk. 382.) To uphold the judgment appealed from would therefore not only be in contravention of all the cases, but in subversion of the principles upon which the equity jurisdiction is founded.

Third — But while it is insisted on behalf of the respondent that, if the contract be as yet unexecuted, its full execution can be compelled in this proceeding, yet the chosen position of counsel is that the complaint discloses a contract fully executed — nothing remaining to be done either by vendors or vendee in order to vest a title in the latter to a band of five hundred head, distinguished and separate from the larger herd to which they originally belonged. As has been stated already, we do not consider that the complaint carries the contract which it sets forth, to that pitch in the matter of execution; and it results that in our opinion the complaint can be made to take on no other aspect than that of a bill brought to compel the specific performance of a contract for the sale of personal property, all the terms of which contract have not as yet been fulfilled — and here the jurisdictional obstacle, previously named, is encountered. But on the facts of this case, the plaintiff had a speedy and perfect remedy at law. The plaintiff, as the assignee of Baker, had the right to the immediate possession of the whole herd for the purpose of making a selection of his five hundred head. In pursuance of that right the defendants were requested to deliver the whole herd to the plaintiff, but refused so to do. We have here all the

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grounds upon which the action of detinue has been familiarly planted for ages. In that form of remedy the plaintiff could have recovered possession of the whole herd—selected his five hundred head from it and returned the residue of the cattle to the Piattis. Our action for the “claim and delivery of personal property,” considered as a remedy, is at least, commensurate with the action of detinue at common law. But if the plaintiff could not have availed himself of this remedy, and whether he could or not we have no occasion to decide, yet it is beyond controversy, that he could have maintained an action upon the contract for the recovery of damages, which relief would have been “adequate and complete” in the fulness of the meaning borne by those terms in equity law.

The view we have taken of the case makes it unnecessary to consider the other questions discussed by counsel.

The judgment is reversed and the Court below is directed to enter judgment in favor of the defendants.

Mr. Justice SAWYER expressed no opinion.

SOLANO COUNTY v. JOHN M. NEVILLE.

ACTION IN NAME OF COUNTY.—An action may be brought in the name of a county to recover money belonging to the General Fund of the county.

COMPENSATION OF TAX COLLECTORS.—The Legislature has the power to enact a law directing the Collector of Taxes for a county to pay one half of the compensation allowed him by law for the collection of the same into the County Treasury for the benefit of the General Fund.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The following is the complaint to which defendant demurred:

“Solano County, plaintiff, by J. C. Hinckley, District Attorney, complains of John M. Neville, defendant, and for cause of action alleges that the said defendant, being Sheriff, and *ex officio* Tax Collector of Solano County, between the 17th day

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of August and the 16th day of November, A. D. 1863, collected a large amount of public revenue and taxes on property, to wit: the sum of \$86,578 87, and during the time aforesaid collected and received a percentage thereon, allowed by law as compensation for the collection of property tax, such percentage amounting to the sum of \$2,631 57.

"Plaintiff further shows that, by an Act of the Legislature of this State, entitled 'An Act to regulate the fees of certain officers in Solano County,' approved April 6, 1863, it was made the duty of said defendant, Sheriff and *ex officio* Tax Collector as aforesaid, to pay into the County Treasury of said county, for the benefit of the General Fund thereof, fifty per cent of the aforesaid compensation allowed by law for the collection of property tax, to wit, the sum of \$1,315 78½, and that no portion of said sum has been paid into said County Treasury, but that the whole thereof, by virtue of the Act aforesaid, is due and payable from the defendant to the plaintiff.

"Nevertheless, the said defendant, although often requested, has hitherto wholly neglected and refused to pay the same, or any portion thereof.

"Wherefore plaintiff prays judgment against said defendant for said sum of \$1,315 78½, with the costs, fees and charges allowed by law.

"J. O. HINCKLEY,

"District Attorney Solano County."

Judgment was rendered for the defendant, and plaintiff appealed from the order sustaining the demurrer.

The other facts are stated in the opinion of the Court.

J. C. Hinckley, for Appellant.

Swan & Hays, also for Appellant.

We beg leave to submit that the complaint contains "a statement of facts constituting the cause of action in ordinary and concise language," as required by the second subdi-

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vision of the thirty-ninth section of the Practice Act. That there is nothing uncertain, ambiguous, or unintelligible in the complaint.

"It is only necessary that the cause of indebtedness should be stated in such a manner as to apprise the defendant of the object of the suit." (*Milliken v. Murray*, 5 Cal. 245.)

We do not think it can be contended with any degree of earnestness that this complaint is deficient in any of the grounds named in the fourth ground of demurrer.

A writ of mandate would be a novel proceeding to recover money due, and we think there can be nothing in the point that no demand had been made of the defendant to pay the money over, because the law under which the suit is brought makes it the duty of the defendant to pay the money into the County Treasury.

As to the third ground of demurrer, "That the complaint does not state facts sufficient to constitute a cause of action;" assuming that the other grounds of demurrer are not well taken, we rely upon the law under which this suit is brought, and the facts as stated in the complaint, as showing a good cause of action.

The seventh section of the "Act to regulate the fees of certain officers in Solano County," reads as follows, to wit: "The Tax Collector shall receive the fees and compensation now allowed by law; but fifty per cent of the compensation allowed for the collection of property tax shall be paid by him into the County Treasury, for the benefit of the General Fund." Approved March 6, 1863. (Statutes of 1863, page 193.)

It will be observed that whilst the law does state that the Tax Collector shall receive the fees and compensation now allowed by law, it does not state that *he* shall be allowed that compensation; and it will also be observed that the law does not say that fifty per cent of *his* compensation for collection, etc., shall be paid into the Treasury, etc., but says *the* compensation allowed, etc., shall be paid into the Treasury, etc.

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Whitman & Wells, for Respondent.

We demur to the complaint, alleging: First — That the plaintiff, Solano County, hath not the legal capacity to sue, because the amount is given to a particular fund, to wit, the General Fund of the county. The Treasurer of the county is the legal custodian of that fund, and he alone can sue for moneys due it; or if the Board of Supervisors might maintain the action, the County of Solano, in its corporate capacity, is not empowered to bring the suit. (*Hunsacker v. Borden*, 5 Cal. 290.)

Nor is the County of Solano the real party in interest. The General Fund of the county is in the charge of the Treasurer, and is pledged in his hands for the debts that have been audited and allowed thereon. The holders of these debts, then, are the real parties in interest, and the Treasurer, as the trustee of an express statutory trust, is the person who should bring the suit.

But the more formidable objection is based upon the express provisions of the Act. Distinctly affirming, as it does, that the Tax Collector shall receive the fees allowed by law, it proceeds to enact that he shall pay them over to the General Fund, precisely as if it had stated that A. shall be entitled to recover all debts due him by the means now allowed by law, but that he shall pay fifty per cent of all debts received by him into a certain bank for the use of B.

It is objectionable, as taking the property of the Tax Collector and giving it to another. It directs his statutory rights, not on behalf of or for the benefit of the State, but of a stranger.

By the Court, RHODES, J.

The plaintiff sued the defendant to recover the one half of the fees allowed by law, as the percentage for the collection of the property tax in Solano County, which was received by him as Tax Collector, between the 17th of August and the

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16th of November, 1863. The defendant demurred to the complaint and his demurrer was sustained.

The first ground of demurrer now urged by the defendant is, that the plaintiff has not legal capacity to sue. This is answered by the Act of May 11, 1854 (Wood's Dig. 249), which provides that "suits brought for or against a county, shall be by or in the name of such county." The General Fund belongs to the county, and neither the Treasurer nor the Board of Commissioners can sue to recover moneys that are required by law to be paid into that fund, for neither they nor the creditors of the county have a direct interest in the fund.

The ground mainly relied on is that the Act of 1863 "is objectionable as taking the property of the Tax Collector and giving it to another." It is provided by section seven of the Act to regulate the fees of certain officers in Solano County (Stats. 1863, p. 193), that "the Tax Collector shall receive the fees and compensation now allowed by law; but fifty per cent of the compensation allowed for the collection of property tax shall be paid by him into the County Treasury for the benefit of the General Fund."

It is not surprising that the appellant finds it difficult to construct an argument in answer to the respondent's proposition, for when it is said that the whole matter of fees and compensation for the collection of taxes is subject to the control of the Legislature, and that by the section of the Act cited, the Tax Collector is entitled to retain for his services only one half of the compensation allowed by the general Revenue Act, and is required to pay into the General Fund of the county the remaining half, the argument is exhausted.

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer, with leave to the defendant to answer the complaint according to the rules of said Court.

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THE PEOPLE *ex rel.* J. W. DICKENSON v. E. M. BANVARD.

STATEMENT ON APPEAL FROM A JUDGMENT.—A party who appeals from a judgment or an order, with a statement annexed to the judgment roll, must specify particularly in his statement the grounds upon which he intends to rely on the appeal.

MOTION FOR NONSUIT.—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.

POWER OF LEGISLATURE OVER OFFICES.—The incumbent of an administrative office, created by the Legislature, may be legislated out of office pending the term for which he was elected.

JUDGMENT IN QUO WARRANTO.—In an action of *quo warranto* to determine the right to an office, where the relator claims the office as against the incumbent, the Court may not only determine the right of the defendant, but of the relator also; and if it determines in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office.

APPEAL FROM A JUDGMENT.—On an appeal from a judgment, the appellate Court cannot consider the question whether the findings of fact are justified by the evidence.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The defendant was elected Treasurer of the County of Placer, at the general election in 1862, and afterwards qualified and entered upon the discharge of its duties.

By the law, as it then stood, his term commenced on the first Monday in December, 1862, and extended to the first Monday in March, 1865. By the Act of 1863, (see Laws of 1863, p. 387, Sec. 11,) it was provided that all county officers in every county of this State shall be elected at the general election in 1863, and of every second year thereafter, and shall hold their offices for the term of two years from and after the first Monday of March subsequent to their election.

At the general election held in September, 1863, defendant and relator were candidates for the office of Treasurer of Placer County, and relator received a majority of the votes and the certificate of election. The defendant refused to surrender up the office on the first Monday in March, 1864, and this action was commenced to try the right to the office.

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The Court found the following facts:

"At the general election in 1862, defendant was duly elected to the office of County Treasurer of said county for the ensuing term, which, as the law then stood, was for two years and three months from the first Monday in December, 1862.

"He duly qualified and entered upon the office at the commencement of the said term, and has held it ever since.

"The term under the law of 1862, if the same were now in force, would of course not expire until March, 1865.

"In 1863, under the recent amendments of the State Constitution, the Legislature passed an Act providing that all county officers throughout the State, including Treasurer, should be elected at the general election in said year, (1863,) that their terms should commence on the first Monday in March, 1864, and continue for two years; and repealing all former statutes conflicting with said Act. Under this latter Act, the relator, Dickenson, at the general election in 1863, was duly elected County Treasurer of said county. He received his certificate of election, took the oath, filed his official bond, and did all the acts necessary and required by law, in order to entitle him to enter upon the office. At the commencement of his term, on the first Monday of March, 1864, he demanded the office of the defendant, who refused to deliver it to him, but continues to hold it himself."

Upon these facts the Court rendered the following judgment:

"Wherefore, it is considered and adjudged that the said relator, J. W. Dickenson, is the lawfully elected and duly qualified Treasurer of said Placer County, and is entitled to use, hold, and exercise the said office, and perform the duties thereof, and to receive the emoluments thereof for two years, commencing with the 1st day of March, A. D. 1864, and that the defendant, E. M. Banvard, is guilty of usurping, holding, using, and executing the same, performing the duties and receiving the emoluments thereof unlawfully.

"And it is ordered, adjudged, and decreed, that the said

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defendant, E. M. Banvard, be and he is hereby excluded from the said office of Treasurer of said Placer County, and from exercising any of the duties pertaining thereto; and that he, the said defendant, do forthwith yield and deliver up to the said relator, J. W. Dickenson, the said office of Treasurer of said Placer County, and all of the books, papers, keys, furniture, property, rooms, documents, moneys, records, belonging or pertaining to the said office or the business thereof, and all and everything or things of whatsoever name or nature which may belong to the said office or the business thereof; and that the said relator have and recover of the said defendant, E. M. Banvard, his costs and expenses herein, taxed, at twenty-seven dollars and sixty cents, and that execution issue therefor."

The defendant appealed from the judgment, and annexed a statement of the evidence, exceptions, etc., to the judgment roll.

After the relator had closed his evidence and rested, defendant moved the Court for a nonsuit, without assigning in his motion the grounds on which he claimed it.

Defendant claimed as one reason for holding over, that relator's bond was insufficient, and on the defense offered two witnesses to prove that before relator filed his bond they told him it was insufficient, and did not comply with the statute.

Jo Hamilton, for Appellant.

The Act of 1863, eleventh section, meant nothing more than this: In the counties of the State a general election should be held in 1863, for State and county officers. The county officers elected to take office on the first Monday of March subsequent to their election. But in Placer County, which had elected its county officers under a special Act, and who had elected until the 1st of March, 1865, the law, while it gave to the officers elect the right to take office on the first Monday of March, 1864, did not oust the old officers, and if the election of county officers in Placer was valid at all under the Act of 1863, it gave to those officers elected no present right

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of office, because there was no vacancy in office; and at most, as two incumbents could not exercise the right of office at the same time, the persons elected in 1863 could not enter until the expiration of the term of those elected in 1862.

This is a reasonable construction of the Act of 1863, in its true meaning and intent. If it meant anything else, it was easy to have said the terms of officers elected in 1862 should close on the first Monday of March, 1864. But instead of so saying, it is wholly silent, leaving them undisturbed in the offices. Before any other construction could be put upon the law of 1863, we are forced to the conclusion that the Legislature intended to do and did do an unjust thing; for by no rule of fairness or justice could a whole year be taken from the term. By putting this construction upon the Act of 1863, it leaves the whole of the Act fairly and clearly intelligible.

Charles A. Tuttle, for Respondent.

The findings of the Court stand in the place of the verdict of a jury. (*Wheeler v. Hays*, 3 Cal. 285.)

In *Gagliardo v. Hoberlin*, 18 Cal. 395, the defendant brought up all the testimony, but made no motion for a new trial. The Court say: "In this case, no motion having been made for a new trial, the findings of the Court are conclusive as to the facts. * * * In the absence of such an application, the conclusions of fact must be deemed to have been properly drawn, and the matter cannot be regarded as open to investigation on appeal."

In *Deputy v. Stapleford et al.*, 19 Cal. 302, the same doctrine is affirmed.

In *Nelson & Nobell v. Highland*, 13 Cal. 73, the Court say: "No motion for a new trial having been made in this case, the finding of facts by the Court below is conclusive, and as this finding fully sustains the judgment, it is affirmed." (See *Leining v. Gould*, 13 Cal. 598.)

This rule has been applied to both legal and equitable actions. Mr. Justice Field, in *Duff v. Fisher*, 15 Cal. 380,

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says: "In this State the statute provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed—it is only by motion for a new trial."

By the Court, SHAFER, J.

This is an information filed by the Attorney-General on the relation of Dickenson, alleging that the defendant has usurped the office of Treasurer of Placer County, and that the office of right belongs to the relator. The appeal is from the judgment. We shall consider the errors alleged, in the order in which they are set down in the statement.

First—"The Court erred in refusing respondent's motion for a nonsuit." By the three hundred and thirty-eighth section of the Practice Act, a party who appeals from a judgment or order, with a statement annexed, is required "to state specifically the particulars or grounds upon which he intends to rely on appeal." This rule has not been complied with by the appellant, nor did he in his motions for a nonsuit disclose the grounds of it in the Court below. Most, if not all, the considerations upon which it has been held that a party, objecting to the introduction of testimony, should state precisely the grounds of his objection, are equally applicable to show, when a nonsuit is moved for at the trial, that the attention of the Court and of opposite counsel, should be particularly directed to the supposed defects in the plaintiff's case. We not only understand such to be the rule, but consider its observance a matter of much practical consequence. (*Mateer v. Brown*, 1 Cal. 221; *Kiler v. Kimball*, 10 Cal. 268; *McGarity v. Byington*, 12 Cal. 429.)

Second—"The Court erred in refusing the testimony of Fellows and Spear." The respondent "offered to prove by each of these that each informed the relator, before the filing of his official bond, that the same was insufficient and did not comply with the statute and order of the Board of Supervisors." The testimony was objected to, and was excluded by the Court on the ground of irrelevancy. There was no

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error in this ruling. Assuming that the relator's bond was insufficient, the fact itself might be material; but any representations by third persons upon that subject, though made to the relator, would be immaterial.

Third — "The judgment of the Court was against law." There is but one question which, under the findings of the Court, we are at liberty to consider as within the purview of this objection; and that is, whether the Legislature has power to shorten the term for which a County Treasurer is elected — or more largely stated, whether an incumbent of an administrative office created by the Legislature, can be legislated out of office pending the term for which he was elected? The question is not an open one. It was met and decided in *People ex rel. Attorney-General v. Squires*, 14 Cal. 12.

Fourth — "The Court erred in ordering respondent to immediately vacate said office." By the three hundred and twelfth section of the Practice Act, the Court was authorized, not only to determine the right of the defendant, but to determine the right of the relator also; and, on the facts found, there can be no doubt that the judgment was correct on the point covered by the objection.

Fifth — "The testimony does not warrant either the findings or the judgment of the Court." It is inexact to say that a judgment is not warranted by the evidence. It may not be warranted by the pleadings, or the verdict, or the findings; and on demurrer to the evidence, or on motion for nonsuit properly made, it may be said that a judgment, entered for the plaintiff, is not warranted by the facts which the evidence tended to prove. The only point raised, then, by the objection now under consideration, is, whether the findings are justified by the evidence, and that question cannot be gone into under an appeal from the judgment. The testimony can only be reviewed on motion for new trial. (*Gagliardo v. Hoberlin*, 18 Cal. 395; *Deputy v. Stapleford*, 19 Cal. 302; *Allen v. Fennon*, ante 68.)

Judgment affirmed.

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ADELIA HILL v. J. M. SMITH.

FORM OF DENIAL IN ANSWER.—If an answer, in response to an allegation of the complaint, instead of denying it, in express terms, contains the averment that the defendant did not commit the act charged, or that the fact alleged to exist does not exist, these averments of the answer traverse the matters alleged, and are good denials of the same.

PROOF OF MINING FOR GOLD.—Evidence that a party is at work on a claim, and is mining, and is at work with tools commonly used by miners, is sufficient to justify a jury in finding that he is mining for gold, without any proof that he has found any gold in the claim.

MINING ABOVE THE HEAD OF A DITCH.—Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head after the ditch is dug, in such manner as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, or to fill up the ditch and reservoirs with the same so as to lessen their capacity and increase the expense of cleaning them out.

SAME.—The fact that a miner, working a claim above the head of a ditch, conducts his mining operations in such a manner as to cause the least possible injury to the ditch and water flowing in the same, does not excuse his responsibility for injuries caused by working the same. It matters not how cautiously or carefully the miner works, for if the ditch owner is in fact injured, the miner is none the less liable.

USE OF WATER FOR MINING.—As between ditch owners and miners using the waters of a stream in the mineral region for mining purposes, the law does not tolerate any injury by one to the prior rights of the other.

COMMON LAW.—The reasons which constitute the groundwork of the rules of the common law touching water rights have not lost their governing force in the mineral regions of this State. The conditions to which we are called upon to apply those rules are changed rather than the rules themselves.

PRIOR AND SUBSEQUENT APPROPRIATORS OF WATER.—In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant?

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

This action was commenced May 26th, 1863. The complaint averred the excavation of a ditch for the conveyance of water for mining purposes from Indian Cañon to Iowa Hill, by plaintiff's grantor, in 1852, and the continuous use of the water of the cañon in the ditch from that time up to the commencement of the suit; and that at the time the ditch was dug the water flowed down in a clear state, without any mixture of

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mud or sediment, and so remained until the acts of defendant complained of; and that the water, when in a clear condition, was more valuable and profitable to plaintiff for sale for mining purposes than when mixed with mud and sediment. That the defendant had been engaged for four weeks in digging up the bed of the cañon at points from six hundred to one thousand feet above the head of the ditch, and washing down the earth with the water into the ditch, thereby mixing the earth, mud, and sediment with the water, so that the same settled in the bottom of the ditch and reservoirs, and lessened their capacity and increased the expense of cleaning the same. That the miners who purchased the water from plaintiff, used the same through hose, and that when it was loaded with mud it destroyed their hose, etc., and that plaintiff's sales of water had been injured thereby.

The complaint prayed for judgment for damages, and for an injunction.

The answer did not deny in express language the allegations of the complaint, but in answer thereto stated that the waters of Indian Cañon had not flowed down in a clear state, and that defendant had not washed any earth into plaintiff's ditch, etc.

The defendant, on the trial, proved that he had located a claim above the head of the ditch a short time before the suit was commenced, and was engaged in working the same, but introduced no evidence to show that he had found any gold there. The evidence showed that the bed of the cañon above the head of the ditch was about one hundred feet in width, and that the earth was from three to four feet in depth, and that the defendant used the water of the cañon to work his claim, and that after the water left the claim it flowed into the ditch.

The Court gave the following instructions to the jury, to which plaintiff excepted.

"It is very difficult to state with exactness the rights of a ditch owner as against miners who subsequently locate claims on the same stream above the head of the ditch.

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Our Courts have endeavored to adopt those rules in relation to the subject which will allow, as far as possible, both these classes of location upon the public domain to enjoy their property. Of course, if the first locator of a water ditch upon a clear stream was held to be entitled to the continuous use of the water in a pure state, then large regions of rich mining country would be kept from settlement and development. On the other hand, if miners were allowed to locate claims immediately above the heads of ditches, and to mine there to the same extent and with the same rights as elsewhere, then large ditches, costing thousands of dollars, would be unjustly at the mercy of every adventurer.

"The rule in such cases, so far as any can be definitely stated, is this: The subsequent locators of mining claims on a stream above a ditch, which diverts water for sale to miners, have no right to work their claims, or run their tailings in such a manner as either to entirely obstruct the flow of water into the ditch, or to obstruct it to any considerable extent, or to diminish the quantity of water belonging to the ditch, or to so deteriorate the quality of the water as to render it unfit for mining purposes, or to so fill up the ditch with sediment as to materially lessen its value; but the mere fact that their mining operations *muddy* the water, rendering it less valuable, though not unfit for mining purposes, or deposit sediment in the ditch to only such an extent as may be easily removed, without great cost, does not render them liable in an action like the one at bar.

"If, therefore, in this case you believe from the evidence that defendant is the *bona fide* owner of mining claims on the stream above the head of plaintiff's ditch, that he worked his claims in a reasonable manner, using all due precaution to prevent injury to the ditch; that the effect of his mining was only to muddy the water, but not to diminish its quantity, or to materially injure the ditch or the water, then defendant is not liable. But if you believe defendant's mining operations seriously obstructed the flow of water into plaintiff's ditch, or diminished the quantity of water flowing

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into it, or in any manner materially injured the ditch or the water, then you should find for plaintiff, giving her nominal damages, of course, and such actual damages not exceeding three hundred dollars, as you believe from the evidence she sustained."

The defendant recovered judgment, and the plaintiff appealed from an order denying a new trial and from the judgment.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

Jo Hamilton, for Respondent.

By the Court, SANDERSON, C. J.

The objection to the form in which many of the allegations contained in the complaint are denied is not a substantial one, in our judgment. Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant at a certain time made and delivered to the plaintiff his certain promissory note, etc. Is not this allegation as directly and fairly traversed by saying: "I did not at the time specified, or at any other time, make or deliver to the plaintiff the note described in the complaint," as by saying: "I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint?" We think both serve equally well to form the issue. The former mode (which is the one adopted in this case) is less usual than the latter, but we are unable to perceive why it is not equally as good. It matters but little which form is adopted. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. The denials in this case do not appear to be evasive, but on the contrary, we think they fairly meet the issues tendered by the complaint.

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We are also of the opinion that there is nothing in the point made by counsel for appellant to the effect that the matter set out in the answer by way of excuse or justification is unsupported by the evidence. Assuming that the jury must have determined at the threshold of their investigations that the digging by the defendant of which the plaintiff complained was done by him in good faith, in pursuit of gold, we think the evidence upon that point, in the absence of any counter testimony, was sufficient to sustain their finding. All the witnesses, including the plaintiff's, speak of the defendant's "claim," and of his labor as "mining." They also speak of his "sluice-boxes," "wing-dam," mode of "working claim" and "depositing tailings," all of which are familiar terms in the vocabulary of the miner, and would hardly have been employed by the witnesses had not the defendant been engaged in mining. From these circumstances, and in the absence of all counter testimony, the jury were justified in finding that the defendant was engaged in mining for gold. If they erred at all, it was not in so finding the fact, but in attaching to it, when found, too much importance, and regarding it as a justification on the part of the defendant, as they seem to have done, for whatever injuries he may have caused the plaintiff by his mining operations. And this brings us to the principal and most difficult question involved in this case.

After a careful examination of the evidence, we are impressed with the conviction that the plaintiff ought to have recovered. And we can only account for the verdict upon the hypothesis that the jury misapprehended the law of the case. The plaintiff's prior right is unquestioned. That the defendant's work caused large quantities of rubbish and sediment to be deposited in plaintiff's reservoir and ditches, thereby lessening their capacity and entailing upon her additional expense in cleaning them out and maintaining their original capacity, hardly admits of debate. And it is very clear from the evidence that the value of the water for mining purposes, by reason of the mud and sediment mixed with it by the defendant's mining operations was diminished by from one

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fourth to one half. It appears that the plaintiff's ditch supplied water to hydraulic claims which require water, as was clearly shown, in a purer state than claims worked by the sluicing process or method, in order to work them successfully. Where she had previously sold only sixty inches of water she was compelled to sell a hundred and a hundred and twenty at the same price in consequence of the deterioration of its solvent capacity by reason of the sediment and mud from defendant's claim. It further appears that on one or two occasions the miners, or some of them, who purchased water from the plaintiff, quit work entirely, because the water was so thick with sediment that it could not be used with any reasonable success in hydraulic mining. To say that such injuries are immaterial and therefore constitute no cause of action is to trifle with the prior rights of the plaintiff and misrepresent the law. There seems to have been a successful effort made on the part of the defense to prove that the defendant had studiously conducted his mining operations in such a manner as to cause the least possible injury to the water rights of the plaintiff. It is probable that the jury supposed that, having thus worked, the defendant was not responsible for injuries unavoidably resulting from his work upon the vague notion that everybody has a right to mine at such points as he may choose, provided he causes as little injury to others as is possible under all the circumstances. Such is the only theory upon which we can account for the verdict. Some stress was placed upon this testimony by the Judge, and while we think it was not intentional, the general and abstract terms in which the instructions of the Court were couched were, to a certain extent, as it appears to us, calculated to convey to the jury the idea that such was the law of the case. How cautiously or carefully the defendant worked was a matter of no consequence, for if his work in fact injured the plaintiff, he was none the less liable to an action. Moreover, the entire charge impliedly if not expressly proceeds upon and sanctions the idea that as between ditch owners and miners using the water of a stream in the mineral

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regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other. This is due in a great measure doubtless to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel — *ubi currere solebat* — without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch owner, and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all con-

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troversies like the present the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to wit: has the plaintiff's use and enjoyment of the water *for the purposes for which he claims its use* been impaired by the acts of the defendant? This is purely a question of fact for the jury, and all the law applicable to it is found, as stated by the learned counsel for appellants in the case of the *Phoenix Water Company v. Fletcher*, 23 Cal. 483, embraced in the three following maxims: *Qui prior est in tempore, potior est in jure; Ubi jus, ibi remedium; Sic utere tuo ut alienum non laedas*, and beyond these principles they do not require to be instructed. What diminution in quantity or what deterioration in quality will injuriously affect the use of the water by the plaintiff may be safely left to the determination of the jury, guided only by the foregoing maxims. It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined *in view of the use to which the water is applied* and the other circumstances developed by the testimony.

Judgment reversed and new trial ordered.

THOMAS S. PAGE v. ISAAC HOBBS, WILLIAM F. WOOD, E. D. WOOD, JAMES LOCK, PETER OLOFSEN, JOHN FOWLER, JOHN J. FOWLER, AND HENRY LITTLE.

ENTRY ON INCLOSED PUBLIC LAND TO PRE-EMPT.—If the defendant in an action to recover the possession of land, justifies his entry upon the prior possession of the plaintiff on the ground that the land was public land, subject to the pre-emption laws of the United States, and that he entered in pursuance of said laws, with intent to pre-empt, occupy, and enter the land in accordance with the provisions of the same, it devolves on him to show that he is one of the persons entitled to the benefit of said laws.

RIGHT TO PRE-EMPT SUSCOL RANCHO.—A declaratory statement under the pre-emption laws in relation to land within the boundaries of the Suscol Rancho, made by one who was not a *bona fide* purchaser from Vallejo, at any

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time between March 3d, 1863, and October 15th, 1864, was of no effect. The Act of March 3d, 1863, withdrew said land from the operation of the pre-emption laws until October 15th, 1864.

WHAT PRE-EMPTIONER MUST PROVE.—One claiming to hold public lands as a pre-emptor, as against a prior possessor, must show that he is one of the class of persons entitled to pre-empt, and that he has performed the acts prescribed by the pre-emption laws, or the prior possession will prevail.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Vallejo claimed the Suscol Rancho under a grant from the Mexican Nation. The Supreme Court of the United States rejected the grant in 1862. The plaintiff had purchased from Vallejo the land in dispute, which was a portion of the so-called Suscol Rancho, a long time prior to the rejection of the grant, and had entered into possession and inclosed the same.

In 1862, after the rejection of the grant, defendants entered, claiming the right each to pre-empt one hundred and sixty acres as public land. Plaintiff commenced this action on the 26th of November, 1862. March 3d, 1863, Congress passed an Act granting to *bona fide* purchasers from Vallejo the exclusive right to purchase at any time within one year after the plats of survey were filed in the Land Office. These plats were filed October 15th, 1863. Defendants' declaratory statements as pre-emptioners were filed in the Register's office on the 23d day of October, 1863. The trial was had February 3d, 1864.

The other facts are stated in the opinion of the Court.

M. A. Whealon, for Appellants.

Whitman & Wells, for Respondent.

By the Court, SAWYER, J.

This action was commenced on the 26th day of November, 1862, to recover a portion of the tract of land known as the "Suscol Rancho." The plaintiff was one of the purchasers under the grant to Vallejo. He had occupied for a series of

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years, claiming title under said grant. Soon after the decision of the Supreme Court of the United States, rejecting the Vallejo grant in 1862, numerous parties, regardless of the inclosures or possession of those who had for years occupied under conveyances from Vallejo, entered upon various tracts of the land covered by the rejected grant. Among the parties so entering were the defendants, each of whom laid claim to one hundred and sixty acres. These entries were made sometime during the summer and fall of 1862, and prior to the institution of this suit.

The defendants answered separately, and in their answers severally alleged, that, at the time of their respective entries upon the lands in question, said lands were public lands of the United States, subject to the pre-emption laws of 1841 as subsequently modified and extended over the State of California; that they respectively entered upon tracts of one hundred and sixty acres each, and no more, under and in pursuance of said pre-emption laws, with the intent to occupy and enter the same in accordance with the terms of said Act, so soon as said lands should come into market.

The testimony, by consent of the parties, was taken by a referee and reported to the Court, and the Court tried the case without a jury upon the testimony thus taken.

The Court found:

Firstly — The plaintiff, on and for several years before the twenty-fifth day of October, had by himself and tenants, held the actual possession of the land described in the complaint, cultivating and using the same for the ordinary purposes of agriculture, farming and pasturage.

Secondly — That on or about said twenty-fifth day of October, A. D. 1862, the defendants entered upon said premises, and ousted and excluded plaintiff therefrom, and have from that time to the present withheld the same from him.

Also the value of the rents and profits, and the specific parts of which each was in possession, and rendered judgment accordingly. A motion for new trial having been made and

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denied, defendants appeal from the order denying new trial, and from the judgment.

Upon the facts found, the judgment is clearly correct, and the only questions are, as to the sufficiency of the evidence to support the findings, and as to the propriety of the rejection of certain evidence offered by defendants. Upon the first point, the testimony was clearly sufficient to establish the prior possession during several years of the plaintiff, and the entry and ouster by defendants. The testimony utterly failed to connect the defendants with the title of the United States, through the medium of the pre-emption laws. The pre-emption laws in force at the time, if any, were the Act of 1841, and subsequent modifications. The only qualification of the law of 1841 bearing upon the question is, that in California, unsurveyed lands were subject to pre-emption settlements; and the fact that a party had once before availed himself of the provisions of the Act in other States, did not preclude him from availing himself of its provisions again in this State. In other respects, the provisions of the law of 1841 were in force.

Under that Act, no person is entitled to settle upon the public land, with a view to pre-emption, unless such person is the head of a family, a widow, or one over the age of twenty-one years, the party being a citizen of the United States, or a person who has filed his declaration of intention to become a citizen, and he must "make a settlement in person," and must "inhabit and improve the same," and "erect a dwelling thereon." And, "No person who is a proprietor of three hundred and twenty acres of land in any State or Territory of the United States, and no person who shall quit or abandon his residence on his own land to reside on the public land in the same State or Territory, shall acquire any right of pre-emption under this Act." (Wood's Digest, 746, Sec. 10.)

In order to connect themselves with the United States under the pre-emption laws, it was necessary for the defendants to show that they were persons entitled under this Act to the benefit of its provisions. But there is not a shadow of testi-

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mony in the record tending to show that they, or either of them, were heads of families, single men over the age of twenty-one, or citizens, or persons who had filed their declarations of intention to become citizens, and no satisfactory evidence that they made "a settlement in person," and "inhabited the same." There is testimony that most of them built a shanty, or moved one on the land; but the testimony is that a portion of them lived in them, and a portion did not, and the testimony does not show which defendants lived on the land, or inhabited it, and which did not, except that it appears that U. F. Wood "never lived on the land." But as before stated, there is a total absence of testimony tending to show, that any one of these parties is within the provisions of the Act. It is not enough to show that they entered with an intent to claim under the pre-emption laws, without also showing that they were entitled to make a claim under such laws. The defendants having failed to connect themselves with the title of the United States through the medium of these acts, or otherwise, the evidence justifies the finding, and the prior possession of plaintiff must prevail.

The testimony of the defendants which was rejected, if all admitted, would not obviate this defect of proof, and could not therefore change the result.

But the certificate of the Register of the Land Office, that, on the 23d of October, 1863, the said several defendants filed their declaratory statements under the pre-emption laws, giving notice of their intention to claim the respective portions of the lands upon which they had entered, was inadmissible. These transactions took place nearly a year after the commencement of this suit, and at the time the said declarations were filed, the lands covered by them had been withdrawn from the operation of the law of 1841 (as we held in *Hastings v. McGoogin et al.*, ante 84,) by the Act of March 3, 1863. At this time, and for a year after the 15th of October, 1863 — the day on which the plats of survey were filed — the plaintiff was the only person authorized by the Act of March

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3, 1863, to purchase these lands. There was no error in rejecting the certificate of the Register of the Land Office.

Under the views taken it is unnecessary to discuss the question as to the right of a person, for the purpose of acquiring a pre-emption right, to enter upon the actual possession of another.

Judgment affirmed.

Mr. Justice CURREY, having been consulted as counsel, did not sit in the case.

By the Court, SAWYER, J., on petition for rehearing.

Plaintiff recovered in this action on his prior possession, and not upon a claim under the Act of Congress authorizing those who had purchased under Vallejo to enter the lands reduced to possession under such purchases. The record, however, shows that plaintiff is one of the parties contemplated by the Act, he having reduced the lands to possession, and having been, for several years prior to the entry of defendants, in possession under conveyances from Vallejo. The question is not whether the defendants are under a disability, which must be shown by the party alleging it. They allege a right acquired under the United States, and the burden of showing the right is on them. The Government has not extended its bounty to mankind generally, but it has conferred a right upon a particular class of persons upon the performance of certain prescribed acts, and a party claiming the right must show that he is one of those persons, and that he has performed the acts required.

At the time the declaratory statement was filed by defendants, the lands were not subject to pre-emption by them, for it appears that the lands in question had been reduced to possession by plaintiff under conveyances from Vallejo, and that the time had not expired within which plaintiff had the exclusive right of purchase. It was not a matter of any consequence whether he had yet taken the steps to secure the land or not.

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The declaratory statement, made while the lands were not subject to pre-emption, was of no validity, and there is no sufficient evidence, independent of, or in connection with this declaratory statement, to connect the defendants with the United States Government prior to the commencement of this suit. The plaintiff's prior possession must, therefore, prevail.

As to the question of damages, it appears by the admissions of the parties in evidence, that plaintiff had taken possession of the crops in an action to recover them, but the suit was still pending and undetermined. We cannot know that he will recover. But there is nothing in the pleadings, that will enable us to take cognizance of the fact that plaintiff has brought an action to recover the crops, or that he has received the rents and profits. Besides, it appears in the record that the plaintiff has "remitted a portion of the damages." We presume this was to obviate the objection made by appellant.

Rehearing denied.

THE PEOPLE v. AH PING.

ENTERING HOUSE WITH INTENT TO STEAL.—The mere fact that one person is with another who enters a dwelling house and steals therefrom, and sees him steal without interference on his part to prevent it, does not render him guilty of the crime of maliciously entering a dwelling house in the daytime with intent to steal property therein, nor will the proof of such facts cast on him the burden of proving himself innocent.

APPEAL from the County Court, Sierra County.

The facts upon which the charge recited in the opinion of the Court was based were as follows:

Fellows and O'Farrell, two miners, who occupied a cabin, hired a Chinaman on a Sunday during their absence to watch their cabin, and placed him in the bushes about fifty feet from the same. The watchman saw Ah You and Ah Ping enter the cabin, and came up and found them inside putting flour and other articles of food into two sacks. Ah You took the

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sacks and carried them off. Ah Ping did not carry anything away, but went with Ah You. Ah You plead guilty, and was used as a witness by Ah Ping on his trial. He testified that he alone committed the offense, and that Ah Ping was innocent and was a stranger to him, whom he had accidentally met.

Defendant was convicted, and appealed.

The other facts are stated in the opinion of the Court.

Van Clief & Gear, and *J. M. Haven*, for Appellant, referred to Wood's Digest, 329; Wheaton's Am. Crim. Law, 120; Russell on Crimes, 27; 4 Black. 34; and Barb. Crim. Law, 283.

J. G. McCullough, Attorney-General, for the People, referred to Wood's Digest, p. 290, § 255; Id. p. 329, § 11.

By the Court, SHAFTER, J.

Ah Ping, the appellant, was indicted jointly with Ah You under the Act of 1864 (Acts 1864, p. 104) for maliciously entering a certain dwelling house with intent to steal certain personal property therein. The question for the jury was the alleged breaking into the house with the intent charged. The Court charged, amongst other things, that "it is not necessary, to hold the defendant guilty of the offense charged against him in the indictment, that he be proved positively to have stolen something. If it be proved that he was with the one who did steal as charged in the indictment, and saw him steal without interference on defendant's part to prevent it, upon the defendant will then devolve the labor of proving himself innocent; otherwise he would be held guilty as an accessory. An accessory is an aider and abettor, and our statutes treat him as a principal, and subject to the same rules of law. An accessory is one who stands by and aids and abets and assists, or who counsels and advises the perpetration of a crime." This instruction is erroneous. The definition of the term "accessory" is correctly given, (Wood's Dig. 329, Sec. 11,)

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but it cannot be said that the facts, enumerated in the charge, would establish the guilt of the accused by legal conclusion. The appellant may have been in the house with one who was, himself, there, with felonious intent; he may have seen the latter in the act of committing a felony and have made no attempt to interfere, and still be entirely innocent. These facts, if found, would not necessarily have established the defendant's guilt, nor, what amounts to the same thing, would they have "devolved upon him the labor of proving himself innocent." If the facts, put hypothetically, were found, their effect would not be a question of law, to be passed upon by the Court, but of fact, to be determined by the jury. The charge was erroneous in other particulars, but the error already remarked upon requires that the judgment should be set aside.

Judgment reversed and new trial ordered.

HENRY HEGELER v. GEORGE HENCKELL.

WAIVER OF RIGHT TO MOVE FOR NEW TRIAL.—If a statement prepared on motion for a new trial is not filed within the time prescribed by the one hundred and ninety-fifth section of the Practice Act, the right to move for a new trial is waived, and when such right is thus waived the Court has no power to restore it.

AMENDMENT OF ENTRIES OF CLERK OF COURT.—Clerical errors and misprisions with respect to entries of judicial proceedings may be corrected by the Court even after the adjournment of the term, but the record itself must show the error.

POWER OF JUDGE AT CHAMBERS.—A Judge at Chambers has no power to make an order directing the Clerk of his Court to enter in the minutes of the Court, *nunc pro tunc*, an order alleged to have been made in open Court.

ENTRY OF ORDER OF COURT *nunc pro tunc*.—A Court has no power, after the adjournment of a term, to direct the Clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, where there is nothing in the record to show that such order was made.

ORDER GRANTING NEW TRIAL.—If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed by the appellate Court.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

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Temple & Thomas, for Appellant.

The Court was not authorized to amend the record after the expiration of the term of the Court, without something in the record to amend by. (3 Cal. 255; 9 Cal. 351; 13 Cal. 107; *State v. Smith*, 1 N. & M. 16; *Smith v. Jackson*, 1 Paine, 486; *Bowman v. Green*, 6 Monroe, 341; *Probasco v. Probasco*, 2 Penn. 10, 12; *Marsh v. Berry*, 7 Cow. 344; 3 Cow. 43, and notes; *Waldo v. Spencer*, 4 Conn. 71; 2 Virg. Cases, 527; *State v. Harrison*, 10 Yerger, 542; *Groves v. Fulton*, 7 How. Miss. 592; *Bondurant v. Thompson*, 15 Ala. 202; *Ketchen v. Moye*, 16 Ala. 148; *Gibson v. Wilson*, 18 Ala. 63; *Metcalf v. Metcalf*, 19 Ala. 319, 665; *Hudson v. Hudson*, 20 Ala. 364; *West v. Galoway*, 33 Ala. 306, 553.)

George Pearce, for Respondent.

Every Court of original and general jurisdiction has and holds a revisory jurisdiction over the record of its own proceedings. (*Clapp v. Graves*, 2 Hilton, 317; *Key v. Robinson*, 8 Ind. 368; *Claggett v. Simes*, 11 Foster, 56.)

Section sixty-eight of the Practice Act authorizes the Court, *in furtherance* of justice, to amend any proceeding.

By the Court, CURREY, J.

Judgment was rendered in plaintiff's favor on the 16th of February, 1864, and thereupon the defendant gave notice of his intention to move for a new trial. The statement to be used on the motion was filed on the 5th of March following. On the 4th of June the defendant applied to the Judge of the Court at Chambers for an order directing the Clerk to enter in his minutes of the proceedings of the Court, as of the day when the judgment was rendered, an order staying proceedings in the cause and granting to the defendant fifteen days in addition to the time allowed by statute, within which to prepare and file a statement on motion for a new trial. This application was founded on the affidavit of the defendant's

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attorney, as well as upon the pleadings, proceedings and papers in the action. The defendant's attorney deposed that when judgment was rendered he asked and obtained of the Court fifteen days in addition to the time prescribed by statute, within which to prepare and file a statement on which to move for a new trial and a stay of proceedings in the meantime. That he drew up the order and procured the signature of the Judge thereto, and placed the same in the hands of the person then acting as the Deputy of the Clerk of the Court. That the Clerk and his Deputy, either through design, accident or mistake, had neglected entering the order made. One of the attorneys for the plaintiff made a counter affidavit, in which he stated positively that the additional time granted by the Court was made orally in open Court, and that it was ten and not fifteen days; that he knew nothing of any written order signed by the Judge, and that if such an order was so signed it was different from the one announced from the bench when the application for additional time was made. He also deposed that after the statement was filed, the defendant's attorney applied to the plaintiff's attorney, by letter, requesting them to stipulate to waive the consequences of his having failed to file in time his statement on motion for a new trial, and that they refused to comply with such request. The Clerk of the Court deposed that the written order, which the defendant's attorney mentioned in his affidavit, was never in his possession as Clerk or otherwise, and that after searching for it he had been unable to find it in the Clerk's office. It was in proof by affidavits that the Deputy Clerk referred to had removed from the county.

The motion, with the objections thereto, was heard by the Judge at Chambers. Upon the argument, the Judge informed the counsel of the parties that he did not recollect the order referred to in the affidavit of defendant's attorney, but would find the facts to be as therein alleged. At the same time the defendant moved, upon the statement filed, for a new trial, when the plaintiff objected, upon the ground, among others, that the defendant had waived his right to move for a new trial,

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because he had not filed his statement within the time prescribed by law, or the order of the Court, or the Judge thereof at Chambers. The case was then taken under advisement, and at the next term of the Court an order vacating the judgment and granting a new trial was made. From this order the plaintiff has appealed. The grounds of objection assigned are in substance as follows:

First—That the defendant waived his right to a motion for a new trial by not filing his statement within the time prescribed by section one hundred and ninety-five of the Civil Practice Act.

Second—That there was nothing in the affidavit of the defendant's attorney which took the case out of the provisions of said section.

Third—That the Court could not regard anything in that affidavit as evidence of the existence of the supposed order therein mentioned.

Fourth—That the Court was not authorized to amend the record after the expiration of the term of the Court without something to amend by.

Fifth—That the Court erred in granting the motion for a new trial.

It is not necessary to consider these objections *seriatim*. If the statement prepared by the defendant was not filed within some time for which the one hundred and ninety-fifth section of the Practice Act makes provision, then by the terms of that section the right to move for a new trial was waived, and when such right was waived the Court was powerless to rescue the case from the consequences of the defendant's default.

The order which the defendant's attorney deposes was made and signed, was not made a part of the record of the proceedings in the case at the term of the Court when the judgment was rendered, and the appellant maintains that the omission cannot be remedied by the Court after the term has elapsed. It is the duty of the Clerk to enter all orders made by the Court in the minutes of its proceedings, and the parties con-

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cerned should see to it that such orders are entered. Clerical errors and misprisions may occur in respect to enteries of judgments, orders, and other matters connected with judicial proceedings, which it is competent for the Court to order amended or supplied; and this may be done even though the term when the error or mistake happened may have passed, provided the party moving proceeds with due diligence. (*Swain v. Naglee*, 19 Cal. 127.) In this case it was not sought to amend an entry made, but to obtain an order empowering and directing the Clerk to enter in the minutes, *nunc pro tunc*, an order alleged to have been made in open Court. Such an order could not properly be made by the Judge at Chambers; and we cannot discover from the record that such order was made either at Chambers by the Judge or at any time by the Court; and therefore the case stands upon the naked question whether the Court committed an error in vacating the judgment and granting a new trial. The notice of application for a new trial was duly given, but the statement required was not filed in time to save and secure the right to move for a new trial. At the time the motion was made and when it was granted, the right to move for a new trial was gone, and the Court had no power to vacate and set aside the judgment.

Therefore the order vacating and setting aside the judgment and granting a new trial must be and is hereby reversed.

Mr. Justice SAWYER expressed no opinion.

WILLIAM T. WALLACE v. JAMES ELDREDGE. (No. 1.)

JUDGMENT AFTER DEFAULT.—The Clerk of a Court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint.

ENTRY OF JUDGMENT BY CLERK AFTER DEFAULT.—If the note sued on is payable in money generally, and the complaint contains a copy of the same, the Clerk cannot, after default, enter a judgment payable in gold coin, although the complaint prays for such judgment.

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APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

By the Court, RHODES, J.

The plaintiff commenced an action June 15, 1863, against Eldredge and others upon two promissory notes made by them to the plaintiff, the first of which is in the following form: "\$1,500.—San Francisco, September 26, 1860.—One year after date, for value received, we promise to pay to the order of William T. Wallace one thousand five hundred dollars, jointly and severally. John A. Collier, M. D. Ross, David Crawford, Jr., James Eldredge, by their attorney in fact, Hobart Eldredge;" and the second note is in the same form, except that it is made payable eighteen months after date. The plaintiff in his complaint prayed for judgment for the amount of the promissory notes, "in current gold and silver coin of the United States of America," with interest and costs of suit. Service of the summons was made upon James Eldredge alone, on the 20th of July, 1863, and his default was entered by the Clerk, August 3, 1863, and on the same day the Clerk entered up judgment by default for the amount of the notes, "in current gold and silver coin of the United States of America," together with interest and costs of suit.

The defendant appeals from the judgment, and the ground of his objection is that it is ordered and adjudged that the plaintiff recover the amount therein specified, in the current gold and silver coin of the United States.

It is provided in section one hundred and fifty of the Practice Act that in an action arising upon contract for the recovery of money or damages only, the Clerk shall, immediately after the entry of the default of the defendant, on application

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of the plaintiff, "enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section thirty-two."

The plaintiff was entitled to have a judgment entered against Eldridge for the amount due on the notes. The statute pronounces the judgment of the law, arising upon the facts stated in the complaint, in an action upon a contract for the recovery of money, in case the defendant makes default; and that judgment is that the plaintiff recover of the defendant the amount specified in the summons and costs. The Clerk adjudges nothing — can grant no relief — he is merely the hand that enters the judgment of the law. In the language of Mr. Chief Justice Field: "The Clerk in entering judgments upon default, acts in a mere ministerial capacity; he exercises no judicial functions. The statute authorizes the judgment, and the Clerk is only an agent by whom it is written out and placed among the records of the Court. He must, therefore, conform strictly to the provisions of the statutes, or his proceedings will be without any binding force." (*Kelly v. Van Austin*, 17 Cal. 564.) The facts stated in the complaint do not show that the money mentioned in the contracts sued on, was made payable in a specified kind of money or currency, and, therefore, it was not the judgment of the law that the plaintiff recover the amount in any specified kinds of money, and for that reason that portion of the entry of the Clerk, specifying the kind of money in which the judgment was to be paid, is void. But that entry did not affect, or in any manner impair the validity of the judgment for the recovery of the money, and is as powerless as would be any unauthorized entry in respect to the obligation or lien of the judgment. *Utile per inutile non vitiatur*.

It is ordered that the cause be remanded with directions to the Court below, to amend the judgment, by striking out that portion of it which specifies the kind of money in which the recovery is had.

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WILLIAM T. WALLACE v. JAMES ELDREDGE. (No. 2.)

MATERIAL FACT IN PLEADING.—A statement in a complaint that the contract sued on was made payable in a specific kind of money is an allegation of a material fact.

JUDGMENT A CONTRACT.—A judgment is a contract in the highest sense of the term, and the word "contract" as used in the amendment to the Civil Practice Act providing for the rendition of judgment payable in the kind of money specified in the contract, includes judgments.

JUDGMENT ON GOLD COIN JUDGMENT.—If the complaint in an action on a judgment avers that the judgment sued on was rendered payable in gold coin, and defendant makes default, the Clerk should enter judgment payable in the same kind of money.

CONSOLIDATION OF SUITS.—The Supreme Court will not consolidate suits brought upon distinct causes of action.

JUDGMENTS.—If the decision of the Court below was correct when it was made, the appellate Court will not reverse the judgment by reason of any matter of fact which was not shown or offered in the Court below.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

By the Court, RHODES, J.

In December, 1863, the plaintiff sued Eldredge upon a judgment, and in his complaint he alleged that by the consideration and judgment of the Court he "recovered against the defendant the sum of three thousand four hundred and seventy-five dollars and seventy-one cents, payable in the current gold and silver coin of the United States of America only, and the further sum of nineteen dollars and twenty-five cents, payable only in the like gold and silver coin;" and he prayed for judgment for those sums, and that they be "adjudged to be payable by said defendant in United States gold and silver coin only." The defendant was duly served with process, and on his failure to answer, the Court, on the 11th of January, 1864,

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rendered judgment by default against him for the amount of the alleged judgment and costs of suit, "to be paid by said defendant in current gold and silver coin only;" and the Court also, in said judgment, directed the Sheriff to receive nothing but gold and silver coin in satisfaction of the execution to be issued upon the judgment. The defendant appeals from this judgment, and the cause comes before us on the judgment roll alone. No proceedings appear to have been had in the Court below by the defendant to set aside the default, and the record contains neither a statement nor a bill of exceptions.

The defendant, by his default, admitted every material fact alleged in the complaint. This is not controverted, nor is it, nor can it be denied that in view of the "Special Contract Act" of April 27, 1863, permitting a judgment to be rendered payable in a specified kind of money, upon a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money, the statement in the complaint, that the contract sued on was payable in a specified kind of money, is an allegation of a material fact. That Act, which has been upheld by this Court in *Carpentier v. Atherton*, 25 Cal. 564, would be nugatory and idle, if the facts which authorize the Court to exercise the peculiar jurisdiction specified in this Act, are not material facts in the cause.

A judgment is a contract, in the highest sense of the term, and as an obligation it possesses a force superior to that of a specialty or simple contract (Chit. Cont. 1; 2 Black. Com. 328; 1 Pars. on Cont. 7); and is included in the meaning of the term "contract," or obligation, as employed in the Special Contract Act. If, in this case, the judgment described in the complaint had never been rendered, and the allegations of the complaint in that respect had been pure fictions, it would have been the plain duty of the defendant to have denied the rendition of the alleged judgment; but his default would have been followed by its usual consequences—the admission that it was true, that the judgment had been rendered as alleged, and the admission would bind him in every Court, and in every stage of the case—while the default remained in force against him.

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The appellant moves that we may consolidate this cause with his appeal from another judgment, and consider the two causes as one, and thus in effect incorporate into the second case a *fact*, that not only did not appear in the record, as it came to this Court, but which was not in issue or established in the case while in the Court below. We know of no rule empowering us to consolidate suits brought upon distinct causes of actions. If the consolidation should be made, the desired result would not ensue; for in the trial of the second case, the reversal of the first judgment would be merely matter of evidence, to be offered in proof of an issue of fact, if one had been made in the case.

If the decision of the Court below was correct when it was made, the appellate Court will not reverse it, and certainly it will not do so by reason of any matter of fact that was not shown or offered in the Court below. All the facts in the case, upon which this judgment was rendered, are stated in the complaint, and they are admitted to be true. They are found in no other part of the case, and the Court passed upon them as they were therein set forth, and upon those facts the judgment is correct.

Judgment affirmed.

THE PEOPLE v. ALEXANDER BROWN.

INDICTMENT FOR LARCENY.—An indictment for larceny which charges that the defendant “did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead, and drive away,” etc., contains a sufficient statement of the intent with which the taking was done, without an averment that the property was taken with a felonious intent.

NEW TRIAL IN CRIMINAL CASE.—The appellate Court will not, in a criminal case, grant a new trial on the ground that the verdict is contrary to the evidence, if the testimony is conflicting.

APPEAL from the County Court, Placer County.

The indictment charged “that the said Alexander Brown, on or about the 13th day of May, 1864, and before the finding

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and presentation of this indictment, at the County of Placer, to wit: at a place known as Chandler & Saunders' Ranch, in the County of Placer, did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead, and drive away from the ranch aforesaid, the personal goods and property of another, to wit: the property of W. H. Chandler and J. Saunders, of the value of more than fifty dollars; said property consisting of * * *," etc.

The defendant was convicted, and appealed

A. S. Higgins, for Appellant.

The indictment does not charge that the defendant took the horse, alleged to have been stolen, with a felonious intent. The offense consists in the intent. Is the intent to be presumed from the mere taking, or must it be distinctly charged?

J. G. McCullough, Attorney-General, for the People.

The indictment is sufficient. "Feloniously" implies the intent. (Wharton's Precedents of Indictments, 190; Wood's Dig. 337, Sec. 60; *People v. Garcia*, 25 Cal. 531.)

By the Court, SANDERSON, C. J.

The demurrer to the indictment was properly overruled. The charging part is in the following words: "Did feloniously, wilfully and unlawfully, and with force and arms, steal, take, carry, lead and drive away," etc., which is not only a sufficient statement of the intent with which the taking was done, under our statute, but also at common law. (*People v. Vance*, 21 Cal. 403; Wharton's Precedents, 190.)

We cannot reverse the judgment on the ground that the verdict is contrary to the evidence. Disregarding the testimony offered by the defendant for the purpose of proving an *alibi* (which the jury manifestly did not believe), we are not prepared to say that the evidence does not sustain the verdict. In *The People v. Ah Loy*, 10 Cal. 301, the Court said: "It

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requires a clear case—one in which there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor—to justify an interference with the verdict of the jury.” We think this is one of those cases in which the verdict, whether guilty or not guilty, ought not to be disturbed by this Court. The Court below refused a new trial, and that Court could better judge of the weight of the evidence.

Judgment affirmed.

EBEN OWEN v. SETH D. DOTY.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.—The proceedings provided for in the Act of 1850, concerning “forcible entry and unlawful detainer,” are not a substitute for the action of ejectment. The object of the Act, (excluding the thirteenth section,) is to redress wrongs, occasioned by force used or threatened by the defendant, by restoring possession to the plaintiff, and punishing the defendant with fine and treble damages.

NOTE.—The plaintiff must have had the actual possession when the wrongful or forcible entry was made, and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful.

NOTE.—If the entry of the defendant was lawful, the plaintiff cannot, when his right to the possession has expired, expel him therefrom, or by using or threatening force make his entry unlawful.

COMPLAINT AGAINST TENANT HOLDING OVER.—A complaint in an action brought under section thirteen of the Forcible Entry and Unlawful Detainer Act of 1850, which avers that “when the plaintiff was peaceably in the actual possession of the premises, the defendant, by permission of the plaintiff, entered upon the same,” avers a license to enter, and fails to state that the relation of landlord and tenant existed between the parties, and therefore contains no cause of action.

APPEAL from the County Court, Solano County.

Plaintiff recovered judgment in the County Court, and defendant appealed.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

This action can only be maintained, if at all, under the provisions of the thirteenth section of the Act known as the Forcible Entry and Detainer Act, and our first point is, that it

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is not within the provisions of that Act, inasmuch as the Act relates and is made to apply only to a person holding over, under and contrary to the terms of a lease or agreement, or failing to pay rent. The uniform construction has been that this section applies only to cases where the conventional arrangement of landlord and tenant subsisted, and not to cases where the tenancy exists by operation of law.

It was intimated in *Henderson v. Grewell*, by the late Supreme Court, that this section only applies to cases where a contract of tenancy exists *upon a lease rendering rent*. And this is probably correct when the proceeding is based on the default in the payment of rent, or in that which constitutes its substitute. In this case no lease had expired, and there was no covenant or agreement alleged which imposed upon the defendant the obligation of giving up the premises. The complaint is insufficient for this reason: no lease or agreement is averred, and no breach of suit.

But we submit that the thirteenth section of the Act cited cannot be extended to any such case at the one at bar; otherwise we have a substitute for the action of ejectment introduced into our practice. It applies solely to cases where the conventional relation of landlord and tenant subsists. It is a summary proceeding, to be kept strictly within the statute, proceeding upon the idea that the tenant wrought a forfeiture of his estate or right. (*Chipman v. Emeric*, 3 Cal. 273; *Gaskell v. Treanor*, 9 Cal. 339.)

For these purposes there must exist an express or implied contract to pay rent. (*Sampson v. Schaeffer*, 3 Cal. 201; *O'Connor v. Corbitt*, 3 Cal. 273; *Ramirez v. Murray*, 5 Cal. 223; *Treat v. Liddell et al.*, 10 Cal. 303.)

The Act concerning forcible entry, etc., is *strictissima juris*, and that the action will not be allowed to be used as a substitute for ejectment or trespass. (*Merrill v. Forbes*, 23 Cal. 379.)

J. Dougherty, and M. A. Wheaton, for Respondent.

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Can a tenant at will be put out of possession under the Forcible Entry and Detainer Act? This question seems to be settled by the Act of 1861. (Laws of 1861, p. 514.) The language is, that "at the expiration of the month, the landlord may reenter, or maintain ejectment, or *proceed in the manner prescribed by law to remove the tenant.*" If we have the right to proceed in the manner prescribed by law, we presume we have our choice to proceed in *any* manner prescribed by law, one of such remedies being under the Forcible Entry Act. Nor is such a proceeding a substitute for the action of ejectment. It is a right of action given by the statute, in addition to the right of action by ejectment. So, at least, *reads* the statute referred to.

Under section second of the Forcible Entry Act, this action can be maintained "against those who, having lawful and peaceable entry into lands, tenements, or other possessions, unlawfully detain the same;" and restitution may be had for lands, tenements, etc., which, after a lawful entry, are held unlawfully. Even were it true, therefore, that this action would not be maintained under the thirteenth section, still, under the second and ninth sections, all that the complainant would be required to show in addition to the forcible or unlawful detainer complained of, would be that he was entitled to the possession of the premises, at the time of the forcible or unlawful holding over.

By the Court, RHODES, J.

This action was brought under the Forcible Entry and Unlawful Detainer Act of 1850. The plaintiff alleges in his complaint that in April, 1863, he was peaceably in the actual possession of the premises in controversy; that while so in possession "the defendant, by permission of the plaintiff, entered upon a portion of the same;" that on the 20th day of October, 1863, the plaintiff notified the defendant to remove from the premises and deliver the same to the plaintiff; and that the defendant refused to deliver up the possession, and

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has since that time "unlawfully, wrongfully and forcibly withheld said premises from the plaintiff's possession," etc.

It is not agreed by the parties whether the action was brought under the thirteenth section or one of the preceding sections of the Act. As the Act and the several Acts amendatory thereof, under which the action was brought were repealed by the Forcible Entry and Unlawful Detainer Act of 1863, we shall not enter into an extended discussion of its provisions in this case.

It was not intended that the summary proceedings provided for in the Act, should be a substitute for the action of ejectment, although the second section, literally read, is broad enough to include every unlawful withholding of the possession from the person entitled to it, whether the defendant's entry was lawful or unlawful. The purpose manifested by the Act, when all the sections, except the thirteenth, are considered together, was to redress the wrongs occasioned by the acts of the defendant, committed with force employed, or threatened, or manifested, by restoring the possession to the plaintiff and punishing the defendant by fine and treble damages. The plaintiff must have had the actual possession when the unlawful or forcible entry was made by the defendant. If a forcible detainer is complained of, the entry of the defendant must have been unlawful, for the defendant who, having a right of entry, peaceably takes possession, cannot by any possibility be guilty of a wrong by defending his possession while he is entitled to it; and if his right to the possession has expired while he is in possession, the person thereupon entitled to succeed to the possession cannot by his own act, and without the aid of the proper Court, put the defendant out of possession; and if he attempts to do so, and force is used or threatened by the defendant, the plaintiff cannot call on the Courts to punish the defendant for the acts of force which he (the plaintiff) has provoked.

This case does not fall within those provisions of the Act we have been considering, for although it is alleged that the defendant forcibly withheld the possession, it is also alleged that

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his entry was peaceable and lawful. The entry having been lawful and peaceable, the proper remedy is an action of ejectment, unless the case falls within the thirteenth section. That section, has for its object the removal of the tenant by the landlord by means of the summary proceedings provided for in the Act, in case the tenant fails to pay the rent, or holds over after the expiration of his term. The parties authorized to institute the proceedings are the lessor and his successors in interest, they occupying the relation of landlord, and the defendants are those to whom the premises are "demised or let," and those holding under them. The parties to the action must bear the relation of landlord and tenant, and the tenant must have held over after the expiration of his term, or contrary to the covenants of the lease, or failed to pay the rent.

The complaint fails not only to state directly that the relation of landlord and tenant existed between the parties, but no facts are stated from which that relation could be inferred. The allegation is that "the defendant by permission of plaintiff entered upon a portion of the same," (the premises)—that is, that the defendant entered by the license of the plaintiff, not that he either took or held any right in the land under the plaintiff. A license to enter confers upon the licensee no interest in the premises, not even the right of temporary possession, but the possession is left in the person holding it when the license to enter was given. The entry by the defendant under the alleged permission of the plaintiff did not create the relation of landlord and tenant between the parties, and for that reason the case is not brought within the thirteenth section of the Act.

Judgment reversed and cause remanded.

Mr. Chief Justice SANDERSON expressed no opinion

Statement of Facts.

THE PEOPLE v. THOMAS KING.

PLEADING IN CRIMINAL ACTIONS.—The criminal code of California has worked the same change in pleading in criminal actions which has been wrought by the civil code in civil cases.

INDICTMENT FOR MURDER.—In an indictment for murder it is not necessary to aver the means by which the homicide was committed, or the nature and extent of the wound, or the part of the body upon which it was inflicted.

STATEMENT OF DEGREE OF MURDER IN INDICTMENT.—An indictment for murder should not designate the degree of the murder. If the indictment does state the degree of the murder, it does not vitiate it, but the statement of the degree may be treated as surplusage.

IMPLIED BIAS OF JUROR.—In order to render a juror called in a criminal case incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such conviction.

CHARGE OF JUDGE ON WEIGHT OF EVIDENCE.—Under our Constitution the Judge, in his charge to the jury, cannot express his opinion upon the weight of evidence. He may, however, state the evidence to the jury, and declare the law resulting from the facts proven, and when there is no evidence as to a particular fact or issue, he may so state to the jury.

CHARGE OF JUDGE ON EVIDENCE.—If on a trial for murder there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the Judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter.

CHARGE OF COURT PRESUMED CORRECT UNLESS ERROR SHOWN.—If there is no statement or bill of exceptions embodying the evidence, or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.

INTOXICATION WHEN HOMICIDE IS COMMITTED.—If on a trial for murder there is evidence to show that the defendant was intoxicated when the homicide was committed, the jury may consider the evidence of intoxication, not in extenuation or excuse of the crime, but for the purpose of determining the degree of the crime.

REFUSAL OF AN INSTRUCTION.—It is not error to refuse an instruction asked when the same has already been given in substance.

APPEAL from the District Court, Ninth Judicial District, Siskiyou County.

The following is a copy of the indictment in this case:

"The People of the State of California against Thomas King.

"In the Court of Sessions of the County of Siskiyou and State of California, October Term, A. D. 1863.

"Thomas King is accused by the Grand Jury of the County of Siskiyou aforesaid by this indictment of the crime of mur-

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der of the first degree, committed as follows: The said Thomas King, on the second day of July, A. D. 1863, at the County of Siskiyou and State of California, in and upon one James Duffy, feloniously, wilfully, and of his malice aforethought, did make an assault and did then and there feloniously, wilfully, and of his malice aforethought, cut, stab, and wound him the said James Duffy, and did then and there give him the said James Duffy one mortal wound, of which said mortal wound the said James Duffy afterwards, on the second day of July, A. D. 1863, did die. So the grand jurors aforesaid, upon their oaths, do say, that the said Thomas King, on the said second day of July, A. D. 1863, at the said County of Siskiyou and State of California, feloniously, wilfully, and of his malice aforethought, did kill and murder the said James Duffy, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

In the trial, Jesse Davis was called as a juror. On examination as to his qualifications as a juror, he made the following answers to the following questions:

1st Question—"Have you heard what purported to be a statement of facts of this case?"

Answer—"I have heard what purported to be a statement of the facts from different persons."

2d Question—"Do you believe the statements true you heard?"

Answer—"I believed the statements heard, judging from the character of the men who told those statements to me."

3d Question—"From the statements you heard, have you formed or expressed an unqualified opinion as to the guilt or innocence of the defendant?"

Answer—"I have formed an opinion."

4th Question—"Do you still entertain the same opinion?"

Answer—"I do still entertain the same opinion."

5th Question—"Would it require evidence to remove or change the opinion you entertain?"

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Answer—"It would require evidence to change my opinion in regard to the guilt or innocence of the prisoner."

8th Question—"Do you believe these reports sufficiently strong to act on them in your common business transactions?"

Answer—"I believe them as much as I believe any reports that I hear, or as much as I could believe any reports."

The defendant then challenged the juror for implied bias.

The juror also stated, in answer to the District Attorney, that he would not be willing to act on his opinion, and that he could not decide on the guilt or innocence of the defendant without hearing the evidence on the trial, and that he could and would decide the case impartially without reference to what he had heard or the opinion he had formed, and that the only credit he had given to the reports was that of hearsay reports not made under oath, which would not weigh in his mind against testimony of witnesses given in under oath.

The Court disallowed the challenge, and the counsel for defendant excepted.

The defendant was convicted of murder in the first degree, and appealed.

The other facts are stated in the opinion of the Court.

J. Berry, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, C. J.

The objections to the indictment are not well taken. There is some conflict in the decisions in this State as to what must be alleged in an indictment for murder. Some of the cases go so far as to hold that the essential averments of an indictment under our criminal code are the same as at common law, and that therefore a statement of the manner of the death and the means by which it was effected is indispensable. (*People v. Wallace*, 9 Cal. 80; *People v. Cox*, 9 Cal. 33; *People v. Lloyd*, 9 Cal. 54.) In other cases it has been held that our criminal

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code changes in many respects the rule of the common law, and dispenses with the statement of many facts and circumstances connected with the killing which were usual and perhaps indispensable at common law. (*People v. Stevenson*, 9 Cal. 273; *People v. Dolan*, 9 Cal. 576.) In the former case it was held that a description of the weapon used was not necessary, and it was not material to describe the wound further than by the use of the word mortal, nor the part of the body upon which it was inflicted. And it seems that it is not necessary to aver in terms that the wound was mortal, for if the facts stated show that such was the fact (as that the party died of the wound) the indictment in that respect is sufficient. (*People v. Judd*, 10 Cal. 313.)

Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the civil code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and Judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense. A disposition to relax much of this

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ancient strictness in criminal proceedings has manifested itself in modern practice, and in harmony therewith the Legislature of this State has substituted, in the place of the old, a new system of practice and pleading, which retains all the elements of the former so far as they are made necessary by a due regard for the substantial rights of a defendant, but discards all such elements as serve no good purpose, and only tend to embarrass and defeat the administration of justice. That system provides a few plain and simple rules by which to determine the sufficiency of pleadings, and declares that such rules shall be the test. (Section 235.) Those rules are found in section two hundred and forty-six, and in order to ascertain whether an indictment is sufficient or not, it is only necessary to interrogate it by the light of that section. The present indictment stands this test in every particular: 1. It is entitled in a Court having authority to receive it. 2. It was found by a Grand Jury of the county in which that Court was held. 3. It gives the name of the defendant. 4. It shows that the crime alleged was committed within the jurisdiction of the Court. 5. It declares that the offense was committed at a time prior to that at which the indictment was found. 6. It sets forth the act charged as the offense clearly and distinctly in ordinary and concise language, without repetition and in such a manner that any person can know and understand therefrom what is intended; for it alleges that the defendant—stating his name—at a place named, and at a time mentioned which was prior to the finding of the indictment, with malice aforethought assaulted one James Duffy, and did cut and stab the said James Duffy, giving him a mortal wound, of which he afterwards died on the same day, and therefore within a year and a day from the time when the mortal thrust was received, which is all that is necessary to constitute the offense of murder, and sufficiently identifies the act to guard the defendant against a second prosecution, and, as provided in the seventh and last subdivision of the section in question, states the same with sufficient certainty to enable the Court to pronounce a judgment. The indictment is not bad because

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it does not allege that James Duffy was a human being, nor that he had a body, nor the part of his body upon which the wound was inflicted. The first two never were necessary, and the last is not now, whatever it may have been formerly. If there is any objection to the indictment, it is found in the fact that it designates the degree of the murder. While this does not make the indictment bad, and may be treated as surplusage, still the indictment ought not, because it need not, state the degree of the murder. The trial jury, and not the Grand Jury, determine the degree of the crime, and the former should not be embarrassed by the opinion of the latter.

The Court did not err in disallowing the challenge interposed by the defendant to the juror Jesse Davis upon the ground of implied bias. In order to render a juror incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute. Admitting that Davis had formed an opinion — which in view of all his answers taken together is extremely doubtful — it certainly was not an unqualified, but on the contrary, a conditional or qualified opinion. The law upon this branch of the case will be found very fully discussed by Mr. Justice Baldwin, in *The People v. Reynolds*, 16 Cal. 130. (See also, *People v. Williams*, 17 Cal. 142; and *People v. Mahoney*, 18 Cal. 180.)

It is next claimed that the Court erred in giving the following instruction:

“In the case that is now being submitted to you there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this case.”

This instruction is not a little obscure, and if it was given as represented in the transcript, it is quite possible that the jury may have found some difficulty in determining its exact

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meaning. The record does not contain the evidence, or any part thereof, and we cannot, therefore, read the instruction in the light of the testimony, in view of which it was given, but are forced to determine its meaning by its own terms. If there was any evidence before the jury tending, however slightly, to reduce the homicide to the grade of manslaughter, this instruction was erroneous. If the expression "there is no evidence on any points or matters given in proof," is to be understood as admitting that there were "points and matters given in proof" which, if true, would reduce the offense to manslaughter, but declaring the evidence as to such points or matters to be insufficient to warrant the jury in finding them to be true, it was erroneous, because it assumed to pass upon the weight of evidence, which, under our Constitution, is left entirely to the jury, and in regard to which the Judge, contrary to the rule of common law, is not allowed to express an opinion. On the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous, because Judges, although not allowed to charge juries with respect to matters of fact may state the testimony and declare the law. (Sec. 17, Art. VI, of the Constitution.) At common law a Judge is allowed to express his opinion as to the weight of evidence. (*Commonwealth v. Child*, 10 Pick. 252.) In this respect the constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but Judges may still, as formerly, state what facts are in evidence and what are not; or in other words they may state the evidence *pro* and *con*, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to particular facts or issues, when such is the case. Counsel for defendant seem to have understood the Judge as instructing the jury that there was no evidence as to facts which, under the law, would reduce the offense charged to manslaughter, and to have ex-

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cepted to the instruction upon that ground, so understood — there being no evidence of the character in question — the instruction was not erroneous.

It is proper, however, to add, in this connection, that in the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the Court below, upon the principle that the party who alleges error must show it. This, however, must be taken with the qualification that where the action of the Court below is manifestly erroneous under any and every conceivable state of facts, this Court will review it, notwithstanding the evidence may not have been brought up. (*The People v. Levisen*, 16 Cal. 98.)

It appears, from the instructions given by the Judge of his own motion, that there was evidence before the jury tending to prove that the defendant was intoxicated at the time the homicide was committed. In view of this evidence certain instructions were asked on the part of the defense to the effect that so far as the degree of murder is concerned no presumption arises from the mere fact of the killing considered apart from the means used and the circumstances under which it occurred; and that in determining the question of premeditation it was proper for the jury to take into account the defendant's condition, as drunk or sober. These instructions were evidently taken from the case of *The People v. Belencia*, 21 Cal. 544, and ought therefore to have been given, unless already given in substance, for as to the law of that case there can be no question. Where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration or the attempt to perpetrate arson, rape, robbery, or burglary, the degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated, and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon

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the ground that the condition of the defendant's mind, at the time the act was committed, must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

The Court below does not seem to have questioned the law of the defendant's instructions, but refused to give them upon the ground that they had been already given in substance. Upon inspection of the instruction given by the Court, we are satisfied that the law, as declared in the instructions under consideration had already been given in language, perhaps, better adapted to the comprehension of the jury, and hence the ruling of the Court was not erroneous. We add, however, that in such cases it is better to give the instructions asked, than to refuse, for by such refusal a pretext is afforded for an appeal which otherwise, perhaps, would not be taken.

The judgment is affirmed and the Court below directed to appoint a day for the execution.

ALEX. B. GROGAN v. HENRY KNIGHT, ESTHER ANN
PACKWOOD, JOEL RUMSEY, ELLSWORTH TIL-
TON, JOSEPH SAVAGE, JOHN DUGAN, JOHN J.
REED, AND PETER COGGSWELL.

SURVEY OF PUBLIC LANDS.—The survey of the public lands of the United States into sections and subdivisions of sections can only be made under the authority of Congress, and is beyond the control of the States.

SELECTION OF SCHOOL LANDS BY A STATE.—A selection of public lands made by the authorities of a State in lieu of the sixteenth and thirty-sixth sections granted to the State for school purposes, before the lands selected have been surveyed by the United States, and the survey approved, is invalid, and confers no title upon the State.

SALE OF UNSURVEYED LANDS BY A STATE.—A sale and certificate of purchase made by a State of lands selected by the State in lieu of the sixteenth and thirty-sixth sections, before the lands thus selected and sold have been surveyed and the survey approved by the United States, confers upon the grantees of the State no title or right of possession.

Argument for Respondent.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellants.

This is an action of ejectment, and the only evidence of title the plaintiff attempted to show was a location of school land warrants on *unsurveyed* public lands of the United States.

These locations being upon unsurveyed lands, were no evidence of title. (Pre-emption Law of Congress of September 4th, 1841, Sec. 8; Instructions of U. S. Land Commissioner, 3d subdivision, p. 502, *Lester's Land Laws*; also Decisions, No. 507, p. 457, *Ib.*; *Terry v. Megerle*, 24 Cal. 609; Statutes of California of 1863-4, p. 301.)

The defendants had the possession sued for at the time the locations were made on which the plaintiff's certificates issued. (Act concerning certificates of purchase, Statutes of 1859, 332; *Id.*, Sec. 5, 302.)

Whitman & Wells, for Respondent.

The plaintiff in this case has based his claim upon certificates of purchase issued by the State Land Office for land selected as school land, taken in lieu of sixteenth and thirty-sixth sections, and duly assigned to him, and certificates of school warrants.

This selection and sale is authorized by Acts of Congress providing for the survey of public lands in the State of California, the sixth section of which specifically grants the sixteenth and thirty-sixth sections to the State for the support of schools. (*Wyman v. Banvard*, 23 Cal. 524; *Higgins v. Houghton*, 25 Cal. 252.)

The seventh section provides that the proper authorities of the State may select other lands in lieu thereof when such sections may be reserved for public uses or taken by private

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claims, which lands shall be selected agreeably to the provisions of an Act of Congress, approved May 20th, 1826, and which shall be subject to approval by the Secretary of the Interior.

The right of the State to enact such a law has been sustained by the Federal Courts. (Acts of 1861, 218, etc.; *Jackson v. Wilcox*, 13 Peters, 498.) And until the United States complains of it, or the question arises upon a patent issued from the United States, it is competent for this Court to uphold the selection made by the State, for we do not see here any adjudication as against the claim or title of the United States.

By the Court, RHODES, J.

This is an action of ejectment to recover the possession of a portion of the lands formerly known as the Suscol Rancho. The premises are public lands of the United States, and have never been surveyed under the authority of Congress. The plaintiff relies for his title upon certificates of purchase issued October 17, 1862, by the Register of the State Land Office, upon the location and sale of school lands, selected in lieu of the sixteenth and thirty-sixth sections of the public lands of the United States. The United States Register of the proper land district refused to approve the selection, because the lands were unsurveyed. The defendants were in possession, they having entered upon the land in May, 1862, and each of them claimed a right of pre-emption under the Acts of Congress, to the respective quarter sections upon which he had entered.

It appears in the statement on the defendants' motion for a new trial, that "the plaintiff testified that one Dr. Page had caused the lands to be inclosed in 1861; that said Dr. Page was the real party in interest in this suit; that the plaintiff only held the lands in his name in trust for Dr. Page, and to secure him for the advances he had made; that said Dr. Page had replanted the crops raised on the land, and received the same for

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the year 1862, and had pastured the pasture part of the land; also had received the profits of the land in 1862." The Court found as facts: "First—On the 28th day of October, A. D. 1862, the plaintiff held the certificates of the State of California, duly issued, for the land in controversy; Second—The ineptive steps for the obtaining such certificates were taken before any one of the defendants entered upon the land." The prior possession of the plaintiff, or his grantor, is neither admitted by the pleadings nor found by the Court; and the only finding of fact respecting the plaintiff's title, possession or right of possession, is as above mentioned. The Court from those facts found the following conclusions of law: "First—The plaintiff was at the time alleged in his complaint seized and possessed of the land in controversy, and had title thereto; Second—The title thus held, and the right of possession flowing therefrom, relate to the first steps taken for acquiring the same." It thus clearly appears that the Court found for the plaintiff on the sole ground that the certificates of purchase were sufficient to convey, and did convey to the plaintiff, the right to the possession of the lands described in the certificates, and not on the ground of the prior possession of the plaintiff or Dr. Page. We are, therefore, not required to determine whether the evidence was sufficient to have enabled the Court to find for the plaintiff on the ground of the prior possession of Dr. Page, if it had clearly appeared that his right depending upon his possession had been transferred to the plaintiff. The first finding of fact, which is unnecessarily indefinite, and merely states a portion of the evidence tending to prove a fact, would seem to indicate that the certificates of purchase were issued to the plaintiff or had been assigned to him, rather than that Dr. Page had conveyed the land to him.

The point upon which the appeal must turn has relation to the value and effect of the certificates of purchase issued by the State.

The defendants resist the claim of title set up by the plaintiff, on the ground that the certificates of purchase, having

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been issued before the lands selected had been surveyed according to the laws of the United States, were not evidence of title in the person to whom they were issued. It will not be contended that the title to the lands selected passed to the plaintiff, unless the title would have passed to the State upon the performance, in her behalf, of acts similar in their character to those under which the plaintiff claims, for although the certificates issued to the purchaser, the selection and location of the lands was made for the State. Could the State in October, 1862, by her own act, have acquired title to those lands as portions of the lands to be selected in lieu of the sixteenth and thirty-sixth sections, granted for the purposes of public schools, prior to the survey of the lands by the United States?

The seventh section of the Act of March 3, 1853, provides that such land shall be selected by the authorities of the State agreeably to the provisions of the Act of Congress, approved the 20th of May, 1826; and that Act provides that the lands shall be selected in sections and subdivisions of sections. It requires no argument to prove that the survey of public lands of the United States into sections and subdivisions of sections can be made only under the authority of Congress. The survey is a part of the system devised by Congress for the disposal of the public lands; and the survey is as completely beyond the control of the State authorities as any portion of the system. The selection of a particular tract, as a subdivision of public land, in anticipation of the survey by the United States, would be no less wanting in authority than would the selection of a designated subdivision in anticipation of the grant by Congress. In *Bernard's Heirs v. Ashley's Heirs*, 18 How. 43, a selection of land had been made by the Governor of the Territory of Arkansas, under the Acts of Congress, authorizing him to select lands equal to ten sections, in tracts not less than a quarter section each, and to sell the same for the purpose of raising a fund to erect public buildings in the territory; and it was held that the selection that he had made of a quarter section within a township, the sur-

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vey of which was incorrect and had not then been approved by the Surveyor-General, was invalid, and that the selection could take effect only from the time when the survey was sanctioned and became a record in the district land office.

A question quite similar in its character, in all its essential particulars, was before the Court in *Terry v. Megerle*, 24 Cal. 609, the plaintiff claiming title to the lands by virtue of the location upon unsurveyed lands, of "school land warrants," issued by the State, under the Act to dispose of the five hundred thousand acres granted to the State, for the purposes of internal improvements. Mr. Chief Justice Sanderson, in commenting upon the provisions of the Act of Congress, says: "There is no ambiguity in the language used; on the contrary, the meaning is too plain and obvious to admit of doubt. The language is, 'located as aforesaid,' that is to say, in parcels of not less than three hundred and twenty acres, conformably to sectional divisions and subdivisions and after the survey has been made. * * * The grant imposes conditions as to quantity, manner of selection and location, and time of location, and under it no title to any specific land can vest in the State until all of these conditions have been complied with. The State has no more right to select and locate lands before the survey has been made, than she has to locate it in tracts of one hundred and sixty acres each, or without regard to sectional divisions and subdivisions of the United States survey." We are entirely satisfied with the construction announced in that case, of those provisions of the Act in question, and it is difficult to understand how it could be contended that the grantee of the State, of land selected under her sole authority, prior to the United States survey, thereby acquired the legal title, when it is capable of mathematical demonstration that his asserted title to any given acre of the three hundred and twenty acres selected and located for him by the authorities of the State, is liable to be defeated by the survey subsequently made by the United States.

In the case of *Barry v. Gamble*, 3 How. 32, one of the questions was the sufficiency of the location of a New Madrid

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land certificate, which had been located on public lands prior to the United States survey; and Mr. Justice Catron in delivering the opinion of the majority of the Court, said: "The location was in irregular form, and altogether disregarded the section lines and the ordinary modes of entry under the laws of the United States. This circumstance lies at the foundation of the controversy. The General Land Office, at Washington, refused to issue a patent on locations thus surveyed. The Secretary of the Treasury, on the 11th of May, 1820, and again on the 19th of June, 1820, called on the Attorney-General for his opinion on the validity of such locations. (2 Land Laws and Opinions, 9, 10.) This officer replied 'that the authority given is to make these locations on any of the lands of the Territory, the sale of which is authorized by law; but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized.' To cure this defect the Act of 1822 was passed," etc. And the Court held that the location was rendered valid by that Act.

It may be admitted that, by virtue of the Act of Congress of 1853, the State became entitled to an amount of land equal to two sections in each congressional township, yet as the State did not, by virtue of that Act, acquire the title to any specified tract of land, and could not acquire it, until the survey had been made under the authority of Congress, it necessarily follows that, prior to such survey, she had no power or authority to confer upon a purchaser from her any right, title or interest in any specific parcel of such lands.

If the selection had been made after the survey, and it remained only subject to the approval of the Secretary of the Interior, the person claiming under the State might with more propriety say, in the language of the respondent, "until the United States complain of it, or a question arises upon a patent issued by the United States, it is competent for this Court to uphold the selection made by the State," but if the selection is prior to the survey, and the defendant goes into possession, without a trespass upon the actual possession of the purchaser

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from the State, if the latter claims protection on the ground that the United States may not complain of his selection and location, the defendant may well reply that the United States may not complain of *his* possession. The question is not whether the General Government will or will not complain of his selection of unsurveyed public land, but it relates to the title on which he seeks to recover the possession; the question is, did the acts and proceedings of the officers, acting on behalf of the State, confer upon the purchaser from her the right to the possession of a tract of unsurveyed land? And this must be answered in the negative. We would not be justified in temporizing with this question, on the consideration that there are very many similar claims to title in this State, the value of which might be impaired by our decision in this case; but, feeling as we do, that the question admits of but one solution, it is our plain duty to declare the law.

The error assigned by the defendants, in ordering their testimony relating to their pre-emption claims to be stricken out, becomes immaterial, in the view we have taken of the case, and in the absence of a finding of the fact of the prior possession of the plaintiff or his grantor.

Judgment reversed and the cause remanded.

Mr. Justice CURREY and Mr. Justice SAWYER expressed no opinion.

THE PEOPLE v. EUGENE CAZALIS.

SUPPLYING THE PLACE OF A LOST PLEADING.—If a pleading in a pending action is lost, its place can only be supplied by motion based upon affidavits showing what the lost pleading contained, and the service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

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John B. Felton, and J. W. Stephenson, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, SHAFER, J.

The defendant was sued for taxes upon personal property. The complaint was demurred to. When the case was reached on the calendar, the District Attorney discovered that the complaint was lost or mislaid; and the Court, on bare suggestion by him, made an order substituting for the original a paper, presented and filed by the attorney, purporting to be a true copy of the original. This proceeding was had in the absence of the defendant and his attorney, and without notice. The demurrer was thereupon submitted, and in three days thereafter was overruled, and the Court immediately rendered a final judgment, without notice to the defendant or his counsel, and without giving time to answer. The appeal is from the judgment.

It is insisted that the judgment should be reversed upon either one of two grounds: First—That no proof was submitted to the Court showing the loss of the original complaint or that the copy filed was a true copy. Second—That no notice was given that the order would be applied for.

It was held in *McLeadon v. Jones*, 8 Ala. 298, that "the manner of correcting the loss of the pleadings, is, to show by affidavits what the record contained, the loss of which is to be supplied. The substitution can only be made after a personal notice of the intention to move the Court, and the notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits submitted." The case at bar may be distinguished from that of *Benedict v. Cozzens*, 4 Cal. 381. In that case the defendant answered the substituted complaint before the objection, that it was allowed to be filed without notice, was taken. But if the decision in that case should be considered as con-

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flicting with the rule laid down in the case cited from the Eighth of Alabama, it is in our judgment erroneous.

Judgment reversed and cause remanded for further proceedings.

HORACE W. CARPENTIER *v.* GREENE W. WEBSTER.

OCCUPANCY OF COMMON LANDS BY TENANTS IN COMMON.—Tenants in common hold their lands by unity of possession, and each and every of them has the right to enter upon and occupy the whole of the common lands and every part thereof.

POSSESSION OF ONE TENANT IN COMMON.—One tenant in common has no share except that which is undivided, and has no right to exclude his co-tenant from any portion of the common lands.

OUSTER OF A TENANT IN COMMON BY HIS CO-TENANT.—If one tenant in common incloses and enters into the exclusive possession of a portion of the common lands, not exceeding in quantity the number of acres which he would be entitled to have allotted to him on partition of the whole, and refuses to allow a co-tenant to occupy this portion with him, it is an ouster of the co-tenant, and he may maintain ejectment and be let into the possession of the part from which he is thus excluded.

OUSTER BY TENANT IN COMMON.—One tenant in common may be guilty of an ouster of a co-tenant by excluding him from a portion less than the whole of the property held in common.

A REFUSAL TO LET A CO-TENANT INTO POSSESSION AN OUSTER.—If one tenant in common is in the exclusive possession of a portion less than the whole of the common lands, and his co-tenant demands of him to be let into possession of the same on the ground of his joint ownership, and the other, while admitting the several title of the co-tenant, refuses to let him into possession, this refusal is an ouster.

OUSTER MAY RESULT WHEN TITLE IS ADMITTED.—If a tenant in common denies the several title of a co-tenant, but lets him into possession, it is not an ouster; but if he admits the several title of a co-tenant and refuses to let him into possession, it is an ouster.

DEMAND OF POSSESSION BY CO-TENANT.—A demand made by a tenant in common of a co-tenant in possession to be let into possession of every part of the common lands, is not a notice to the co-tenant in possession to quit.

OUSTER BY ONE TENANT IN COMMON IN CASE OF MEXICAN GRANT NOT SURVEYED.—If several are tenants in common in a grant of land made by Mexico of a given quantity, to be located within the exterior boundary lines of a much larger quantity, and no survey or location of the quantity granted has been made, the exclusive possession by one of the tenants in common of a portion less than the whole of the land within the exterior boundary lines of the larger quantity, and his refusal to let a co-tenant into possession of the same, is an ouster.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

Argument for Appellant.

The defendant recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion of the Court.

E. R. Carpentier, for Appellant.

The defendant's acts amount to an ouster of the plaintiff, and the Court erred in instructing the jury that the plaintiff had failed to show an ouster.

Tenants in common possess the whole in unity. Their estate may be several—their possession must be in common. The possession of one is in support of the title of both; but the refusal of one to permit his co-tenant to enter upon and occupy the land, or any part of it, divests the possession so as to entitle the companion to his action of ejectment. (1 Greenleaf Cruise, title 20, §§ 2, 14, 17, 18, 19.)

“No real force, as a turning out by the shoulders, is necessary. If upon demand by the co-tenant, the other denies his right and continues in possession, such possession is adverse, and ouster enough.” (*Doe v. Prosser*, 1 Cowp. 217.)

“If a tenant in common drive out of the land any cattle of the other tenant in common, or will not suffer him to enter or occupy the land, this is an ejectment or expulsion.” (Coke Litt. 199 b.)

A claim of exclusive right of possession, or denial of the co-tenant's right, or any act which amounts to a denial of right, is an ouster. (*Brackett v. Norcross*, 1 Greenleaf, 82; *Allyn v. Mather*, 9 Conn. 128, per Hosmer, C. J.; *Sigler v. Van Riper*, 10 Wend. 419; *Jackson v. Tibbits*, 9 Cowen, 253; *Edwards v. Bishop*, 4 Conn. 63; *Hargrove v. Powell*, 2 Dev. & Bat. 97; *Gordon v. Pearson*, 1 Mass. 328, etc.)

The last case (*Gordon v. Pearson*) is a parallel case and perfectly in point. There, as here, there was a demand of possession, and a refusal by the defendant, who says, you must get it by law if you can. And this was held a sufficient ouster.

“An ouster must be proved by acts of an adverse character, such as claiming the whole for himself; denying the title

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of his companion; or refusing to permit him to enter." (2 Green. Ev. 359, § 318.)

Exclusive possession, for long periods, has been held both in England and the United States, sufficient to warrant the presumption of ouster, though no other proof was given. (*Dos v. Prosser*, and other cases cited.)

The denial of right which is held to be an ouster, is not necessarily a denial of the co-tenant's title. A denial of the right of possession or enjoyment is all that is meant by the authorities, for though the defendant admit the title of his co-tenant, yet if he refuse to allow him to possess, or deny his right to such possession, this would be none the less an ouster.

Moreover, the defendant's answer in this case, is, of itself, an ouster. The complaint avers title, and is verified. The answer admits the plaintiff's ownership of the undivided one half of the rancho, but denies his title to any other or greater share or interest, and unqualifiedly denies his right of possession.

The evidence shows that the plaintiff is the owner of an interest in said rancho, equal to three hundred and twenty acres in addition to the one half thereof; and the right of possession is the very question which was put in issue by the defendant, which was actually tried, and upon which judgment was rendered.

Instead of confessing the right of the plaintiff, the defendant presents an issue upon it; and as the answer has reference by relation to the commencement of the suit, the denial of the plaintiff's right is not only evidence, but conclusive proof of ouster.

As to the point so strongly pressed by counsel for the respondent, that there can be no ouster by a tenant in common, except by the exclusive, adverse possession of *the entire tract* constituting the subject of the tenancy in common, we submit, with all due respect for the learned counsel, that the proposition is wholly unsustained by any of the numerous authorities cited by him, or by any case that can be found in the books, and scarcely merits serious argument in reply.

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The "claiming of the whole," which, according to Lord Mansfield, constitutes an ouster, refers to the right, and not to the boundaries — the quantity of interest and not of acres. (See Vol. 6, Allen's Massachusetts Reports; *Bennett v. Clemence et al.*, abstracted, quoted Vol. 3, American Law Journal, December number, 1863.)

The case from 16th Mass. approvingly cited by the counsel for the respondent, is in point for the appellant, and entirely consistent with the whole current of authority upon the subject. It decides that a tenant in common shall not do, substantially, what was done by the plaintiff in this case — that is, shall not exclude his co-tenant or disturb his possession.

I shall not criticise the language of the instruction that "an actual ouster of the plaintiff *from the joint possession*" must be shown, further than to invite to it the attention of this Court.

The language of the plaintiff's demand was carefully chosen and is not liable to criticism. He had a right to be *let into the possession* of the whole, and that was the extent of his demand. He did not demand or claim the entire possession. The rights of the defendant were fully recognized. He was informed that the plaintiff was the *chief* owner, and he was required not to yield up the possession, but to let the plaintiff into the possession and enjoyment of the premises along with himself. If the plaintiff has any right in the premises, it is the right of common and immediate enjoyment. And this right is denied him by the defendant — denied both as a matter of law, and in fact.

Campbell & Brummagim, for Respondent.

1st. Tenants in common are severally and solely seized each of his own share. They are seized *per my*, but not *per tout*; for this reason they must sue separately, in actions savoring of the realty. 2d. The possession of one tenant in common is, in contemplation of law, the possession of his companions. But one may actually oust the others, and claim to hold in his own right. 3d. One tenant in common has a right to the

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enjoyment of the common property, and for that purpose he may enter upon it, and his co-tenants have no right to disturb such enjoyment. 4th. One tenant in common can compel the others to make partition of the common property.

The Court charged the jury in effect, that before one tenant in common can maintain ejectment against his co-tenant, he must show an actual ouster from the joint possession of the *entire* common property. In other words, that while the defendant occupied no more than his proportionate share, such possession was consistent with the common title, and in contemplation of law was the possession of the plaintiff—and therefore no ouster had been shown.

In support of the doctrine here laid down, we beg leave to refer the Court to the following well established rule of the common law. In Coke upon Littleton, (Vol. I, p. 906,) Littleton lays down the rule in these words: "*Also, in the case aforesaid, as if two have an estate in common for term of years, (for one year, half a year, etc.,) the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of ejectione firmæ of the moiety, etc.*" Upon which Lord Coke comments as follows: "*The one occupy all, and put the other out of possession.* These are words materially added; for albeit one tenant in common take the whole profits, the other hath no remedy by law against him, for the taking of the whole profits is no ejectment. But if he drive out of the land any of the cattle of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firmæ* for the one *moiety*, and recover *damages* for the entry, but not for the *meane profits*." How materially added? Before the rule laid down in the text, albeit one tenant should take the *whole* profits, the other had no remedy by law against him, for the reason that it was no ejectment; wherefore, it was added, that although there was no remedy for taking the *whole* profits—that is to say, the profits of the *whole estate*—yet if he should *occupy all*—that is to say, the *entire estate*—the co-tenant should have his

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remedy by "*ejectione firmæ*" for his *moiety*: namely, for his undivided interest. The acts from which an ejectment or expulsion might be inferred are stated thus: "But if he drove out of the land any of the cattle of the other tenant in common, or do not suffer him to enter or occupy the land, this is an expulsion." The words "out of the land" means out of the land owned in common; because, if one tenant occupied a portion with a garden, and the cattle of the other entered it, and they were driven out of the garden but not out of or from the common estate, it could not be contended that the owner of the estate would have his action of ejectment against his co-tenant, the effect of which would be that the cattle should be again let into the garden from which they had been driven. So with the other words, "*or not suffer him to enter or occupy the land.*" What land? Why, clearly, the common land; because, if one tenant occupied — say as in case of the cattle — a mere garden spot, and refused to allow his co-tenant to disturb him in its occupancy, but leaving him all the residue of the common property upon which to enter, could such act be construed into a refusal on the part of one to allow the other to enter and occupy the land? Most clearly it could not. And we shall hereafter demonstrate, as we think beyond question, the consistency of our construction of this rule of the common law, with another maxim, namely: that the *possession* of one *tenant in common* is the *possession* of all, and that the latter was intended to enable tenants in common to occupy and enjoy their common estate in severalty, and before partition could be made, without losing any of their rights, and without incurring any of the consequences that result from an adverse possession.

And again, (see page 907,) the same author goes on to say. "In the same manner it is where two hold the wardship of the lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment *de gard* of the moiety, because that these things are chattels real, and may be apportioned and severed." Ousted of what possession? Why, manifestly, of

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the *entire* possession of such lands and tenements *part*, but of the whole; that is, of "*all*" the land in common. And the reason of the rule assigned by the statute is, that such things, he says, are chattels real, *apportioned* and *severed*. This has reference to a writ of partition which, although it is a writ of right, a person out of possession is not entitled to it. (In this statute the common law rule is adopted; it will, I think, be shown that even an adverse holding of a fraction of the common property by one tenant will not prevent partition, if the other is in possession of any part of the common property. In order, therefore, that this right of apportionment by writ of partition shall not be defeated by the ouster of one tenant by the other from the possession of the entire property, it is provided that in all such cases the ousted tenant shall have his ejectment, for the purpose to him not only the possession, but the right to *compel* partition of the common property. If a person out of possession could still compel partition, by action of ejectment for his undivided moiety, the rule would be without an object and useless. It may be stated as a general rule, ejectment will not lie by one tenant against his co-tenant, in any case where the reversion is still in common; because, as long as there is no disseizin, the land is still in common, but when a disseizin takes place, it ceases to be in common. The action of ejectment is then for the purpose of bringing the estate back into the common, thereby preparing it for partition, which ought to be the result of the process. But when there *is* no disseizin, a co-tenant is not entitled to a writ of partition by petition for partition.

Since the enactment of the statute 3 and 4 W., c. 136, on Ejectment, 136,) the rule of the common law, that no proof of actual ouster in actions of ejectment, by one tenant against their co-tenants, has been required; with; or, in other words, a different rule has been established. This statute enacts that when any person entitled to a writ of partition as tenant in common shall have been in

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receipt of the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

"It follows," the learned author says, "as a corollary from this enactment, that one joint tenant, co-partner, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant." (See Adams, 137.)

Now, while the English statute is not in force in this State, the common law, as it stood when that statute was enacted, is in force.

That statute changed the rule of the common law to this extent: 1st—It provided that one co-tenant might maintain ejectment against his companion who was in possession of less than the entirety; 2d—It changed the common law rule of evidence on the question of ouster, making the possession of one co-tenant, when it was for more than his share, evidence of ouster to that extent. The remedy applied by the statute indicates clearly the extent and reason of the change, because, before its enactment under the common law, one co-tenant could not maintain ejectment against his companion unless he was in possession of the entirety, on the ground that a possession of less than the entirety could not be deemed or treated as an adverse possession, which, under the common law, is an essential ingredient in the proof of ouster. And again, as to what constituted ouster under the common law, it is said that many subtle distinctions had been taken, and the statute was intended to provide a remedy in this particular, rendering the proof more simple and certain. The statute, however, left the common law as it stood before its enactment, so far as it relates to a co-tenant occupying no more than his share, which, under no circumstance, neither by the statute nor by the common law, can be tortured into an adverse possession. No

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stronger evidence could be adduced of the correctness of our position than is afforded by this English statute; because, if a co-tenant could have maintained ejectment against his companion when he was in possession of less than the entirety, and if such possession would have been adverse, then there would have been no necessity for the remedy provided by the statute, for the simple reason that there was no inconvenience in the rule as it stood at common law. Besides, we look in vain for any case, either in England or America, and the counsel for the appellant have failed in their researches to find or to point us to a single case where one tenant in common maintained ejectment against his fellow, where the possession extended to no more than his share.

And we here particularly wish to direct the attention of the Court to the pregnant fact, that all the cases cited for the appellant to show that he had been ousted are where one co-tenant undertook to claim and dispose of the whole property, or denied the title of the demandant to any part of the common property.

But we are here met with another maxim of the common law, and which is the sole foundation upon which the appellant rests his right to maintain his present action. It is said that the occupation of tenants in common is undivided, and that neither of them knoweth his part in several. (See 5 Bacon's Ab. 240.)

What is the true meaning of the term *undivided occupation*? In order to arrive at the sense in which this term or maxim of the common law is used, let us refer to another maxim, namely, that all the tenants have a right to enter upon the common property and occupy the same; and again, it is said that one tenant in common has no right to disturb his co-tenant in his enjoyment of the common property. When, therefore, we come to harmonize these maxims of the common law, and to make them consistent the one with the other, and to preserve the rights which they are intended to confer, we must be governed by a practical common sense view of the whole subject, and give to the terms used rather an enlarged construction,

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suited to the condition of the country, than that narrow and technical one which the appellant relies and insists upon.

When it is, therefore, said that their occupation is undivided, it certainly does not mean that all the tenants shall occupy the same precise space at the same moment of time, because that would imply a mathematical absurdity. Neither can it mean that if one is occupying a particular spot, that his fellow may insist upon occupying that precise locality, for that would be disturbing him in his possession and enjoyment of the common property. The occupation must, therefore, to preserve its *unity*, and to give to each his proportionable share of the occupation and enjoyment of the common property, be in its very nature several; because there can, physically speaking, be no such thing as an *undivided occupation* of a single spot of ground by two or more persons at the same time, except in theory, or, more properly speaking, except as a legal fiction. And this legal fiction of undivided occupation was invented to preserve what is called the *unity of possession*, which is the only *unity* belonging to tenancies in common. Hence it is said that the possession of one tenant is the possession of his companions also. So, if one enters under the common title, he enters for all, and although the others may never enter at all, still the occupation is undivided, the *unity of possession* is preserved, and if they all enter and occupy in *severalty*, such occupation is undivided. It is, therefore, only when one ceases to claim under the common title, denies the title of his co-tenant, and ousts him from the possession of the entire common property, that this theoretical *unity* of possession is destroyed, and the presumption of law that the possession of one is the possession of his fellow, ceases to exist.

That all the tenants should occupy separate and distinct parcels, and at the same time preserve the *unity* of possession, seems to have resulted from a practical and useful necessity growing out of the occupation of estates held in common; because, if the possession of one did not inure to the benefit and protection of all, there could be no such thing as either the peaceable enjoyment or the improvement of such property,

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but there would be a perpetual conflict and a perpetual contest betwixt the tenants in regard to every part and parcel and fraction of the entirety. From what has been said, it would seem to follow that the general right of each tenant, legally flowing from the nature of the estate, should be deemed to fall within the application of the maxim, "*sic utere tuo, ut alienum non lœdas;*" and that neither should so occupy the common property as to injure or entirely destroy the rights of the others. In this there is a species of severance, but it is a severance which does not destroy or affect the *unity* of possession, but, on the contrary, preserves and defends it, and at the same time harmonizes all the other elements of this peculiar estate, giving to the joint owners of land not only a beneficial but a peaceable enjoyment of their respective interests. And again, it is said that neither knoweth his part in several; and from this maxim it is argued that a several occupation amounts to a practical severance by metes and bounds. If such occupation were not the occupation of all the other tenants, then it might be urged, with great show of plausibility, that the party so occupying was by his own act making partition of the common property. The right to enter carries with it the right to occupy; but the exercise of this right does not imply that the spot chosen for such purpose is the part selected as the *several* share of such occupant, but it is a mere temporary location, liable to be changed when partition is made; and until partition shall have been made, neither can know his part in several. It is essential to an estate in common to be subject to partition, but Courts, regarding all equities which may exist between the parties, will, in decreeing a partition of the common estate, see that the partition does not lessen any part of the estate in value, (see 1 P. Wm. 446,) and if one tenant has made valuable improvements on the part occupied by him, if it can be done without injury to others, such division will be made as to give him the benefit of his improvements, and even in such cases, recompense in money is made to those who occupy the part of less value. Thus it will be seen that Courts in making final partition of the common prop-

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erty betwixt the tenants, recognize the principle we are contending for in this case, namely, a *several occupation* of the common property before partition.

The appellant has failed to point us to any authority, either English or American, where the action of ejectment was maintained by one tenant in common against his co-tenant for an ouster for a mere moiety of the common property; and we now refer to the authorities cited by the appellant when this case was submitted, and which we claim establish beyond controversy that the ouster must be from the *whole* of the common property.

The English authority cited by the appellant is the case of *Fisher & Taylor v. Prosser*, 1 Cowper, 217. The Court will see that the ejectment in that case was for the entire common property. Lord Mansfield, in defining the essential points necessary to constitute ouster, says: "So in cases of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share he acknowledges him his co-tenant. Nor, indeed, is a *refusal of itself* sufficient, without *denying* his title. But if, upon demand of the co-tenant of his moiety, the other *denies to pay*, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and ouster enough."

The rule here laid down may be treated as the settled English doctrine on the question of ouster, from the time of its announcement down to the enactment of the statute of W. 4, to which reference has been made, and we submit that it sustains the views we have urged to the fullest extent.

First, it is necessary that when a demand is made, it must be for the *precise moiety* the other denies or refuses to pay, and *denies his title*, that is, his title to the common property, saying he claims the *whole*, that is, in the language of Littleton, "*all*," and continues in possession; this, the learned Judge says, is adverse and ouster enough. Nothing could be clearer, because

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to entirely preclude the idea that the occupancy of a *part* only could be construed into an ouster. He says, that the possession of one tenant in common, *eo nomine*, can never bar his companion, because it is not adverse, but is in support of the common title. The case at bar falls clearly within this rule. The respondent claimed merely as a tenant in common, and his possession never could be adverse, but must, therefore, be in support of the common title. He admitted the co-tenancy of the appellant, and never denied his title even by implication.

So in *Helling's Case*, 11 East, 50, it is said, one tenant in common in possession *claiming the whole*, and denying possession to the other, is sufficient evidence of an ouster.

So, in *Doe v. Wawn*, 3 M. & W. 339, it was held that, where property owned by four tenants in common, the property being covered with houses, and three of the tenants leased the premises for ninety-nine years to a railroad company, and the company pulled down the houses and constructed a railroad upon their site, against the wish of the other tenant, that such occupation was sufficient evidence of ouster, and this decision was made on the ground—1st, of the rule laid down by Littleton, namely, "that if one tenant in common occupy the *whole* and put the tenant out of *possession* and *occupation*," it is sufficient evidence of ouster; and, 2d, on account of the peculiar use which the other tenants, through the railway company, made of the entire premises, being of such a character as to exclude the co-tenant from *occupying* the land. Such acts, the learned Judge says, would be as effectual an exclusion as if the defendant had been prevented from entering and occupying in person.

The broad principle which runs through all the cases is here again asserted, namely, that it must be an *exclusion* from the *whole* of the common premises, amounting to an absolute denial of title, in order that one tenant may maintain ejectment against his companion, on the ground of ouster.

The appellant has cited us to *Brackett v. Norcross*, 1 Greenleaf, 89, as an authority which he claims is strongly in his favor. The learned Judge, in discussing the question of ouster,

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says: "On advertng to the evidence as reported by the Judge who presided on the trial we find, 'The agent of the demandant had repeatedly demanded possession—the defendant uniformly refused to admit the demandant to enter, or to suffer demandant's agent to occupy—he also *denied demandant's title, and has ever since held the exclusive possession and occupation.*'" Upon the facts as reported it was held that they afforded sufficient evidence of ouster. The Court will perceive by a perusal of this opinion that the same English authorities to which we have already referred, are quoted and relied upon, particularly the case in 1 Cowper, 217, and great stress is laid on the words, "*denies his title, saying he claims the whole.*"

How widely the facts of this case differ from the case at bar. The language is, "he denied demandant's title, and has ever since held *exclusive possession and occupation.*" (*Fredeck v. Gray*, 10 S. & R. 188; *Valentine v. Northrop*, 12 Wend. 495; *Sigler v. Van Riper*, 10 Wend. 419; *Mumford v. Brown*, 1 Wend. 52; *Keay v. Goodwin*, 16 Mass. 3; *Marcy v. Marcy*, 6 Pick. 372; *Ord v. Chester*, 18 Cal. 77.)

We insist that in order to establish an ouster by one co-tenant of his fellow, upon proof of a demand for possession and a refusal to comply, a demand for the *precise moiety* or share which the co-tenant claims is indispensable.

The reason of this rule must be apparent to all. In the first place a refusal of the co-tenant in possession to allow another to enter, is, as a general proposition, based upon a denial of the demandant's title to any part of the demanded premises; and this denial of title, we shall be able to show, is one of the chief, if not indispensable requisites in the proof of ouster. The necessity, therefore, that the party making the demand should specify the precise share which he claims, in order that the extent of his demand, as well as the consequences of his admission into the possession may be fairly understood by both parties, would seem to be too clear a proposition for argument. But, again, while the party in possession might be willing to admit the demandant, provided he claimed no

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more than his share, he might be very unwilling to admit him if he claimed more than his share; and if he did demand more, and the tenant in possession refused, and even denied his title to the extent claimed, such refusal and denial would not constitute ouster; but, as in the case at bar, where the extent of the demandant's interest is designated by the words "*principal owner*," leaving the extent of his claim entirely indefinite, undefined, and uncertain, we hold that no reply that could be made to such a demand, should be held to constitute proof of ouster.

On this point we shall first refer to the case of *Fisher & Taylor v. Prosser*, 1 Cowp. 218. Lord Mansfield says: "But if upon the demand of the co-tenant of his *moiety*, the other *denies to pay*, and *denies* his title, saying he claims the *whole*, and will not pay, and continues in possession, such possession is adverse and *custor* enough." The language here used leaves no doubt as to its meaning; that is, there must be a demand for the precise "*moiety*." Now it must not be said that the term "*moiety*," as here used, has reference solely to a demand of the rents and profits, and not to a demand of his share of the common property; because the reason why it should apply to the latter as well as to the former is the same, namely, that the party in possession may clearly understand the nature and extent of the demand made upon him, in order that he may give an intelligible reply, and that he may not be deceived or mislead by an ambiguously, cunningly worded demand, intended to provoke a refusal, for the express purpose of making proof of ouster when none exists. Littleton, too, as we have before seen, in speaking of the remedy of one co-tenant when he is put out of occupation, says, he should have against the other a writ of *ejectionis firmæ* of the *moiety*.

In *Colburn v. Mason*, 25 Maine, 434, the rule seems to be clearly laid down that should be adopted in the case at bar. The proof was that the demandant, to show a disseizin, had read to the tenant in possession the description in his deed of a *fourth part* of the premises, and the witness said to him, "These are the premises you are in possession of." The answer

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was "Yes; it is hard to pay twice." Upon this statement of the facts it was held that no ouster had been proved. The Court say that it was incumbent on the plaintiffs to show that the defendant denied their *right* to the possession, or that he did some other notorious act indicative of holding adversely to them, and that the evidence did not establish anything of the kind. And again, they say that not a word escaped his lips tending to a denial of the demandant's *right* as a co-tenant, and that what he said could not amount to an *unequivocal* denial of the demandant's *title*.

It will, in the first place, be seen that the *precise share* of the demandant was stated, and, in the next place, it is laid down as a rule that the reply must amount to a denial of the demandant's right as a co-tenant, and, in the language of the opinion, "an unequivocal denial of the demandant's *title*." Did the reply of the respondent in the case at bar amount to or even tend to show a denial of the appellant's title? His statement was, "that he owned an interest in the rancho, and was in possession of no more than he was entitled to, and that he could not let Mr. Carpentier into possession unless at the end of a lawsuit." In construing this reply, we must keep in view the nature of the demand, which was, that he, Carpentier, was the "*principal owner*." The adjective "*principal*," as used on that occasion, meant that he was the *chief* owner, or, in fact, that he owned pretty much all of the Rancho of San Ramon, and he demanded "to be let into the immediate possession and enjoyment of the same, and of every part and parcel thereof." To this demand the respondent refused to comply; but he did not deny the right of Carpentier as a co-tenant; he did not deny his title; but he merely insisted, as he owned an interest, as he was in possession of no more than he was entitled to, that he could not surrender up the entire possession of the premises, because the language in which the demand was couched lead inevitably to one of two conclusions, either that if he did comply with the demand, Carpentier would take possession of the chief part of his house as well as of his field, or that he intended to turn him out altogether. He

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the *entire* possession of such lands and tenements, not of a *part*, but of the whole; that is, of "*all*" the lands so held in common. And the reason of the rule assigned by the author is, that such things, he says, are chattels real, and may be *apportioned* and *severed*. This has reference to the writ of partition which, although it is a writ of right, yet a tenant out of possession is not entitled to it. (In this particular our statute adopts the common law rule; it will, however, be shown that even an adverse holding of a fraction of the common property by one tenant will not prevent partition, if the other is in possession of any part of the common property.) In order, therefore, that this right of apportionment and severance by writ of partition shall not be defeated by the mere ouster of one tenant by the other from the possession of the entire property, it is provided that in all such cases the tenant *ousted* shall have his ejectment, for the purpose of restoring to him not only the possession, but the right on his part to *compel* partition of the common property. If a tenant out of possession could still compel partition, the remedy by action of ejectment for his undivided moiety would be without an object and useless. It may be stated that, as a general rule, ejectment will not lie by one tenant in common against his co-tenant, in any case where the remedy of partition exists; because, as long as there is no disseizin, the estate is still in common, but when a disseizin takes place, the estate ceases to be in common. The action of ejectment is therefore for the purpose of bringing the estate back into common, thereby preparing it for partition, which ought to be the first process. But when there is no disseizin, a co-tenant's remedy is by petition for partition.

Since the enactment of the statute 3 and 4 W., (see Adams on Ejectment, 136,) the rule of the common law requiring proof of actual ouster in actions of ejectment, brought by tenants in common against their co-tenants, has been dispensed with; or, in other words, a different rule has been adopted. This statute enacts that when any person entitled to any land or rent as tenant in common shall have been in possession or

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receipt of the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

"It follows," the learned author says, "as a corollary from this enactment, that one joint tenant, co-partner, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant." (See Adams, 137.)

Now, while the English statute is not in force in this State, the common law, as it stood when that statute was enacted, is in force.

That statute changed the rule of the common law to this extent: 1st—It provided that one co-tenant might maintain ejectment against his companion who was in possession of less than the entirety; 2d—It changed the common law rule of evidence on the question of ouster, making the possession of one co-tenant, when it was for more than his share, evidence of ouster to that extent. The remedy applied by the statute indicates clearly the extent and reason of the change, because, before its enactment under the common law, one co-tenant could not maintain ejectment against his companion unless he was in possession of the entirety, on the ground that a possession of less than the entirety could not be deemed or treated as an adverse possession, which, under the common law, is an essential ingredient in the proof of ouster. And again, as to what constituted ouster under the common law, it is said that many subtle distinctions had been taken, and the statute was intended to provide a remedy in this particular, rendering the proof more simple and certain. The statute, however, left the common law as it stood before its enactment, so far as it relates to a co-tenant occupying no more than his share, which, under no circumstance, neither by the statute nor by the common law, can be tortured into an adverse possession. No

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stronger evidence could be adduced of the correctness of our position than is afforded by this English statute; because, if a co-tenant could have maintained ejectment against his companion when he was in possession of less than the entirety, and if such possession would have been adverse, then there would have been no necessity for the remedy provided by the statute, for the simple reason that there was no inconvenience in the rule as it stood at common law. Besides, we look in vain for any case, either in England or America, and the counsel for the appellant have failed in their researches to find or to point us to a single case where one tenant in common maintained ejectment against his fellow, where the possession extended to no more than his share.

And we here particularly wish to direct the attention of the Court to the pregnant fact, that all the cases cited for the appellant to show that he had been ousted are where one co-tenant undertook to claim and dispose of the whole property, or denied the title of the demandant to any part of the common property.

But we are here met with another maxim of the common law, and which is the sole foundation upon which the appellant rests his right to maintain his present action. It is said that the occupation of tenants in common is undivided, and that neither of them knoweth his part in several. (See 5 Bacon's Ab. 240.)

What is the true meaning of the term *undivided occupation*? In order to arrive at the sense in which this term or maxim of the common law is used, let us refer to another maxim, namely, that all the tenants have a right to enter upon the common property and occupy the same; and again, it is said that one tenant in common has no right to disturb his co-tenant in his enjoyment of the common property. When, therefore, we come to harmonize these maxims of the common law, and to make them consistent the one with the other, and to preserve the rights which they are intended to confer, we must be governed by a practical common sense view of the whole subject, and give to the terms used rather an enlarged construction,

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suited to the condition of the country, than that narrow and technical one which the appellant relies and insists upon.

When it is, therefore, said that their occupation is undivided, it certainly does not mean that all the tenants shall occupy the same precise space at the same moment of time, because that would imply a mathematical absurdity. Neither can it mean that if one is occupying a particular spot, that his fellow may insist upon occupying that precise locality, for that would be disturbing him in his possession and enjoyment of the common property. The occupation must, therefore, to preserve its *unity*, and to give to each his proportionable share of the occupation and enjoyment of the common property, be in its very nature several; because there can, physically speaking, be no such thing as an *undivided occupation* of a single spot of ground by two or more persons at the same time, except in theory, or, more properly speaking, except as a legal fiction. And this legal fiction of undivided occupation was invented to preserve what is called the *unity of possession*, which is the only *unity* belonging to tenancies in common. Hence it is said that the possession of one tenant is the possession of his companions also. So, if one enters under the common title, he enters for all, and although the others may never enter at all, still the occupation is undivided, the *unity of possession* is preserved, and if they all enter and occupy in severalty, such occupation is undivided. It is, therefore, only when one ceases to claim under the common title, denies the title of his co-tenant, and ousts him from the possession of the entire common property, that this theoretical *unity* of possession is destroyed, and the presumption of law that the possession of one is the possession of his fellow, ceases to exist.

That all the tenants should occupy separate and distinct parcels, and at the same time preserve the *unity* of possession, seems to have resulted from a practical and useful necessity growing out of the occupation of estates held in common; because, if the possession of one did not inure to the benefit and protection of all, there could be no such thing as either the peaceable enjoyment or the improvement of such property,

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but there would be a perpetual conflict and a perpetual contest betwixt the tenants in regard to every part and parcel and fraction of the entirety. From what has been said, it would seem to follow that the general right of each tenant, legally flowing from the nature of the estate, should be deemed to fall within the application of the maxim, "*sic utere tuo, ut alienum non lœdas;*" and that neither should so occupy the common property as to injure or entirely destroy the rights of the others. In this there is a species of severance, but it is a severance which does not destroy or affect the *unity* of possession, but, on the contrary, preserves and defends it, and at the same time harmonizes all the other elements of this peculiar estate, giving to the joint owners of land not only a beneficial but a peaceable enjoyment of their respective interests. And again, it is said that neither knoweth his part in several; and from this maxim it is argued that a several occupation amounts to a practical severance by metes and bounds. If such occupation were not the occupation of all the other tenants, then it might be urged, with great show of plausibility, that the party so occupying was by his own act making partition of the common property. The right to enter carries with it the right to occupy; but the exercise of this right does not imply that the spot chosen for such purpose is the part selected as the *several* share of such occupant, but it is a mere temporary location, liable to be changed when partition is made; and until partition shall have been made, neither can know his part in several. It is essential to an estate in common to be subject to partition, but Courts, regarding all equities which may exist between the parties, will, in decreeing a partition of the common estate, see that the partition does not lessen any part of the estate in value, (see 1 P. Wm. 446,) and if one tenant has made valuable improvements on the part occupied by him, if it can be done without injury to others, such division will be made as to give him the benefit of his improvements, and even in such cases, recompense in money is made to those who occupy the part of less value. Thus it will be seen that Courts in making final partition of the common prop-

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erty betwixt the tenants, recognize the principle we are contending for in this case, namely, a *several occupation* of the common property before partition.

The appellant has failed to point us to any authority, either English or American, where the action of ejectment was maintained by one tenant in common against his co-tenant for an ouster for a mere moiety of the common property; and we now refer to the authorities cited by the appellant when this case was submitted, and which we claim establish beyond controversy that the ouster must be from the *whole* of the common property.

The English authority cited by the appellant is the case of *Fisher & Taylor v. Prosser*, 1 Cowper, 217. The Court will see that the ejectment in that case was for the entire common property. Lord Mansfield, in defining the essential points necessary to constitute ouster, says: "So in cases of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share he acknowledges him his co-tenant. Nor, indeed, is a *refusal of itself* sufficient, without *denying* his title. But if, upon demand of the co-tenant of his moiety, the other *denies to pay*, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and ouster enough."

The rule here laid down may be treated as the settled English doctrine on the question of ouster, from the time of its announcement down to the enactment of the statute of W. 4, to which reference has been made, and we submit that it sustains the views we have urged to the fullest extent.

First, it is necessary that when a demand is made, it must be for the *precise moiety* the other denies or refuses to pay, and *denies his title*, that is, his title to the common property, saying he claims the *whole*, that is, in the language of Littleton, "*all*," and continues in possession; this, the learned Judge says, is adverse and ouster enough. Nothing could be clearer, because

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to entirely preclude the idea that the occupancy of a *part* only could be construed into an ouster. He says, that the possession of one tenant in common, *eo nomine*, can never bar his companion, because it is not adverse, but is in support of the common title. The case at bar falls clearly within this rule. The respondent claimed merely as a tenant in common, and his possession never could be adverse, but must, therefore, be in support of the common title. He admitted the co-tenancy of the appellant, and never denied his title even by implication.

So in *Helling's Case*, 11 East, 50, it is said, one tenant in common in possession *claiming the whole*, and denying possession to the other, is sufficient evidence of an ouster.

So, in *Doe v. Wawn*, 3 M. & W. 339, it was held that, where property owned by four tenants in common, the property being covered with houses, and three of the tenants leased the premises for ninety-nine years to a railroad company, and the company pulled down the houses and constructed a railroad upon their site, against the wish of the other tenant, that such occupation was sufficient evidence of ouster, and this decision was made on the ground — 1st, of the rule laid down by Littleton, namely, "that if one tenant in common occupy the *whole* and put the tenant out of *possession* and *occupation*," it is sufficient evidence of ouster; and, 2d, on account of the peculiar use which the other tenants, through the railway company, made of the entire premises, being of such a character as to exclude the co-tenant from *occupying* the land. Such acts, the learned Judge says, would be as effectual an exclusion as if the defendant had been prevented from entering and occupying in person.

The broad principle which runs through all the cases is here again asserted, namely, that it must be an *exclusion* from the *whole* of the common premises, amounting to an absolute denial of title, in order that one tenant may maintain ejectment against his companion, on the ground of ouster.

The appellant has cited us to *Brackett v. Norcross*, 1 Greenleaf, 89, as an authority which he claims is strongly in his favor. The learned Judge, in discussing the question of ouster,

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says: "On adverting to the evidence as reported by the Judge who presided on the trial we find, 'The agent of the demandant had repeatedly demanded possession—the defendant uniformly refused to admit the demandant to enter, or to suffer demandant's agent to occupy—he also *denied demandant's title, and has ever since held the exclusive possession and occupation.*'" Upon the facts as reported it was held that they afforded sufficient evidence of ouster. The Court will perceive by a perusal of this opinion that the same English authorities to which we have already referred, are quoted and relied upon, particularly the case in 1 Cowper, 217, and great stress is laid on the words, "*denies his title, saying he claims the whole.*"

How widely the facts of this case differ from the case at bar. The language is, "he denied demandant's title, and has ever since held *exclusive possession and occupation.*" (*Fredeck v. Gray*, 10 S. & R. 188; *Valentine v. Northrop*, 12 Wend. 495; *Sigler v. Van Riper*, 10 Wend. 419; *Mumford v. Brown*, 1 Wend. 52; *Keay v. Goodwin*, 16 Mass. 3; *Marcy v. Marcy*, 6 Pick. 372; *Ord v. Chester*, 18 Cal. 77.)

We insist that in order to establish an ouster by one co-tenant of his fellow, upon proof of a demand for possession and a refusal to comply, a demand for the *precise moiety* or share which the co-tenant claims is indispensable.

The reason of this rule must be apparent to all. In the first place a refusal of the co-tenant in possession to allow another to enter, is, as a general proposition, based upon a denial of the demandant's title to any part of the demanded premises; and this denial of title, we shall be able to show, is one of the chief, if not indispensable requisites in the proof of ouster. The necessity, therefore, that the party making the demand should specify the precise share which he claims, in order that the extent of his demand, as well as the consequences of his admission into the possession may be fairly understood by both parties, would seem to be too clear a proposition for argument. But, again, while the party in possession might be willing to admit the demandant, provided he claimed no

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more than his share, he might be very unwilling to admit him if he claimed more than his share; and if he did demand more, and the tenant in possession refused, and even denied his title to the extent claimed, such refusal and denial would not constitute ouster; but, as in the case at bar, where the extent of the demandant's interest is designated by the words "*principal owner*," leaving the extent of his claim entirely indefinite, undefined, and uncertain, we hold that no reply that could be made to such a demand, should be held to constitute proof of ouster.

On this point we shall first refer to the case of *Fisher & Taylor v. Prosser*, 1 Cowp. 218. Lord Mansfield says: "But if upon the demand of the co-tenant of his *moiety*, the other *denies to pay*, and *denies* his title, saying he claims the *whole*, and will not pay, and continues in possession, such possession is adverse and *custe*r enough." The language here used leaves no doubt as to its meaning; that is, there must be a demand for the precise "*moiety*." Now it must not be said that the term "*moiety*," as here used, has reference solely to a demand of the rents and profits, and not to a demand of his share of the common property; because the reason why it should apply to the latter as well as to the former is the same, namely, that the party in possession may clearly understand the nature and extent of the demand made upon him, in order that he may give an intelligible reply, and that he may not be deceived or mislead by an ambiguously, cunningly worded demand, intended to provoke a refusal, for the express purpose of making proof of ouster when none exists. Littleton, too, as we have before seen, in speaking of the remedy of one co-tenant when he is put out of occupation, says, he should have against the other a writ of *ejectione firmæ* of the *moiety*.

In *Colburn v. Mason*, 25 Maine, 434, the rule seems to be clearly laid down that should be adopted in the case at bar. The proof was that the demandant, to show a disseizin, had read to the tenant in possession the description in his deed of a *fourth part* of the premises, and the witness said to him, "These are the premises you are in possession of." The answer

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was "Yes; it is hard to pay twice." Upon this statement of the facts it was held that no ouster had been proved. The Court say that it was incumbent on the plaintiffs to show that the defendant denied their *right* to the possession, or that he did some other notorious act indicative of holding adversely to them, and that the evidence did not establish anything of the kind. And again, they say that not a word escaped his lips tending to a denial of the demandant's *right* as a co-tenant, and that what he said could not amount to an *unequivocal* denial of the demandant's *title*.

It will, in the first place, be seen that the *precise share* of the demandant was stated, and, in the next place, it is laid down as a rule that the reply must amount to a denial of the demandant's right as a co-tenant, and, in the language of the opinion, "an unequivocal denial of the demandant's *title*." Did the reply of the respondent in the case at bar amount to or even tend to show a denial of the appellant's title? His statement was, "that he owned an interest in the rancho, and was in possession of no more than he was entitled to, and that he could not let Mr. Carpentier into possession unless at the end of a lawsuit." In construing this reply, we must keep in view the nature of the demand, which was, that he, Carpentier, was the "*principal owner*." The adjective "*principal*," as used on that occasion, meant that he was the *chief* owner, or, in fact, that he owned pretty much all of the Rancho of San Ramon, and he demanded "to be let into the immediate possession and enjoyment of the same, and of every part and parcel thereof." To this demand the respondent refused to comply; but he did not deny the right of Carpentier as a co-tenant; he did not deny his title; but he merely insisted, as he owned an interest, as he was in possession of no more than he was entitled to, that he could not surrender up the entire possession of the premises, because the language in which the demand was couched lead inevitably to one of two conclusions, either that if he did comply with the demand, Carpentier would take possession of the chief part of his house as well as of his field, or that he intended to turn him out altogether. He

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the *entire* possession of such lands and tenements, not of a *part*, but of the whole; that is, of "*all*" the lands so held in common. And the reason of the rule assigned by the author is, that such things, he says, are chattels real, and may be *apportioned* and *severed*. This has reference to the writ of partition which, although it is a writ of right, yet a tenant out of possession is not entitled to it. (In this particular our statute adopts the common law rule; it will, however, be shown that even an adverse holding of a fraction of the common property by one tenant will not prevent partition, if the other is in possession of any part of the common property.) In order, therefore, that this right of apportionment and severance by writ of partition shall not be defeated by the mere ouster of one tenant by the other from the possession of the entire property, it is provided that in all such cases the tenant *ousted* shall have his ejectment, for the purpose of restoring to him not only the possession, but the right on his part to *compel* partition of the common property. If a tenant out of possession could still compel partition, the remedy by action of ejectment for his undivided moiety would be without an object and useless. It may be stated that, as a general rule, ejectment will not lie by one tenant in common against his co-tenant, in any case where the remedy of partition exists; because, as long as there is no disseizin, the estate is still in common, but when a disseizin takes place, the estate ceases to be in common. The action of ejectment is therefore for the purpose of bringing the estate back into common, thereby preparing it for partition, which ought to be the first process. But when there is no disseizin, a co-tenant's remedy is by petition for partition.

Since the enactment of the statute 3 and 4 W., (see Adams on Ejectment, 136,) the rule of the common law requiring proof of actual ouster in actions of ejectment, brought by tenants in common against their co-tenants, has been dispensed with; or, in other words, a different rule has been adopted. This statute enacts that when any person entitled to any land or rent as tenant in common shall have been in possession or

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receipt of the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

"It follows," the learned author says, "as a corollary from this enactment, that one joint tenant, co-partner, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant." (See Adams, 137.)

Now, while the English statute is not in force in this State, the common law, as it stood when that statute was enacted, is in force.

That statute changed the rule of the common law to this extent: 1st—It provided that one co-tenant might maintain ejectment against his companion who was in possession of less than the entirety; 2d—It changed the common law rule of evidence on the question of ouster, making the possession of one co-tenant, when it was for more than his share, evidence of ouster to that extent. The remedy applied by the statute indicates clearly the extent and reason of the change, because, before its enactment under the common law, one co-tenant could not maintain ejectment against his companion unless he was in possession of the entirety, on the ground that a possession of less than the entirety could not be deemed or treated as an adverse possession, which, under the common law, is an essential ingredient in the proof of ouster. And again, as to what constituted ouster under the common law, it is said that many subtle distinctions had been taken, and the statute was intended to provide a remedy in this particular, rendering the proof more simple and certain. The statute, however, left the common law as it stood before its enactment, so far as it relates to a co-tenant occupying no more than his share, which, under no circumstance, neither by the statute nor by the common law, can be tortured into an adverse possession. No

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stronger evidence could be adduced of the correctness of our position than is afforded by this English statute; because, if a co-tenant could have maintained ejectment against his companion when he was in possession of less than the entirety, and if such possession would have been adverse, then there would have been no necessity for the remedy provided by the statute, for the simple reason that there was no inconvenience in the rule as it stood at common law. Besides, we look in vain for any case, either in England or America, and the counsel for the appellant have failed in their researches to find or to point us to a single case where one tenant in common maintained ejectment against his fellow, where the possession extended to no more than his share.

And we here particularly wish to direct the attention of the Court to the pregnant fact, that all the cases cited for the appellant to show that he had been ousted are where one co-tenant undertook to claim and dispose of the whole property, or denied the title of the demandant to any part of the common property.

But we are here met with another maxim of the common law, and which is the sole foundation upon which the appellant rests his right to maintain his present action. It is said that the occupation of tenants in common is undivided, and that neither of them kneweth his part in several. (See 5 Bacon's Ab. 240.)

What is the true meaning of the term *undivided occupation*? In order to arrive at the sense in which this term or maxim of the common law is used, let us refer to another maxim, namely, that all the tenants have a right to enter upon the common property and occupy the same; and again, it is said that one tenant in common has no right to disturb his co-tenant in his enjoyment of the common property. When, therefore, we come to harmonize these maxims of the common law, and to make them consistent the one with the other, and to preserve the rights which they are intended to confer, we must be governed by a practical common sense view of the whole subject, and give to the terms used rather an enlarged construction,

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suited to the condition of the country, than that narrow and technical one which the appellant relies and insists upon.

When it is, therefore, said that their occupation is undivided, it certainly does not mean that all the tenants shall occupy the same precise space at the same moment of time, because that would imply a mathematical absurdity. Neither can it mean that if one is occupying a particular spot, that his fellow may insist upon occupying that precise locality, for that would be disturbing him in his possession and enjoyment of the common property. The occupation must, therefore, to preserve its *unity*, and to give to each his proportionable share of the occupation and enjoyment of the common property, be in its very nature several; because there can, physically speaking, be no such thing as an *undivided occupation* of a single spot of ground by two or more persons at the same time, except in theory, or, more properly speaking, except as a legal fiction. And this legal fiction of undivided occupation was invented to preserve what is called the *unity of possession*, which is the only *unity* belonging to tenancies in common. Hence it is said that the possession of one tenant is the possession of his companions also. So, if one enters under the common title, he enters for all, and although the others may never enter at all, still the occupation is undivided, the *unity of possession* is preserved, and if they all enter and occupy in severalty, such occupation is undivided. It is, therefore, only when one ceases to claim under the common title, denies the title of his co-tenant, and ousts him from the possession of the entire common property, that this theoretical *unity* of possession is destroyed, and the presumption of law that the possession of one is the possession of his fellow, ceases to exist.

That all the tenants should occupy separate and distinct parcels, and at the same time preserve the *unity* of possession, seems to have resulted from a practical and useful necessity growing out of the occupation of estates held in common; because, if the possession of one did not inure to the benefit and protection of all, there could be no such thing as either the peaceable enjoyment or the improvement of such property,

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but there would be a perpetual conflict and a perpetual contest betwixt the tenants in regard to every part and parcel and fraction of the entirety. From what has been said, it would seem to follow that the general right of each tenant, legally flowing from the nature of the estate, should be deemed to fall within the application of the maxim, "*sic utere tuo, ut alienum non lœdas*;" and that neither should so occupy the common property as to injure or entirely destroy the rights of the others. In this there is a species of severance, but it is a severance which does not destroy or affect the *unity* of possession, but, on the contrary, preserves and defends it, and at the same time harmonizes all the other elements of this peculiar estate, giving to the joint owners of land not only a beneficial but a peaceable enjoyment of their respective interests. And again, it is said that neither knoweth his part in several; and from this maxim it is argued that a several occupation amounts to a practical severance by metes and bounds. If such occupation were not the occupation of all the other tenants, then it might be urged, with great show of plausibility, that the party so occupying was by his own act making partition of the common property. The right to enter carries with it the right to occupy; but the exercise of this right does not imply that the spot chosen for such purpose is the part selected as the *several* share of such occupant, but it is a mere temporary location, liable to be changed when partition is made; and until partition shall have been made, neither can know his part in several. It is essential to an estate in common to be subject to partition, but Courts, regarding all equities which may exist between the parties, will, in decreeing a partition of the common estate, see that the partition does not lessen any part of the estate in value, (see 1 P. Wm. 446,) and if one tenant has made valuable improvements on the part occupied by him, if it can be done without injury to others, such division will be made as to give him the benefit of his improvements, and even in such cases, recompense in money is made to those who occupy the part of less value. Thus it will be seen that Courts in making final partition of the common prop-

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erty betwixt the tenants, recognize the principle we are contending for in this case, namely, a *several occupation* of the common property before partition.

The appellant has failed to point us to any authority, either English or American, where the action of ejectment was maintained by one tenant in common against his co-tenant for an ouster for a mere moiety of the common property; and we now refer to the authorities cited by the appellant when this case was submitted, and which we claim establish beyond controversy that the ouster must be from the *whole* of the common property.

The English authority cited by the appellant is the case of *Fisher & Taylor v. Prosser*, 1 Cowper, 217. The Court will see that the ejectment in that case was for the entire common property. Lord Mansfield, in defining the essential points necessary to constitute ouster, says: "So in cases of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share he acknowledges him his co-tenant. Nor, indeed, is a *refusal of itself* sufficient, without *denying* his title. But if, upon demand of the co-tenant of his moiety, the other *denies to pay*, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and ouster enough."

The rule here laid down may be treated as the settled English doctrine on the question of ouster, from the time of its announcement down to the enactment of the statute of W. 4, to which reference has been made, and we submit that it sustains the views we have urged to the fullest extent.

First, it is necessary that when a demand is made, it must be for the *precise moiety* the other denies or refuses to pay, and *denies his title*, that is, his title to the common property, saying he claims the *whole*, that is, in the language of Littleton, "*all*," and continues in possession; this, the learned Judge says, is adverse and ouster enough. Nothing could be clearer, because

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to entirely preclude the idea that the occupancy of a *part* only could be construed into an ouster. He says, that the possession of one tenant in common, *eo nomine*, can never bar his companion, because it is not adverse, but is in support of the common title. The case at bar falls clearly within this rule. The respondent claimed merely as a tenant in common, and his possession never could be adverse, but must, therefore, be in support of the common title. He admitted the co-tenancy of the appellant, and never denied his title even by implication.

So in *Helling's Case*, 11 East, 50, it is said, one tenant in common in possession *claiming the whole*, and denying possession to the other, is sufficient evidence of an ouster.

So, in *Doe v. Wawn*, 3 M. & W. 339, it was held that, where property owned by four tenants in common, the property being covered with houses, and three of the tenants leased the premises for ninety-nine years to a railroad company, and the company pulled down the houses and constructed a railroad upon their site, against the wish of the other tenant, that such occupation was sufficient evidence of ouster, and this decision was made on the ground — 1st, of the rule laid down by Littleton, namely, "that if one tenant in common occupy the *whole* and put the tenant out of *possession and occupation*," it is sufficient evidence of ouster; and, 2d, on account of the peculiar use which the other tenants, through the railway company, made of the entire premises, being of such a character as to exclude the co-tenant from *occupying* the land. Such acts, the learned Judge says, would be as effectual an exclusion as if the defendant had been prevented from entering and occupying in person.

The broad principle which runs through all the cases is here again asserted, namely, that it must be an *exclusion* from the *whole* of the common premises, amounting to an absolute denial of title, in order that one tenant may maintain ejectment against his companion, on the ground of ouster.

The appellant has cited us to *Brackett v. Norcross*, 1 Greenleaf, 89, as an authority which he claims is strongly in his favor. The learned Judge, in discussing the question of ouster,

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says: "On adverting to the evidence as reported by the Judge who presided on the trial we find, 'The agent of the demandant had repeatedly demanded possession—the defendant uniformly refused to admit the demandant to enter, or to suffer demandant's agent to occupy—he also *denied demandant's title, and has ever since held the exclusive possession and occupation.*'" Upon the facts as reported it was held that they afforded sufficient evidence of ouster. The Court will perceive by a perusal of this opinion that the same English authorities to which we have already referred, are quoted and relied upon, particularly the case in 1 Cowper, 217, and great stress is laid on the words, "*denies his title, saying he claims the whole.*"

How widely the facts of this case differ from the case at bar. The language is, "he denied demandant's title, and has ever since held *exclusive possession and occupation.*" (*Fredeck v. Gray*, 10 S. & R. 188; *Valentine v. Northrop*, 12 Wend. 495; *Sigler v. Van Riper*, 10 Wend. 419; *Mumford v. Brown*, 1 Wend. 52; *Keay v. Goodwin*, 16 Mass. 3; *Marcy v. Marcy*, 6 Pick. 372; *Ord v. Chester*, 18 Cal. 77.)

We insist that in order to establish an ouster by one co-tenant of his fellow, upon proof of a demand for possession and a refusal to comply, a demand for the *precise moiety or share* which the co-tenant claims is indispensable.

The reason of this rule must be apparent to all. In the first place a refusal of the co-tenant in possession to allow another to enter, is, as a general proposition, based upon a denial of the demandant's title to any part of the demanded premises; and this denial of title, we shall be able to show, is one of the chief, if not indispensable requisites in the proof of ouster. The necessity, therefore, that the party making the demand should specify the precise share which he claims, in order that the extent of his demand, as well as the consequences of his admission into the possession may be fairly understood by both parties, would seem to be too clear a proposition for argument. But, again, while the party in possession might be willing to admit the demandant, provided he claimed no

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more than his share, he might be very unwilling to admit him if he claimed more than his share; and if he did demand more, and the tenant in possession refused, and even denied his title to the extent claimed, such refusal and denial would not constitute ouster; but, as in the case at bar, where the extent of the demandant's interest is designated by the words "*principal owner*," leaving the extent of his claim entirely indefinite, undefined, and uncertain, we hold that no reply that could be made to such a demand, should be held to constitute proof of ouster.

On this point we shall first refer to the case of *Fisher & Taylor v. Prosser*, 1 Cowp. 218. Lord Mansfield says: "But if upon the demand of the co-tenant of his *moiety*, the other *denies to pay*, and *denies* his title, saying he claims the *whole*, and will not pay, and continues in possession, such possession is adverse and *ouster* enough." The language here used leaves no doubt as to its meaning; that is, there must be a demand for the precise "*moiety*." Now it must not be said that the term "*moiety*," as here used, has reference solely to a demand of the rents and profits, and not to a demand of his share of the common property; because the reason why it should apply to the latter as well as to the former is the same, namely, that the party in possession may clearly understand the nature and extent of the demand made upon him, in order that he may give an intelligible reply, and that he may not be deceived or mislead by an ambiguously, cunningly worded demand, intended to provoke a refusal, for the express purpose of making proof of ouster when none exists. Littleton, too, as we have before seen, in speaking of the remedy of one co-tenant when he is put out of occupation, says, he should have against the other a writ of *ejectione firmæ* of the *moiety*.

In *Colburn v. Mason*, 25 Maine, 434, the rule seems to be clearly laid down that should be adopted in the case at bar. The proof was that the demandant, to show a disseizin, had read to the tenant in possession the description in his deed of a *fourth part* of the premises, and the witness said to him, "These are the premises you are in possession of." The answer

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was "Yes; it is hard to pay twice." Upon this statement of the facts it was held that no ouster had been proved. The Court say that it was incumbent on the plaintiffs to show that the defendant denied their *right* to the possession, or that he did some other notorious act indicative of holding adversely to them, and that the evidence did not establish anything of the kind. And again, they say that not a word escaped his lips tending to a denial of the demandant's *right* as a co-tenant, and that what he said could not amount to an *unequivocal* denial of the demandant's *title*.

It will, in the first place, be seen that the *precise share* of the demandant was stated, and, in the next place, it is laid down as a rule that the reply must amount to a denial of the demandant's right as a co-tenant, and, in the language of the opinion, "an unequivocal denial of the demandant's *title*." Did the reply of the respondent in the case at bar amount to or even tend to show a denial of the appellant's title? His statement was, "that he owned an interest in the rancho, and was in possession of no more than he was entitled to, and that he could not let Mr. Carpentier into possession unless at the end of a lawsuit." In construing this reply, we must keep in view the nature of the demand, which was, that he, Carpentier, was the "*principal owner*." The adjective "*principal*," as used on that occasion, meant that he was the *chief* owner, or, in fact, that he owned pretty much all of the Rancho of San Ramon, and he demanded "to be let into the immediate possession and enjoyment of the same, and of every part and parcel thereof." To this demand the respondent refused to comply; but he did not deny the right of Carpentier as a co-tenant; he did not deny his title; but he merely insisted, as he owned an interest, as he was in possession of no more than he was entitled to, that he could not surrender up the entire possession of the premises, because the language in which the demand was couched lead inevitably to one of two conclusions, either that if he did comply with the demand, Carpentier would take possession of the chief part of his house as well as of his field, or that he intended to turn him out altogether. He

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ble for one tenant to oust his companion, it must be impossible also to possess *adversely* to him.

In *Bennett v. Clemence et al.*, 6 Allen 10, the parties were tenants in common of a tract of land, and the plaintiff owned a tract adjoining in severalty. The plaintiff erected a permanent building, the principal part of which stood upon his own land, but a small portion of it was on the common lands, but not enough to be used separately with any advantage to the occupant. It was held "that such an exclusive appropriation of a part of the common lands by one tenant in common, to his own use, by the erection of a permanent structure, was evidence of an ouster of the co-tenant;" and it was stated as a general truth, that "a tenant in common may re-enter into the *part* from which he has been ousted, provided he can do so without a forcible entry or breach of the peace."

The entire correctness of these decisions is not only manifested by the principles and analogies already adduced, but also from a well settled doctrine to which we now for a moment invite attention. If one tenant in common convey a particular part of the lands held in common, to a stranger, the deed is void, or, at least, voidable, as to his co-tenant, though good against the grantor. It follows, then, that if the grantee should enter upon and occupy the part so conveyed to him, and should, furthermore, exclude the co-tenant therefrom, that the latter would have his action to be let into possession. According to *Stark v. Barrett*, 15 Cal. 368, "the conveyance could have no legal effect to the prejudice of the co-tenant," but "that, until partition, the grantee would be entitled to the use and possession as co-tenant, in the parcel conveyed, with the other owners." Now, if the act of exclusion, in the case put, would amount to an ouster, why should not the same act, if performed by the maker of the deed, be followed by a like consequence? No reason can be suggested except those we have previously considered and held to be fallacious.

We close the discussion on this branch of the general subject, by suggesting that the cases which have been cited, are to be regarded as so many judicial expositions of the true

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meaning of the rule as stated in Littleton. By that statement, the one tenant must "occupy," as distinguished from "possess." He must also put the other "out of occupation." The aggressing tenant must occupy "all"—that is, he must actually occupy all of that from which he excludes his companion—the sole point and purpose of the author being to state that, as between tenants in common and joint tenants, there could be no ouster except one that was actual, as contradistinguished from constructive. And that Coke understood that to be the only point made in the text, is entirely manifest from the first passage in his general comment, which passage we here reproduce as it is written: "The one occupy all and put the other out of possession." These are words materially added, for "albeit one tenant in common take the whole profits, the other hath no remedie by law against him, for the taking of the whole profits is no ejectment."

Third—The remaining ground upon which it is argued that no evidence was introduced at the trial tending to prove an ouster, is, that there was none tending to prove a denial of plaintiff's title by the defendant; but, on the contrary, that the evidence was decisive to show that his title as tenant in common was formally and persistently acknowledge!

In case an ouster is sought to be proved, as between tenants in common, on the ground that the defendant being in the sole possession of the land, refused to pay to his co-tenant his just share of the rents and profits, the refusal, unaccompanied with a denial of the title of the co-tenant, will not amount to an ouster. The case of *Fisher v. Prosser*, 1 Cowp. 217, cited for the respondent, goes to that conclusion only. The case at bar is of an entirely different impression. On grounds already stated, the plaintiff had a right of entry upon the demanded premises; and that right was denied and resisted—the defendant being at the time in the sole occupation of the sixty acres. Littleton gives the rule applicable to the facts of this case in the passage previously cited; and the ouster therein declared consists solely in a putting "out of possession and occupation;" and it is well settled that exclusion from possession

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and putting out of possession are equivalents in law. Coke (Sec. 323) makes no account of denial of title in the sense in which the phrase is used in the objection; for he says if one tenant in common "will not suffer the other to enter and occupy the land, this is an ejectment or expulsion." These definitions make the ouster to consist in overt acts; and if the co-tenant is either expelled or excluded from the land by reason of them, he having the right to remain, or to enter upon it, all the facts are ascertained which the definitions contemplate. And it may be added, that such overt acts practically deny the only "title" directly involved in the transaction, viz: the then present right of entry. The admission made by the defendant of the plaintiff's title, whether studied or otherwise, in our judgment, amounts to nothing. *Allegans contra-ria non est audiendus*. A disseizor cannot qualify his own wrongs. (*Ricard v. Williams*, 7 Wheat. 59.) Exactly stated, the defendant admitted the right of property, which was several, and which no hostile action on his part could presently affect, but denied the right which was joint and which it was within his power to thwart, viz: the right of immediate possession. If the defendant had denied the several right of property and allowed the plaintiff to enter, no ouster would have resulted; and it follows that a mere verbal admission of that right cannot defeat an ouster wrought out upon other and sufficient grounds. "The defendant positively refused to let the plaintiff into possession," and therein he denied to the plaintiff the benefit of the title which he admitted to be fully vested in him.

There is a diversity of methods by which it may be proved that one co-tenant has been ousted by another, and that now in question is one of the number, and is not to be confounded with the others. The authorities are decisive, that when the co-tenant makes a proper demand, not for his share of the rents and profits, but to be let into possession, and the request is refused, and the tenant upon whom the demand is made continues in possession thereafter, such possession will be considered as adverse, even though there was no formal denial of

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title. The result of the cases is well presented in 2 Greenleaf's Evidence, Sec. 318: "An ouster in such case, therefore, must be proved by acts of an adverse character; such as claiming the whole for himself, denying the title of his companion, or refusing to permit him to enter, and the like.

The respondent insists that the demand made by the plaintiff was substantially defective, for the reason that the precise share of the plaintiff in the rancho was not stated. The answer of the defendant shows that he knew at the time his answer was filed, that the plaintiff owned an undivided half of the rancho as tenant in common with him; and the evidence tended to prove that he knew of the relation at the time of the demand, and that the plaintiff was the principal owner. If the defendant knew that he and the plaintiff were tenants in common, and that plaintiff was the principal owner, the jury, in view of those and the other facts in the case, might very well have concluded that the defendant knew the precise extent of the plaintiff's interest at the date of the demand, if the fact was material to be proved.

It is further insisted that the demand must be considered as abortive, for the alleged reason that the plaintiff demanded the sole possession of the premises—the demand made involving a notice to quit. The demand, so far forth as it was in writing, required the defendant "to let the plaintiff into possession," etc. The words "let into possession," when occurring in a connection like the one in which they were used, do not, in our judgment import a notice to quit; but if the question admits of any doubt, still it appears by the record that the plaintiff during his interview with the defendant stated to him verbally that he wanted "to be let into the possession of the land with the defendant," and "the defendant did not accede to said demand," but "positively refused to let the plaintiff into possession." When the written demand and the verbal explanation are considered in connection with each other, it is apparent, that the claim of the plaintiff was not for the sole but the joint possession of the premises demanded.

It is further insisted for the respondent that inasmuch as the

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Mexican grant under which both parties claim title was of two square leagues, to be located within certain exterior boundary lines, containing six square leagues, and inasmuch as no survey and location had been made before the commencement of the action, it cannot be considered that the defendant had been guilty of an ouster, even though all the legal views heretofore expressed in this opinion should be admitted or assumed to be correct.

It is urged that in *Ferris v. Coover*, 10 Cal. 590, and in *Mahoney v. Van Winkle*, 21 Cal. 552, the defendants were mere trespassers without title; and the point made, is, that a distinction should be taken between the case of a defendant with title and that of a defendant without title.

The parties are tenants in common. The defendant, in his answer, recognizes that relation as existing between himself and the plaintiff, and he cannot properly claim any right, or any exemption, except such as are due to him under the law by which that relation is governed. The defendant, by the rule of the relation, is entitled to possess the land, and every part of it, in common with the plaintiff; and the plaintiff has the right to possess the land, and every part of it, in common with him; but if either the one or the other prevents his associate from entering upon the land, or any part thereof, he performs an act which the law of the relation forbids, and the wrong would be none the less a wrong for the reason that it was perpetrated by a coproprietor. We do not find it at all essential to consider whether the original grant to Castro and Pacheco passed the legal title to them on the delivery of the grant. It is enough that it passed to the grantees an immediate and vested interest in the quantity of land therein specified, (*Fremont v. The United States*, 17 How. 542;) with the joint right to hold and possess to the larger boundaries until survey. (*Ferris v. Coover*, 10 Cal. 590; *Mahoney v. Van Winkle*, 21 Cal. 552; *Thornton v. Mahoney*, 24 Cal. 569.) In short, the record finds that the relation of tenants in common exists between the parties, and that it has existed since the 10th day of March, 1860. We must accept that relation as a

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fact, and our only office in error is to adjudge upon the rights of the parties by the tests which the law of that relation supplies.

Judgment reversed and new trial ordered.

ISAAC ROFF v. C. P. DUANE, W. G. ROSS, DANIEL HARVEY, FREDERICK HOOD, DANIEL DONALDSON, JOHN A. KELLEY, DANIEL SWEENY, AND PATRICK H. OWENS.

RENTS AND PROFITS IN FORCIBLE ENTRY AND DETAINER.—As the right to the possession of the premises is not in issue in an action for forcible entry and unlawful detainer, if it is found that at the time of the alleged forcible entry the plaintiff had the actual and peaceable possession, and that the defendants unlawfully detained the premises, the plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, without regard to the nature or extent of the right or title by which he held the possession.

EVIDENCE IN FORCIBLE ENTRY AND UNLAWFUL DETAINER.—If B. and H. are in the peaceable possession of a lot of land, and S. and S., accompanied by others—their employés—forcibly evict them therefrom and take possession, and then lease the lot to R., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess R. and take possession, and R. brings an action of forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and S. in defense.

EFFECT OF STATING PURPOSE OF EVIDENCE.—If a document is offered in evidence, and the party offering it states that he offers it for a particular purpose, it must be confined in its effect as evidence to the purpose expressed when it was offered.

A LEASE IN FORM NOT SIGNED BY THE LESSOR.—A lease in form, which contains the name of one person as lessor in the body of it, and is signed by another person, and also the lessee, is not a lease, nor is it admissible in evidence in an action of forcible entry and unlawful detainer on behalf of the nominal lessee, (the plaintiff in the action,) for the purpose of showing the extent of the property which the plaintiff claims he possessed.

ADMISSION OF ILLEGAL TESTIMONY.—If illegal testimony is admitted by the Court below, and the appellate Court cannot determine whether the finding of the Court below was based on this or other testimony in the case, the judgment will be reversed.

APPEAL from the County Court, City and County of San Francisco.

The complaint averred that on the 11th day of May, 1863, the plaintiff was and for a long time had been in the peaceable

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possession of the land in dispute. Plaintiff testified that he went into possession on the 7th day of May, 1863, and was forcibly evicted by defendants on the eleventh of the same month. The instrument offered in evidence by plaintiff as a lease, was dated on the 7th day of May, 1863. It purported to lease the land to plaintiff for the term of one month from the 7th day of May, 1863. The action was commenced on the 27th day of May, 1863. October 19, 1863, the Court gave judgment for restitution of the entire tract of land, and for the monthly value of the rents and profits up to the day of rendition of judgment. The plaintiff testified on the trial that he went on to the premises in dispute under an agreement with Smith and Sullivan, but did not see or sign the paper purporting to be a lease, until the 9th day of October.

After plaintiff had rested, defendants' counsel called as a witness F. Hood, and offered to prove by him the following facts:

1. That the defendants, five or ten days prior to the alleged forcible entry in this suit, were in the quiet and peaceable possession and occupation of the premises described in the complaint in this action; and while in such possession, E. L. Sullivan and Charles K. Smith, being the parties referred to by Roff in his testimony, forcibly entered, and forcibly evicted these defendants therefrom; and also with force tore down and burnt the building by them occupied; and that the building from which Roff was evicted was erected by Sullivan and Smith within twenty-five yards of the house so burned by them.

2. That said Sullivan and Smith employed and paid parties fifty dollars each per day for tearing down and burning said building, evicting these defendants and holding possession against them, and that such employes were fully armed with deadly weapons for that purpose.

The counsel for the plaintiff objected to such evidence upon the grounds that it was immaterial, irrelevant, and constituted no defense to the action.

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The Court sustained the objections, to which ruling the counsel for the defendants excepted.

The other facts are stated in the opinion of the Court.

Bennett, Cook & Clarke, for Appellants.

The counsel for the plaintiff stated that he "only offered the paper purporting to be a lease in evidence for the purpose of showing the extent of the property which the plaintiff claimed he possessed." The right of the plaintiff (if any he had) extended only over the land of which he had *actual* possession. He could recover nothing by virtue of *constructive* possession. (*Plume v. Seward*, 4 Cal. 94; *Lawrence v. Fulton*, 19 Cal. 684, 690.) This lease would be admissible only by reason of its relevancy for one of two objects; 1st — To prove title; 2d — To enable the plaintiff to recover *beyond* the limits of his *actual* possession. It was not relevant or admissible for either of these purposes; yet, by reason of its introduction, the plaintiff was enabled to recover to the extent of the boundaries therein specified, and far beyond any pretense of *actual* possession. Thus, this instrument was not only irrelevant, but its introduction has been positively prejudicial to the defendants.

The judgment for rents and profits is greater than the law authorizes. Roff, at the most, had the right of occupying the premises only for one month. The Court finds the monthly rents and profits to be twenty dollars. Roff's month commenced on the 7th day of May. It would terminate on the 7th of June. Yet the Court has given judgment for the rents and profits from the 11th of May to the 7th of October, being the sum of ninety-eight dollars. This sum of ninety-eight dollars the Court has trebled. This is manifestly all wrong. The plaintiff could have no claim for rents and profits after his interest or estate had ceased. According to the principle on which the Court rendered judgment, if the cause had not been "finally submitted" for five years, the Court would have gone on adding the monthly rents for the whole period, and then trebling the aggregate sum. Then Smith and Sullivan

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could have brought their ejectment, and again recover the rents and profits from the 7th day of June, 1863, down to the time of judgment.

Hoge & Wilson, for Respondent.

The lease was clearly admissible for the purpose of showing the nature and character of the plaintiff's possession, whether peaceable or otherwise, and the extent of that possession. The validity of the lease cannot be tried in this form of action, as this Court has repeatedly decided, and particularly in the case of *McCauley v. Weller*, 12 Cal. 528, 529. Nor is it perceived what right a mere intruder or trespasser has to question the validity of a lease as between the person in possession of lands and the owner under whom he takes that possession, and whose right he acknowledges; and particularly when in this case the owners all recognize the relation of landlord and tenant, and the validity of the lease. It is not for the wrongdoer to question the validity of the lease. That is a matter entirely between the parties to the lease, and cannot be raised in this action. The paper in question was offered, as such documents always are, to show the possession, its character, and extent. It was done in the case already cited, and in many others, and, as we think, is eminently proper in cases like these. The very case cited by the counsel for the appellants, of *Mitchell v. Davis*, 23 Cal. 382, decides the very point in our favor. If it were otherwise, it would not avail the defendants, as the evidence was ample without it, and it could not possibly have done the defendants any injury.

By the Court, RHODES, J.

This is an action of forcible entry and detainer. The County Court, on appeal, found for the plaintiff, and the defendants appeal from the judgment and the order denying a new trial. Several of the grounds assigned by the defendants on their motion for a new trial—that the judgment is against the evidence; that the plaintiff was a mere servant or

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hired man of Smith and Sullivan; and that the possession of the plaintiff was a mere scrambling possession — belong to the same general class and relate altogether to the weight or sufficiency of the evidence. The Court below found that the plaintiff was in the peaceable, actual and quiet possession of the premises, and that the defendants were guilty of the forcible entry and detainer complained of; and it is scarcely necessary to repeat that where there is any evidence of a fact in issue which is passed on by the Court below, and where the Court below has denied the motion for new trial based on the ground that the finding is contrary to the evidence, or to the weight of the evidence, or that the evidence is insufficient to support the finding, this Court will not reverse the order of the Court below, unless the order is manifestly an abuse of the legal discretion of the Court. The order in this case is not subject to that objection.

The defendants contend that the judgment for the rents and profits is greater than the law authorizes, because, they say, the plaintiff at most had the right of occupying the premises, according to his lease, only one month. The objection might be tenable if the object of the action was to determine the right to the possession of the premises, or to recover the rents and profits, the right to which depended on the right to the possession of the premises; but the right to the possession is not directly or incidentally in issue. The inquiry is, Had the plaintiff the actual and peaceable possession at the time of the forcible entry complained of? And if that issue and the unlawful detainer are found for the plaintiff the law awards to him the monthly value of the rents and profits during the time of the detention without regard to his right or title in the premises.

They make the further point, that the Court erred in excluding the evidence offered by them to prove that five to ten days prior to the alleged forcible entry they were in the peaceable occupation of the premises, and that Sullivan and Smith, the lessors of the plaintiff, forcibly entered and evicted them, and tore down and burnt the appellants' building, and

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employed and paid persons therefor and for holding possession against them, the employes being armed with deadly weapons for that purpose. Upon those facts, they were entitled to have instituted and maintained against Sullivan and Smith an action for the forcible entry and detainer, or an action of ejectment, if they had also the right of possession; but the forcible entry upon the appellants did not authorize them to seek redress by making a forcible entry upon the actual and peaceable possession of another. It was the object of the statute not only to prevent and punish the forcible entry of those having no right of entry, but also of those who, having a right of entry given by law, make entry "with strong hand," or "with multitude of people." The forcible entry of Sullivan and Smith is no justification of the forcible entry of the appellants upon the respondent. If the evidence offered had been admitted, it would not have constituted a defense to the action, for in addition to the reasons already given, there was no offer to show that the respondent participated in the alleged forcible entry of Sullivan and Smith, and his privity in estate with Sullivan and Smith would not render him directly or indirectly liable for their wrongful acts.

The appellants also assign as error, the admission in evidence of a document, purporting to be a lease of the premises to the plaintiff for one month. In the body of the lease, Charles K. Smith is described as the lessor, but it is not executed by him, it being signed by E. L. Sullivan and the lessee. The premises described in the lease, have the same name and number of acres and about the same boundaries as the tract described in the complaint. The signatures to the lease were admitted to be genuine signatures of Sullivan and the plaintiff. The defendants objected to the lease being given in evidence on the grounds: "1st—That it is incompetent, irrelevant and illegal testimony; 2d—That it was not a lease from Smith to Roff; 3d—That it was not a lease from Sullivan to Roff; 4th—That the paper in its body purported to be a lease from Smith to Roff, and that Roff never executed it; and 5th—That as a lease it was a nullity as between Smith and Roff." The

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counsel for the plaintiff thereupon stated that he only offered the paper in evidence "for the purpose of showing the extent of the property which the plaintiff claimed he possessed." The defendants renewed their objections to the document offered for the purpose stated, and the Court overruled the objections and allowed it to be read in evidence, and the defendants excepted.

The plaintiff now insists that the lease was admissible "for the purpose of showing the nature and character of the plaintiff's possession, whether peaceable or otherwise, and the extent of that possession. If it was admissible for any purpose, it must be confined in its operation to the purpose expressed when it was offered. Is it admissible for that purpose? It evidently is not the lease of Smith, nor is it the lease of Sullivan, for Smith does not sign it, and Sullivan does not profess to make it. It does not amount to a lease, and is no more in substance than the document would have been if there had been a blank where Smith's name appears, and there had been no signature but that of the intended lessee. It thus becomes unnecessary to determine whether a lease made between Smith or Sullivan as the lessor, and the plaintiff as the lessee, would have been admissible as evidence to prove the extent of the premises claimed by the plaintiff, for the record does not present that question. The question is, in substance, whether a draft of a lease unexecuted by the lessor is competent evidence to prove the extent of the land claimed by the nominal lessee. The plaintiff did not enter under that document, nor did he profess to have done so, and he does not pretend to have seen it until several days after his entry on the lands. The point that the defendants, being wrongdoers, have no right to question the validity of the lease has no force, because the document is not in fact a lease. We are clear that the document was not admissible for the purpose for which it was offered, for a paper, in form a lease, to be executed by both lessor and lessee, but in fact executed by the lessee alone, does not tend to extend, limit or define the boundaries of the lands held or claimed by the nominal lessee. We cannot say that because

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the remaining evidence was sufficient to authorize the Court to find for the plaintiff, therefore the error in admitting the lease became immaterial, for it is impossible for us to ascertain whether the Court found that the plaintiff was in the possession of the whole premises sued for or any part thereof, from the lease or from the other testimony in the case.

Judgment reversed, and the cause remanded for a new trial.

Mr. Chief Justice SANDERSON expressed no opinion.

THE PEOPLE v. THOMAS B. POOL.

JUSTIFICATION OF A HOMICIDE.—The right to take life in defense of one's person, habitation, or property, or for the protection of those whom by the law of nature he is bound to protect, is founded on necessity; and when this defense is interposed in justification of a homicide, the first inquiry is as to the alleged necessity.

SAME.—If an officer in fresh pursuit of criminals comes suddenly upon several of them, and calls out "You are my prisoners—surrender:" and at the same time points a gun towards them, they are not justified in firing on him, or in taking his life.

SAME.—If several persons commit a robbery, and immediately flee from the scene of it, and are pursued soon after by an officer, who overtakes them at a distance of ten or twelve miles from the place where the crime was committed, and is slain by them in an attempt to arrest them, on the trial for the homicide the People may introduce evidence of the robbery, and the defendant's connection with it.

PROOF OF INTENT WITH WHICH HOMICIDE WAS COMMITTED.—In ascertaining the degree of guilt of one who has committed a homicide, it is important to determine the intent with which the act was done. The intent may be proved by evidence, direct or circumstantial, tending to establish the fact.

ACT OF ONE CONSPIRATOR THE ACT OF ALL.—If several persons conspire together to commit a robbery, and to resist arrest even to the taking of life, and after the robbery is committed take the life of an officer in resisting an arrest, whatever is said or done by any one of them in furtherance of the common design is a part of the *res gestæ*, and the act of all.

NOTICE BY AN OFFICER OF HIS OFFICIAL CHARACTER.—Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterwards, notice of the official character of the person attempting to make the arrest, or of the cause of the arrest, is not necessary.

ARREST WITHOUT A WARRANT.—A peace officer may, without a warrant, arrest a person for a felony he has committed—though not committed in the officer's presence—when the criminal is fleeing from the scene of the crime.

SAME.—The words "when he is pursued immediately after an escape" in the one hundredth and thirty-seventh section of the Practice Act, are not used in the sense of an escape from custody, but in the sense of flight from the

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scene of the crime; and the words "immediate pursuit," are the same as "fresh pursuit" used in common law phrase in criminal cases.

WHAT IS IMMEDIATE OR FRESH PURSUIT OF CRIMINALS.—If, after the commission of a felony, the guilty parties flee to avoid an arrest, and within three or four hours are pursued by officers for the purpose of apprehending them, and the officers by diligent pursuit overtake them at a distance of twelve miles from the place where the crime was committed, this is an immediate or fresh pursuit of the criminals.

STATUTE DEFINING MURDER IN THE FIRST DEGREE.—The adjectives "wilful," "deliberate," and "premeditated," considered in connection with the context in the phrase "or for any other kind of wilful, deliberate, and premeditated killing," found in that section of the Act concerning crimes and punishments defining murder in the first degree, are merely cumulative and expressive of the same idea.

ROBBERY.—If the Court in its charge to the jury characterizes the crime of robbery as an "outrage," it is not calculated to prejudice the cause of the defendant, or do him an injury.

CHARGE TO JURY AS TO THEIR VERDICT.—To charge the jury that they "have the power to find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or not guilty," is the same in effect as to charge them that it is their province so to find.

DEFINITION OF MURDER.—Each of the phrases, "wilful killing," "deliberate killing," and "premeditated killing," standing in relation to the offense of murder, embraces, essentially, the legal idea of the other.

APPEAL from the District Court, Eleventh Judicial District,
El Dorado County.

The facts are stated in the opinion of the Court.

James Johnson, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, CURREY, J.

The defendant was indicted with others for the murder of Joseph M. Staples, committed on the first day of July, 1864, at a place called Somerset House, in El Dorado County. The defendant plead not guilty. On the trial it was proved that at about ten o'clock of the evening of the day previous, the defendant with thirteen other persons stopped two stage coaches which were on their way from the then Territory of Nevada to Placerville, in the County of El Dorado, and by violence took from one of them a large amount of gold—gold coin and bullion—which was in the custody of the person

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having charge of the coach in which the same was when taken. The scene of the robbery was about twelve miles from the Somerset House, and about fourteen miles from Placerville. Soon after the stage coaches arrived at the latter place, and the deceased, who was a Deputy Sheriff of El Dorado County, became informed of the robbery, he and a constable started in pursuit of the robbers, and at about five o'clock the next morning came upon some of them at the Somerset House, where they were together in a room, and finding a gun standing at the door of the room the deceased took it into his possession, and then opening the door addressed the defendant and his companions, saying to them: "You are my prisoners—surrender;" and at the same time pointing toward them the gun which he held in his hands, while they, on their part, instead of surrendering, drew their pistols and opened fire on the deceased. Several of the shots took effect upon a vital part of his body, causing his death in a few minutes. After the firing had been commenced by those in the room, the deceased shot the defendant, by which he was disabled.

The defendant was found guilty of the murder of Staples, and was sentenced to be executed. From this judgment he has appealed, and counsel on his behalf asks this Court to reverse the judgment on several grounds, which we have carefully considered, and concerning which we will now pronounce our judgment:

I. It appears from the evidence in the case that Staples did not, at the time he attempted to arrest the defendant and his companions, inform them in terms of his official character, nor the cause for the attempted arrest, and it is therefore argued on the defendant's behalf that the homicide was justifiable.

A false and mischievous notion seems to have obtained to a considerable extent that a person may justify or excuse the slaying of his fellow being for causes which fall far short of any exigency from which it may be lawfully presumed the act of the slayer was necessary for the defense of his person, habitation, or property, or for the protection of those whom by

the law of nature he is bound to protect and defend. The right of defense in the cases indicated is founded on necessity, and when sought to be interposed in justification of the act, the first inquiry is as to the alleged necessity. Then, were it assumed that the defendant and the men with him were innocent of the crime for which the deceased sought to arrest them, and ignorant of his official character, could it be said they were justified by the circumstances which transpired in taking his life? He had it in his power to shoot, at the moment he informed them that they were his prisoners and demanded their surrender, and yet he did not exert such power; besides which, his language and menace, as associated, was calculated to convey the idea that he did not design violence if they would heed his demand. The circumstances, in our judgment, did not, even on the hypothesis stated, justify or excuse the taking of the life of the deceased. But whether the crime committed was of the magnitude of murder in the first degree, depends upon the entire circumstances of the case.

The defendant objected to the evidence offered and given at the trial in relation to the robbery, and now insists that the Court erred in permitting any examination as to that offense and the defendant's connection with it. In our view of the matter it was material for more reasons than one:

First — To show that the defendant was engaged in the commission of the robbery, and that he and his confederates had a motive beyond their own protection, as men innocent of crime, in killing the deceased while in pursuit of them.

Second — To show that in connection with their criminal purpose, they had agreed to resist being arrested even to the death, and that being confederated together for the felonious purpose of robbery and resistance to the civil power of the State, the killing of the deceased, by whichever of them actually done, was the act of each and all of the conspirators.

Third — To establish a condition of circumstances from which the robbers would be deemed to have sufficient notice that their pursuers were officers of the law, or citizens in pursuit of them as malefactors.

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(1.) In ascertaining the degree of guilt of one who has committed a homicide, it is always important to ascertain the *animus* with which the act was done. It is the intent with which an act was done that constitutes its criminality. The intent and act must both concur to constitute the crime. And the intent must therefore be proved. The proof may be either by evidence, direct or indirect, tending to establish the fact, or by inference of law from other facts proved. (3 Greenleaf's Ev. Sec. 13; 1 Bish. Cr. Law, Secs. 253 to 257; *Fowler v. Padget*, 7 Term R. 514.) Whenever it is important to determine the character of the act perpetrated and to ascertain the intent of the accused, the existence of any motive likely to instigate him to the commission of the crime may be proved, and is relevant and competent for the purpose of fixing or tending to fix the crime upon him. (1 Stark. Ev. Secs. 13 and 14; Wharton's Cr. Law, Secs. 635 and 850.)

(2.) By the act of the defendant's conspiring with those who were with him when the deceased was slain, to commit robbery and to resist arrest even to the taking of life, they jointly assumed to themselves, as a body, the attribute of individuality, so far as regarded the prosecution of the common design, thus rendering whatever was done or said by any one of them in furtherance of that design a part of the *res gestæ*, and therefore the act of all. (3 Greenleaf's Ev. Sec. 94.)

(3) Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest or of the cause of the arrest is not necessary, because he must know the reason why he is apprehended. Cases are not wanting to support this doctrine. In the case of *Rex v. Davis*, 7 Car. and Payne, 177, where it appeared that a gamekeeper, with a servant of his master, were out at night and heard two guns fired, and went toward the place and got into a covert and saw some men there, who ran away, and the servant pursued them and got close up to one of them and attempted to arrest him, and was immediately shot through the side, Baron Parke said: "Where parties find poachers in a wood, they need not give any inti-

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mation by words that they are gamekeepers or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose, when he sees another at his heels?" So in the case of *Rex v. Whithorne*, (3 Car. & P. 394.) Perry and Smith, charged with the murder of Richard Rounce, it appeared that Rounce, with other gamekeepers, found Perry and Smith out for the purpose of catching hares and arrested them. The persons so apprehended soon after called to Whithorne, who came up, and with a stick shod with iron, beat the gamekeepers on the head, killing Rounce, and rescuing Perry and Smith. For the prisoners it was objected, that as the gamekeepers did not announce to the prisoners who they were, the arrest was illegal, and further, that as their duty was to apprehend merely, and it was in proof that they beat the prisoners, that would reduce the offense to manslaughter. To this the Court answered that with respect to the keepers not announcing who they were, there was no pretense for saying the prisoners did not know that perfectly well. They did not make any question of their authority. They did not say, "You have no right to take us, Who are you?" or anything of that sort. The apprehension was legal; and being so, all the legal consequences must follow. So also in *Rex v. Payne*, 1 M., C. C. R. 378. Certain gamekeepers, upon hearing the report of guns, went towards the place from whence the sound came. The prosecutor saw six persons in the wood who were poachers, and with a cocked pistol ran after them as they ran away. After running about fifty yards, they made a stand. One of them shot the prosecutor while he was pursuing. The prosecutor said nothing to them nor they to him before he was shot. At the trial for maliciously wounding the prosecutor, it was objected for the prisoners that inasmuch as the prosecutor's authority to apprehend the prisoners was derived from the Act creating the offense for which he attempted to arrest them, it was incumbent on him to give them notice of his authority. The objection was overruled, and upon a case reserved, the Judges

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were of opinion that the circumstances constituted sufficient notice.

In the case of a public officer such as a Sheriff or a constable, acting in his own district, his authority to make arrests of persons who have recently committed crimes, is to be deemed a matter of notoriety. (*Roscoe's Cr. Ev.* 754.) The robbers were in the act of fleeing with a portion of the spoils of their crime committed several hours previous, and the deceased and the constable with him were at their heels in fresh pursuit. The circumstances of having committed the crime of robbing the stage coach was sufficient to cause them to apprehend pursuit. That they were aware they were pursued appears by the evidence of one of the party, who testified that Bulwer, one of the robbers, who occupied another room, came to the room in which the defendant and others were, and waked them and told them to get up — that somebody was after them. This was just before the deceased came to the door. After Staples was killed the firing was kept up until the constable surrendered. It was after this the constable told them he was an officer, and they demanded of him to show his authority, and asked him "How in hell did you find us so soon?" The deceased, upon entering the door where the defendant and his confederates were, addressed them, "You are my prisoners — surrender." These words were, according to the authorities, a sufficient notice of his character as a peace officer. (*Roscoe's Cr. Ev.* 755; 1 *Russ. on Crimes*, 627; 1 *Hale's Pleas of the Crown*, 461; *Mackalley's Case*, 9 *Coke R.*, 68 *b*, and 69 *a*.)

It is provided by statute that a peace officer may, without a warrant, arrest a person for a felony which he has committed, though not committed in his presence; and also where a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed it. (*Laws 1851*, p. 226, Sec. 134.) The one hundred and thirty-seventh section of the same statute provides that when arresting a person without a warrant, the officer must inform him of his authority, and the cause of arrest, except when he is in the actual commission of a public offense, or when he is pursued

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immediately after an escape. The word *escape* we do not understand to be used in the technical sense of an escape from custody, but rather in the sense of flight from the scene of the crime to avoid being arrested and brought to justice. Even a private person may arrest one who has committed a felony, without a warrant and without informing him of the cause thereof, provided such arrest be made on pursuit immediately after the commission of the offense. (Laws 1851, p. 227, Sections 140, 141.) It would be strange indeed if conditions, stricter and more ceremonial, were imposed on peace officers in such cases than upon private persons. What is meant by pursuit immediately after an escape or immediately after the commission of the offense? Immediate pursuit is substantially the same as fresh pursuit, so frequently used in common law phrase in criminal cases. The phrase "when he is pursued immediately after an escape," is not to be taken so strictly as to defeat its reasonable operation. (1 Russ. on Crimes, 606, 607.) The interval which may elapse between one event and another may, in a particular instance, be sufficient to destroy their relations as immediate in time, while as to two other events the same interval would not have such effect. For example, if one living near the Post Office should call there for a letter and there remain an hour before his return to his own place, it could not be said he returned immediately; but if he should visit a foreign country, and there remain only for a few days and thence depart on his return homeward, it might with propriety be said his return was immediate. Thus it is seen that immediate is a word of relation, and as a measure of time is itself governed in degree by the events and circumstances to which it stands in a qualifying connection.

The conclusion to which we come upon the questions considered are:

1st. That the crime of robbery was committed by the defendant and others, and that the deceased and the constable with him were in the immediate or fresh pursuit of the robbers, for the purpose of apprehending them for the felony they had perpetrated, when the homicide was committed.

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2d. That the defendant and his companions in the crime of robbery were aware at the time of the cause for which they were pursued, and had in legal contemplation notice of the character of their pursuers.

3d. That the testimony, taken as true, established the fact that the defendant as a conspirator with others to commit the crime of robbery, and to resist apprehension therefor even to the taking of life, was concerned in the unlawful killing of the deceased, Joseph M. Staples, while in the discharge of his duty as a peace officer in the County of El Dorado, and that the circumstances of the homicide showed that the act was done with an abandoned and malignant heart.

II. The defendant complains that the charge of the Court to the jury was erroneous in several important particulars, by which his cause was or may have been prejudiced. If this be so, the judgment should be reversed, notwithstanding the evidence, under proper instructions, might be deemed sufficient to support a verdict of guilty of murder in the first degree.

(1.) In defining murder in the first degree the Court charged the jury that "all murder which shall be perpetrated by means of any poison, or lying in wait, torture, or any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, is murder of the first degree. All other kinds of murder shall be deemed murder of the second degree." This charge is substantially in the language of the statute, except that the words "wilful, deliberate and premeditated" are disjoined by the word "or," instead of being conjoined by the conjunction "and," as in the statute. The effect of the charge in this particular is that either a wilful, deliberate or premeditated killing of a human being is murder in the first degree. These adjectives are severally expressive of the same idea. An act done wilfully is done designedly or of set purpose; an act performed deliberately is performed with careful consideration or after examination and reflection; and an act premedi-

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tated and then committed must be understood to be preconcerted, intended or meditated beforehand. In the sentence referred to, the words "wilful, deliberate and premeditated," as connected with the subject to which they relate, if intended to be conjoined, may be regarded as cumulative, and merely giving force to the subject matter by successive expressions of the same idea. In 1 Wharton on Criminal Law (Sec. 1,084) it is said: "In Pennsylvania, New Jersey, Virginia, Alabama, and Michigan, the killing, to commit murder in the first degree, must be 'wilful, deliberate and premeditated.' The omission of 'wilful' in New Hampshire, and the addition of 'malicious,' in Tennessee, cannot, it is apprehended, vary the construction given to the statutes." (*Dale v. The State*, 10 Yerg. 551; 1 Whart. Cr. Law. Secs. 1,085, 1,114.) But the word *and* is not always to be taken conjunctively. It is sometimes, in a fair and rational construction of a statute, to be read as if it were *or*, and taken disjunctively; and in the statute referred to, the several words characterizing a particular homicide being used in substantially the same sense, may be read disjunctively. (Smith's Com. on Statutes, 732.) The substance and effect of the statute is to be regarded and not every unimportant matter of form or circumstance. *Quæ hæret in litera hæret in cortice.*

(2.) In the course of the charge to the jury the Court said: "If several persons conspire together to seize with force and by robbery, treasure or property belonging to another, and escape with it, and if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in the common design. The law makes no difference or distinction between any of the parties engaged. All engaged in such an *outrage* are aware that their acts are unlawful, and that murder may result from such resistance, and all alike must suffer the consequences."

It is objected on behalf of the defendant that characterizing the commission of the acts stated by the Court in the form of a postulate an *outrage* was calculated to prejudice the cause

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of the defendant; but it is difficult to see wherein, for certainly to denominate the crime of robbery an outrage is a mild designation, which in no sense could do the defendant any injury.

(3.) After the Court had charged the jury respecting the law of homicide generally, and after having especially distinguished between the different degrees of crime in cases of criminal homicide, the Court instructed the jury as follows: "Gentlemen of the jury: Under this indictment you have the power to find the defendant guilty of murder in the first degree, murder of the second degree, or manslaughter, or not guilty."

The defendant's counsel objects to the word *power* as used in the portion of the charge here quoted; and it is argued that the instruction that the jury had the power to find as stated implied that they might, or that it was their province, to render a verdict of guilty of either of the offenses specified, regardless of evidence. If such be not the force of the objection then it is without meaning and senseless. The charge would have been the same in effect if the Court had told the jury it was their province to find the defendant guilty of any one of the offenses specified, or not guilty.

(4.) The portion of the charge following the passage last quoted, in these words: "The law, however, makes all murder committed in the perpetration or attempt to perpetrate robbery, murder of the first degree," is also objected to as amounting to an instruction that the killing of Staples was a murder committed in the perpetration or attempt to perpetrate a robbery, and was for that reason murder of the first degree.

This objection, in our judgment, is not well taken, for the reason that the words are not fairly susceptible of the construction given them on the part of the defendant. The language of the Court here used must be understood as it stands related to other portions of the charge, and it is to be presumed the jury understood it as thus related.

III. The defendant requested the Court to instruct the jury in the following words: "If the jury believe from the evi-

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dence in the case that the deceased, Staples, presented himself at the door of the room occupied by defendant Pool and his confederates, and presented a gun at them and demanded that they surrender to him, but did not inform them of his official position or authority to arrest them, or the cause of their arrest, and at the time the gun was pointed at them they had offered no violence to him, and they were ignorant of his official character, and that the killing took place immediately after the gun was presented to them first and while it was levelled upon them, then the killing was no murder." The Court refused to so instruct the jury, and the defendant excepted.

The questions of law involved in the language of the requested instruction have been quite fully considered already. To have charged that the killing was no murder, provided the facts were as hypothetically stated, would have ignored the existence of other facts and conditions (concerning which there was evidence before the jury), which, in some degree at least, were of the elementary conditions giving character to the acts and intentions of the defendant and his confederates, and upon which, to some extent, depended the criminal quality of the acts which were the immediate cause of the homicide. The requested instruction proceeds upon the hypothesis that the facts stated were the only material facts affecting the question of murder in the case, and because of this, if for no other reason, the request was properly refused. There was testimony in the case of other material matters, which, if true, and taken into consideration by the jury, might very properly have had their influence in determining the jury as to their conclusions respecting the character of the homicide, and whether the defendant was guilty of murder or otherwise, or not guilty of any crime at all.

We have carefully considered every point on which the defendant has relied for a reversal of the judgment, with a solemn sense of our duty in a case on the determination of which the life of a fellow creature depends, and the conclu-

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sion to which we have come is that the judgment should be affirmed.

The judgment is therefore affirmed, and the District Court is directed to appoint a day for carrying the judgment pronounced in that Court, and now affirmed, into execution.

Mr. Chief Justice SANDERSON expressed no opinion.

By the Court, SAWYER, J., on petition for rehearing.

In the petition for rehearing, the counsel for appellant strenuously argues, that the substitution of the word "or," in the place of "and," in the phrase "wilful, deliberate and premeditated killing," constituting a part of the statutory definition of murder in the first degree, is a fatal error. He insists that the three words, "wilful, deliberate and premeditated" are not synonymous in meaning, and that the definition of murder in the first degree submitted to the jury was essentially, and materially different from that contained in the statute. It needs no argument to show that these several words, abstractly, and separately considered, are not synonymous. But we are not to consider them separately, or abstractly. They are to be considered in connection with the context. In discussing the question, a murder must be assumed to have been proved, and this fact must be considered as one of the conditions of the problem. For, unless there is a murder, no question can arise as to the degree of the murder, and the instruction bears upon the question of the degree only. The offense being murder the question is, not what does the word "wilful," or "deliberate," or "premeditated," mean, but what do the words "wilful killing," "deliberate killing," "premeditated killing," standing in relation to the offense of murder, signify? Can there be a "wilful killing," a "deliberate killing," or a "premeditated killing," without such killing embracing essentially the legal idea expressed by each of the other phrases? To determine this question it will be necessary to ascertain the legal signification

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of these several phrases, and upon an examination and analysis of the authorities upon the question as to the degree of murder, the result, we apprehend, will be found to be, that there is a "wilful killing," within the meaning of the statute, wherever there is simply a specific intent, a design or purpose formed to take life; that there is a "deliberate killing," wherever such intent or purpose is formed upon deliberation, or consideration, and the deliberation or consideration need not be for any particular period of time; a moment is as effectual as an hour or a day; and there is a "premeditated killing" wherever the deliberation or consideration precedes the purpose formed, and — as before stated with respect to deliberation — it need not precede the purpose formed for any particular period of time. In a late case in Tennessee (as quoted in Whar. Crim. Law, Sec. 1,114,) the Court say: "It is true the Act says the killing must be wilful, deliberate and premeditated. But every intentional act is of course a wilful one, and deliberation and premeditation simply mean that the act was done with reflection and conceived beforehand. No specific length of time is required for such deliberation." Compare these well established legal definitions of the several phrases in question, and see if each does not necessarily imply all of the others? As to the phrase, "wilful killing," there seems to be no room for doubt. How is it possible for the mind to perform the operation of willing — of determining to do an act — of forming a purpose, without a preconsideration of the question? If A. determines to go to San Francisco, he must necessarily have thought upon the subject, considered the question, before he determined to go. And there would seem to be as little doubt, as to the other two phrases. A man may deliberate or meditate upon the subject of killing, and stop short of willing, or forming a purpose to kill. If he does stop upon the deliberation or meditation, without forming a purpose, he certainly will not kill, at least under such circumstances as will constitute the crime of murder. It seems as impossible to perpetrate a "deliberate *killing*," or a "premeditated *killing*," without first willing or forming the purpose to

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do the act, as to form the purpose without a preconsideration. If there is any appreciable, substantial, material element affecting the degree of the offense expressed, or implied, by one of these phrases, that is not necessarily implied by each of the others, we are unable to discover it; and this seems to be the opinion of Mr. Wharton, the author of a very learned and carefully prepared work on American Criminal Law. He says: "In Pennsylvania, New Jersey, Virginia, Alabama, and Michigan the killing, to constitute murder in the first degree, must be 'wilful, deliberate and premeditated.' The omission of 'wilful' in New Hampshire, and the addition of 'malicious' in Tennessee, cannot, it is apprehended, vary the construction given to the statutes. (Am. Crim. Law. 5th ed., Sec. 1,084.) If the omission of "wilful" cannot vary the construction, it must be because a deliberate or premeditated killing necessarily implies a wilful killing, and if the word "wilful"—the most comprehensive term, if there is any difference—can be omitted without varying the construction, certainly, either of the others can be dispensed with. Such being the case it is not material whether the word "or," or "and," be used. The word "malicious" evidently could not vary the construction, for the killing must be malicious to constitute murder in either degree. We may add, that the passage quoted may be regarded as expressing the matured opinion of the author, for it is also found in the earlier editions of his work on Criminal Law. Thus, after this work has been for several years before the public and subjected to the criticisms of Courts and the legal profession, it is still retained in the fifth and last edition. The language in the statutes of Virginia is the same as in our own. Yet, in *Jones' Case*, 1 Leigh, 654, Mr. Justice Daniel, who delivered the opinion of the Court, in his frequent repetitions of the clause in question, uses the words "or," and "and," indiscriminately. The exact point was not under consideration as to the effect of the use of these different words, and of course the case is not authority upon the point now before us. But it shows, at least, that it did not occur to the learned judge at the time, that the two phrases did not sub-

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substantially express the same legal idea. Mr. Chief Justice Cornblower—as quoted in Wharton's Law of Homicide, 382—commenting upon the statutory provision in New Jersey—which is the same as ours—says: “Again, the premeditation intent to kill need not be for a day, or an hour, or even for a minute. For if the jury believe there was a design, a determination to kill, distinctly formed in the mind at any moment before, or at the time the pistol was fired or the blow was struck, it was a wilful, deliberate and premeditated killing, and therefore murder in the first degree.” Now, here it is said, substantially, that “a design, a determination to kill, distinctly formed in the mind,” followed by the act of killing, embraces all the elements required by the statute to constitute murder in the first degree. It is scarcely within the range of possibility that the inadvertent use of the word “or,” instead of “and,” in the charge of the Court—whether upon a critical analysis it shall be found to express precisely the same idea or not—could have had the slightest influence upon the verdict.

Upon the case disclosed by the record, there cannot be a shadow of doubt that the prisoner was in fact guilty of murder in the first degree. Nevertheless, if it had appeared that any error had been committed, which rendered it even in a remote degree probable, that the verdict could have been in any way affected by it unfavorably to the defendant, we should feel it our duty to reverse the judgment. We cannot perceive that there is any substantial material difference in the legal construction to be given to the phrase contained in the charge, and that embraced in the statute, or that any injury could have resulted to defendant. We see no other point in the petition that requires further discussion.

Rehearing denied.

Mr. Chief Justice SANDERSON expressed no opinion.

**BENJAMIN DORE, AND OWEN HANNIGAN, INTERVENORS
v. JOSEPH SELLERS, E. L. GOLDSTEIN, AND
ADOLPH ZURN.**

LIEN OF CONTRACTOR ON BUILDING.—The statute gives one who has entered into a contract in writing to construct a building a lien on the same as security for the payment of the money becoming due to him according to the terms of the contract, but this lien cannot be enforced for an amount exceeding the sum to become due the contractor.

CONTRACTOR HAS NO LIEN EXCEPT FOR MONEY TO BECOME DUE.—If a contractor engages to construct a building in consideration—in whole or in part—of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment cannot become a lien upon the building.

LIEN OF EMPLOYEES OF CONTRACTOR.—The employees of the contractor have no lien on the building as principals, and cannot acquire a lien on the building independent of the one existing on the original contract, which they may enforce to the amount due them, so that the same does not exceed the sum for which the contractor has a lien.

LIEN OF EMPLOYEES OF SUB-CONTRACTOR.—If the contractor has paid the sub-contractor according to the terms of his contract with him, and has not made premature payment, the employees of the sub-contractor are not entitled to demand anything from the contractor or employer.

SAME.—The employees of the sub-contractor cannot intercept any money due from the employer to the contractor, nor can they enforce the lien of the contractor for any of the same, beyond what is due from the contractor to the sub-contractor at the time.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. McM. Shafer, for Appellants.

The question presented is simply this: Can the materialman and laborer go upon the house, superstructure, etc., directly, to the extent of the contract price due, or are they subject to all the conditions which may be created by the account between the contractor and his sub-contractor?

The eighteenth section of the Mechanics' Lien Act provides that the procurement of lumber to be used in erecting buildings with the intent to apply the same to other purposes, is an offense punishable as a crime. The fraud consists in inducing

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one to part with his property upon the faith that it will be incorporated into a permanent and valuable form of real estate, which the builder can resort to as a reasonably certain source of payment.

Section four makes the lien of the material man operative from the time the materials were furnished. At this time no work would have been done, no payments made nor due. The lien depends upon the fact that the lumber is furnished alone, and *not* upon the state of the accounts between the several parties. If it be conceded that the lien will be defeated by the non-application of the lumber for the purpose designed, still *this case shows the lumber was so applied.*

This intention of making the security of the material man absolute, is further shown by section sixteen. The lumber furnished is not attachable as the property of either the contractor or sub-contractor. It is regarded as a *trust to be executed exactly according to its terms*, and for the benefit of the material man.

No distinction is taken between the case of lumber furnished to a contractor and that furnished to a sub-contractor. *All* lumber furnished for the building is protected from attachment or execution against its "purchaser."

If the sub-contractor should have a recovery against him in favor of the contractor for breach of the building contract, lumber furnished for the building would be protected from an execution thereon. Why, then, should the vendor who sold this lumber charged with the trust be deprived of his pay and his lien, which is co-extensive with this trust, by the simple breach of the sub-contractor's contract?

Section thirteen secures the rule of superiority and priority to us, as against *both* Giblin and Zurn & Hannigan, and provides for the marshalling and application of the contract price, first to us, second to the sub-contractor, and third to the original contractor. The intention of observing this order is involved in section twenty-five. The limitation of time to make claim is thirty days as to these "primary" claims, while

Argument for Respondent.

to those last in order of payment sixty days is allowed to initiate proceedings to enforce the remedies of the statute.

The foregoing ideas we think are sustained fully by *Cahoon v. Levy*, 6 Cal. 295; *Soule & Page v. Dawes*, 7 Cal. 574; *McGreary v. Osborne*, 9 Cal. 119; *Crowell v. Gilmore*, 13 Cal. 56; *S. C.* 18 Cal. 370; *McAlpine v. Duncan*, 16 Cal. 126; *Bowen v. Aubrey*, 22 Cal. 566.

E. B. Mastick, for Respondent.

The sub-contractor is entitled to recover only upon performance of sub-contract. All persons claiming through a sub-contractor can only claim that to which he would be entitled. The material man in this case derives his rights through the sub-contractor; the power of the sub-contractor is limited to the terms of his contract; he can confer no greater power than that which he has. The material man may come between the sub-contractor and the contractor, and intercept that to which the sub-contractor would be entitled; but how or by what right could he get more?

The question as put in appellant's brief, I think is not the question in this case. Has the material man who supplies material to a sub-contractor, a lien on the house, etc., for the material thus furnished, in case the sub-contractor fails to perform his contract, and has, up to the time of the notice to the owner, been paid all that was due of the money earned under his contract, and when all the money which is to become due under the original contract remains to be earned?

The appellant says that "the material man is entitled to a lien, etc., and the only limitation to the right is, that the owner of the realty shall not pay more, etc., than what he agreed to pay." Also: "The limitation of this right as against the defendants is, that they shall not be made to pay more than they have agreed."

Again: "The lien to be pursued is measured by the 'original contract,' for the reason, as we have seen, that Sellers and Goldstein ought not to be charged beyond their contract."

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Now, "all that was due" has been paid; all that was to become due "remained to be earned." There was no money due at the time of the notice. "All that was then due," that is, had been earned, had been paid to Zurn and Hannigan, and that which was to become due, "remained to be earned." It was afterwards earned by Giblin, and earning it, he was entitled to it. Neither the material nor labor of the appellants earned it, but the material and labor of Giblin did.

If, then, the liability of the owner is bounded by the amount named in the contract as the price, how are the appellants to recover? (*Bowen v. Aubrey*, 22 Cal. 566.) If any other rule was to prevail, then the owner would be liable for all materials and labor, regardless of the contract price.

By the Court, RHODES, J.

This action is brought under the Mechanics' Lien Act of 1862. Sellers and Goldstein, being the owners of a certain lot in San Francisco, contracted in writing with Giblin for the construction of two houses for a price named, payable in instalments. Giblin contracted in writing with Zurn and Hannigan to do the carpenter work on the buildings and furnish the materials for the work. On the 12th of January, 1863, the sub-contractors gave notice to the contractor and the architect, that they could not complete their contract, and they then abandoned the work. The contractor, up to that time, had paid to the sub-contractors all that was due them for work done and materials furnished by them, and it is not alleged and does not appear that a further sum was to become due to them, for work done or materials furnished before that time. On the 15th of January, 1863, the plaintiff served upon the owners of the premises and the contractor, a notice of his claim as a material man, for lumber, etc., furnished to the sub-contractors for the erection of the houses, the bill for which was on the 13th of January, 1863, certified by the sub-contractor to be correct. Upon the sub-contractors abandoning their contract, the contractor (Giblin) proceeded to complete

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the buildings, including that portion of the work uncompleted under the sub-contract; and at the time they abandoned their contract five thousand eight hundred and sixty dollars, as appears by the stipulation of the parties, "remained to be earned and paid upon the original contract as between the original parties (said Giblin, Goldstein and Sellers,) in two instalments—one of fifteen hundred dollars, and the last of four thousand three hundred and sixty dollars—to be paid on completion of the job. Fully completed March 20, 1863." The plaintiff sued to enforce his lien upon the lot as a material man, and he makes as defendants the owners of the lot and the sub-contractors.

The intervenor's position is similar in all respects to that of the plaintiff. The defendants had judgment in the Court below.

The appellants state the question involved in the case as follows: "Can the material man and laborer go upon the house, superstructure, etc., directly to the extent of the contract price due, or are they subject to all the conditions which may be created by the account between the contractor and his sub-contractor?" and in solving this question they lay down the proposition that, under the Mechanics' Lien Law, the material man and laborer are entitled to a lien upon the premises, as principals, subject to the limitation only, that the amount of such lien shall not exceed the price agreed to be paid by the owner of the real estate to the original contractor for the whole work. If this proposition can be maintained, the question must be answered in the affirmative.

The securing of liens to certain classes of contractors, mechanics and material men, for the value of the labor and materials furnished by them in the construction or repair of buildings and certain other structures, has been a favorite subject of legislation in this State, and remedies have been afforded to them, differing in material respects from those granted to other classes performing apparently equally meritorious services. The Act of 1862, which went to a greater extent in giving liens where none had been directly contracted for by

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the parties, superseded all former statutes on that subject. It is provided by section one that original contractors shall have a lien to the extent of the original contract price, and that such contract shall operate as a lien in favor of the sub-contractors, laborers and material men; and it is declared in section three, that the lien created by such contract "shall be and inure primarily to the benefit of all persons who, as employés of the original contractor, or [of] his assigns, shall perform work and labor, or furnish material for the construction or repair of such building," etc.; and that "after the payment of such material men, workmen and laborers, such lien shall inure to the benefit of the original contractor or his assigns." Sections one, three, and seventeen, are the only ones in the Act that declare the liens that the several classes of persons may acquire under a contract for the construction of a building, the other sections having relation to that general subject, prescribe the manner of acquiring, enforcing and satisfying such liens.

The statute grants to the contractor who has entered into a contract in writing to construct a house, a lien upon the house while it is being constructed, and for a limited time after its completion, as security for the payment of the money becoming due to him, according to the terms of the contract. Although the language of section one is that he shall have a lien "to the extent of the original contract price," it could not have been the intent of the Legislature, and it certainly was not within their power to give a lien for an amount exceeding the sum to become due to the contractor. For if the contractor engages to construct the house in consideration, in whole or in part, of a debt then due from him to his employé, or of a sum of money paid to him by the employer upon the execution of the contract, that portion of the original contract price represented by the debt or the advance payment, could not become a lien upon the house. The amount of the contract price which is to be paid to the contractor becomes a lien upon the house as the same falls due according to the terms of the contract, and it is this lien that

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the statute declares shall inure primarily to the benefit of the employés of the contractor. No lien is provided for them by the statute other than such as arises under and flows from the original contract, and no other or greater lien could by legal possibility inure to their benefit, without subjecting the employer to a contract that he never made. The law does not create one lien for the benefit of the contractor and another for the benefit of his employés, but the lien arises, as the contract is performed according to its terms, for the benefit of both contractor and employés; and the law in enforcing the lien and distributing the sum realized, prefers the employés to the contractor—in other words, the law permits the employés to intercept a portion or all of the sum that was agreed to be paid to the contractor. They have this right, not for the reason that the employer's property has been benefited by the labor or materials furnished by the employés, but because they have furnished the labor or materials for the contractor, to whom the law has granted a lien, for the amount which became due to him under the contract, in consequence of their labor and materials. It therefore necessarily follows that the employés cannot acquire a lien upon the house independent of the original contract, and that they are not entitled to a lien as principals, though entitled to be first paid out of the moneys becoming due under the contract, and which have been earned by the application of their labor or materials.

Are the employés of the sub-contractor subject to all the conditions that may be created by the account between the contractor and sub-contractor? If the account is consistent with the terms of the contract entered into between the contractor and the sub-contractor, and payment has not been prematurely made, there can be no doubt that the employés of the sub-contractor are not entitled to demand from the contractor or employer an amount exceeding the sum then due the sub-contractor, according to his agreement with the contractor. (See *Bowen v. Aubrey*, 22 Cal. 566, and cases cited.)

The contrary doctrine cannot be true, unless it can be demon-

strated that a party who has fully complied with the terms of his agreement can be held responsible for an amount exceeding the amount he agreed to pay.

The mere fact that a portion of the work was done, and the materials furnished by the employes of the sub-contractor, could not entitle him to receive, either directly, or indirectly through payments to his employes a greater sum than he would have been entitled to had he personally performed all the labor and furnished the materials, in performance of the sub-contract. The action seems to have been brought in view of that principle, for it is alleged in the complaint that an amount exceeding the plaintiff's demand was then due the sub-contractors, on their contract with the original contractor, who is entitled to all the residue of the original contract price, that he has not agreed to pay to the sub-contractors, and the contractor is not made a party to the suit. Under the principle now contended for by the appellants, if the sub-contractors had purchased of the material man, on credit, a bill of lumber, to be used by them in performance of their contract, and had thereupon abandoned the contract and appropriated the lumber to other purposes, the original employer would be held liable for the price of the lumber, and he, upon settlement with the contractor, would be permitted to deduct that sum from the contract price, although the contractor, in performance of the contract, had been obliged at his own expense to furnish the full amount of lumber required for the building. The statute, for the protection of employes, holds the payment made before it fell due, according to the terms of the contract, void as against the unsatisfied claims of the employes; but if payment has been made according to the terms of the contract, and before the material man or laborer has given notice of his claim according to law, we find no provision in the statute holding the employer or the original contractor liable for the payment of such claim, and certainly there is no rule of the common law leading to such a result. If in such case the contractor is not indebted to the sub-contractor he is not responsible for the labor or material furnished to the sub-

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contractor by his employés; and the employés not being entitled to intercept it as a portion of the amount due or becoming due to the contractor, cannot have a lien upon the house for their payment. Their only remedy in such case is against the sub-contractor; and if they are not willing to trust to his personal responsibility, they must see that his contract is adequate, as to the price and terms, to afford them sufficient security.

Judgment affirmed.

Mr. Justice SHAFER, having been of counsel, did not sit in this case.

ROBERT J. VANDEWATER v. P. A. McRAE, JOHN C. FALL, WM. P. DENCKLA, AND M. FULLER.

JUDGMENT ON NOTE AND MORTGAGE NOT A BAR TO ACTION AGAINST INDORSER.

—A judgment against the maker of a promissory note secured by a mortgage executed by him simultaneously with the note for the amount due on the note, and directing a sale of the mortgaged premises and an application of the proceeds on the judgment, costs, etc., is not a bar to an action against the indorser of the note, who indorsed the same at the time of its execution for the accommodation of the maker.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The cause was, by the agreement of the parties, referred to Alexander Campbell, as sole referee, to try the case and report a judgment. The referee reported a judgment in favor of the defendants. This report was, on motion of the plaintiff, set aside and a new trial granted, and the present appeal is from that order.

The other facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

The case entirely turned upon the finding and opinion of the referee, that this action against the defendants as indorsers of

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the note in question, was barred by the proceedings and judgment in the foreclosure suit, set out in the report of the referee.

By the amendment to the two hundred and forty-sixth section of the Practice Act, adopted in 1861, it was provided that there should be *but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, or lien upon real estate, etc., which action shall be in accordance with the provisions of this chapter.* And in that action the Court was empowered by its decree or judgment to direct a sale and application of the proceeds to the payment of the amount due, and if there should be any deficiency, the judgment should then be docketed for the balance against the *defendant or defendants personally* liable for the debt, and an execution, as in other cases.

It would seem that the force and intent of these provisions are perfectly manifest. No argument can make them plainer. The law is positive and admits of no evasion. There shall be but a single proceeding for the recovery of a debt when it is secured by mortgage upon real estate, etc., and that shall be against all parties liable for that debt, and shall administer a perfect remedy as between the parties. There is no necessity for and no right to any other proceeding for the recovery of that debt, or the enforcement of that right, and thus the door is closed against useless litigation and multiplication of costs.

The plaintiff seemed to understand the law as we understand it, for he commenced his original proceedings against all parties in conformity with the requirements of the two hundred and forty-sixth section. He voluntarily dismisses his suit, as against these defendants, and proceeds against the others, and obtains his decree and judgment, and by so doing he lost his right to proceed against the defendants as indorsers, and must look to his decree and the mortgaged property for his satisfaction. If the holder of a debt, secured by mortgage, may do this, in defiance of the express provisions of the law, he may sacrifice the mortgage premises, by proceedings without notice to the other parties, to foreclose his mortgage by a separate proceeding, and buy in the property, at some nomi-

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nal sum far below its value, and still enforce his claims to the full amount against all others liable to him, or may drive them to expensive litigation, to get the benefit of the securities. This is directly violative of the whole policy of the law. At all events, before he should be permitted to pursue such course, he should at least be compelled to realize the benefit of his foreclosure proceedings, before he should be permitted to maintain a separate suit against the defendants upon their liability upon his note. As this Court said in the case of *McGarvey v. Hall*, 23 Cal. 141, the defendants have a clear right to set up the mortgage as a defense, and a right to have the mortgaged premises applied in satisfaction of the debt.

Delos Lake, for Respondent.

The obvious intent and object of this statute was to avoid and prevent a multiplicity of actions against the debtor. It was made for the benefit of the mortgagor alone.

In the absence of statutory regulations a mortgage creditor had it in his power to harass his debtor with three actions at one and the same time, *i. e.*, an action at law to recover the debt, an action in equity to foreclose the mortgage, and an action of ejectment.

Ejectment to recover possession under a mortgage was prohibited by section two hundred and sixty of the Practice Act. But until the amendment to section two hundred and forty-six, passed in 1860, the mortgage creditor could maintain separate actions to recover his debt and to foreclose his mortgage.

(The additional amendment of 1861 was to correct a mere verbal inaccuracy.)

By this section the creditor is restricted to one action, against his debtor, who has secured his debt or obligation by mortgage—the mode of proceeding being minutely pointed out by the statute.

The whole scope of the statute is that a promissor who has secured the performance of his promise by mortgage, shall be

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subjected to but one action, which shall include his promise and his security. The term "debt" or "right" in the statute obviously has reference to the obligation which the mortgage is intended to secure.

The maker of the promissory note in question executed the mortgage to secure the performance of *its* promise or obligation, not to secure the performance of the obligation of the indorsers, and as against the mortgagor there can be but one action.

The obligation of an indorser is wholly different from that of the maker. He is not jointly liable with the maker, and but for section fifteen of the Practice Act, could not be joined in the same action. His agreement is, that in case the maker does not perform his promise, he, the indorser, will pay the sum which the maker has promised to pay.

The action against the indorser is not on the maker's promise, but on the indorser's promise.

By the Court, SHAFTER, J.

The defendants are charged by the complaint as indorsers of a promissory note. The following facts are set forth in the agreed statement on motion for new trial:

"On the fifteenth day of December, 1858, the plaintiff loaned to the French Town Canal and Mining Company, the sum of fifteen thousand dollars, for which sum the said company made their promissory note payable to the order of the above named defendants, who indorsed the same for the accommodation of the said makers, the French Town Canal and Mining Company; and, after such indorsement, said note, so indorsed, was delivered to the plaintiff.

"That at the maturity of said note, the same was duly presented to said makers, for payment, at the office of R. E. Brewster & Co. in the City of San Francisco (being the place named in said promissory note,) and payment thereof demanded and refused, and that the above named defendants were duly notified of such demand and non-payment. That there was

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due on said promissory note, and unpaid, the sum of fifteen thousand four hundred and seventy-five dollars and ninety-one cents, after deducting all payments, and that the plaintiff is the owner and holder of said note.

"That simultaneously with the making, indorsing and delivery of said promissory note, the said makers, the French Town Canal and Mining Company, made, executed and delivered to the plaintiff a mortgage, conditioned for the payment of said sum of fifteen thousand dollars and interest, so loaned, as above set forth, to said company, according to the terms of said promissory note, and as security therefor; by which said mortgage said company mortgaged to the plaintiff certain real estate and premises in the County of Butte, known as the French Town Canal and Mining Company Water Ditch.

"That on the 13th day of January, 1862, said plaintiff instituted suit in the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco, wherein the said French Town Canal and Mining Company, and the defendants in this suit, and others, were defendants, to foreclose said mortgage and sell said mortgaged premises to satisfy said note and for judgment and payment against the said French Town Canal and Mining Company, and the defendants in this suit, for the amount which might be found to be due to the plaintiff for principal and interest upon the said note and mortgage, after applying the proceeds of sale of the mortgaged premises toward the payment of the same, and the costs of the said action.

"That on the first day of September, 1862, said last named Court made an order sending said cause to the County of Butte, in the then Fifteenth Judicial District of this State, for trial in the said County of Butte, on the fourth day of November, 1862; and at the trial of said cause said action was, on motion of counsel for plaintiff, dismissed as to the said defendants herein, and brought on for trial against said French Town Canal and Mining Company and others; and judgment was rendered in said cause that there was due to plaintiff therein,

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on said note secured by said mortgage, on the 4th of November, 1862, the sum of ten thousand seven hundred and fifty-five dollars and fifty-four cents, with interest at the rate of two and a half per cent per month; that said mortgaged premises be sold, and in case of deficiency in the proceeds of such sale to satisfy said debt, interest and costs and expenses, on the coming in and confirmation of the Sheriff's report of such sale, that the said French Town Canal and Mining Company should pay to plaintiff such deficiency, with interest aforesaid; and that said judgment remains in full force, unreversed and not appealed from."

It is insisted on behalf of the appellants that this action cannot be maintained against them in view of the two hundred and forty-sixth section of the Practice Act as amended in 1860, and in 1861. The section is as follows:

"There shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage or lien upon real estate or personal property; which action shall be in accordance with the provisions of this chapter. In such action, the Court shall have power by its decree or judgment, to direct a sale of the encumbered property (or of such part thereof as shall be necessary) and the application of the proceeds of the sale to the payment of the costs and expenses of sale, the costs of suit, and the amount due to the plaintiff. If it shall appear from the Sheriff's return that there is a deficiency of such proceeds, and a balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall from the time of such docketing be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the Clerk of the Court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor."

There are but two views possible, as to the meaning of this section — first, that the inhibition contained in it, is limited to the case where the mortgage given is collateral to the particular right which the action is brought to enforce; or, second,

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that the inhibition not only extends to cases of that class, but comprehends cases also where the mortgage is not collateral to that right. The question has been argued, to some extent, on considerations of convenience; but the intention is to be sought for primarily in the language of the section quoted, subject to the settled rules of interpretation and construction.

There may be a question, as suggested by respondent's counsel, as to whether the liability of an indorser sounds in "debt," in the common law sense of that term. But it is unnecessary to determine the point, for the word "right" is used in the same connection as the "debt;" and whatever material element there may be, not included within the latter term, would of course be comprehended by the former. If an indorser does not owe a "debt" to his indorsee technically considered, there can be no doubt that the indorsee has, as against the indorser, all the "rights" of a promisee. For all the purposes of discussion, then, the words "for the recovery of any debt" may be eliminated, leaving the section to read as follows: "There shall be but one action for the enforcement of any right secured by mortgage," etc. The right referred to, is obviously, not the right of a mortgagee as such, but a right existing independently of the mortgage, and which the mortgage is given to secure—a right, in short, the correlative of which is a liability *in personam*; and it results, that the provision may be paraphrased as follows: "There shall be but one action for the enforcement of a personal liability secured by mortgage," etc. The words "secured by mortgage" are descriptive of the right or personal liability, contemplated by the section, and any personal liability not so secured is manifestly without its purview. This action is brought for the enforcement of a personal liability, and if that liability is not secured by mortgage, then the action can be maintained.

On what may be called the question of fact involved in this proposition, it would seem that opinions could not be divided. The mortgage given in this case, was executed by the makers of the note, and the only personal liability secured by it, or

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intended to be secured by it, was that of the makers of the note—as such; or to use the language of the section, the only “right,” secured by the mortgage, was the right of the plaintiff, as indorsee of the note, to call upon the makers to fulfil their personal promise. The promise of a maker of a note is one thing, and the promise of an indorser is another. One is primary and the other is secondary; one is absolute, the other turns upon conditions; each may be secured by a separate mortgage, or one mortgage may be so framed as to secure them both. But a mortgage which by its terms is made applicable to the promise of the maker only, can in no just sense be regarded as collateral either to the personal liability or to the “right” of which the contract of indorsement is the source: On the ground, then, that the right which this action is brought to enforce is unsecured by mortgage, we consider that the plaintiff is at liberty to pursue the defendants *in personam* on their contract of indorsement.

The order granting a new trial is affirmed.

P. CUNNINGHAM v. T. H. HAWKINS.

PROOF THAT DEED WAS INTENDED AS MORTGAGE.—Parol testimony is admissible to show that a deed, absolute on its face, was intended by the parties to be a mortgage, and this rule applies to cases in law as well as in equity.

EVIDENCE IN EJECTMENT.—In actions to recover real property, testimony is admissible to show that a deed, absolute on its face, was intended as a mortgage.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

This was an action to recover possession of one undivided fourth part of a mining claim situated at Poverty Hill, Sierra County.

The complaint averred that on the first day of September, 1861, the plaintiff was the owner of and in possession of the interest in the claim in dispute, and that on the same day defendant entered and ousted him from the possession thereof.

Statement of Facts.

Plaintiff, on the trial, proved that on and before the 16th day of February, 1856, one James Cunningham was the owner of and in possession of the interest in dispute, and that on the same day he sold and delivered possession thereof to one James H. Bartlett.

Plaintiff then introduced in evidence the following bill of sale:

"POVERTY HILL, May 13th, 1856.

"*Know all men by these presents*, that I do, for and in consideration of the sum of two hundred and two dollars 65-100, with interest from date till paid by me, transfer all my right, title, and interest in the claims known as Bartlett, Craig & Co.'s, on Poverty Hill, to Geo. Raskt & Co. Said interest consists of one fourth part of six claims.

"JAMES H. BARTLETT.

"JAMES CUNNINGHAM,

"GEORGE WEST."

Plaintiff then proved that the land described in plaintiff's complaint was, at the time said conveyance was made, known and designated as Bartlett, Craig & Co.'s Claims, and that the interest described in said conveyance was the same interest in said land that this action is brought to recover. That the firm of Geo. Raskt & Co. named in said conveyance, was composed of Geo. Raskt and the defendant, T. H. Hawkins.

Plaintiff then gave in evidence a note from James H. Bartlett to Raskt & Co., of which the following is a copy:

"POVERTY HILL, Sierra County, Cal., May 13th, 1856.

"On demand, for value received, I promise to pay to Geo. Raskt & Co. the sum of two hundred and two dollars 65-100, with interest at the rate of three (3) per cent a month till paid.

"\$202 65-100.

JAMES H. BARTLETT.

"Witness: GEO. WEST."

Plaintiff then offered to prove by the testimony of the said James H. Bartlett that the conveyance was intended as a mort-

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gage to secure the payment of the note, and not as an absolute conveyance.

Plaintiff then introduced in evidence a deed from said Bartlett to him of the property in dispute, dated August 1st, 1861, and proved that a few days after the execution of the same he exhibited the same to defendant, and offered to pay him any demand he might have against said Bartlett which was a lien on the premises.

Defendant recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Williams & Johnson, for Appellant.

It is now the settled rule in this State, and has been since the question was first before Mr. Justice Field, that parol evidence is admissible in equitable actions to show for what purpose a written instrument was given, when that evidence is pertinent to the issues made. We are unable to see a reason for a different rule in actions at law. Possession and the Statute of Limitations were made issues by defendant in this case, and we had a right to bring ourselves within the statute, and to show our possession by showing that Hawkins held as mortgagee. If in doing this it becomes necessary to prove for what purpose a writing was given, we have unquestionably the right to make the proof. True, the written instrument best proves its contents; nor do we seek to change or disturb the wording of the instrument, or its meaning — but we asked to show for what purpose it was given.

Creed Haymond, for Respondent.

By the Court, SAWYER, J.

Plaintiff introduced in evidence an instrument in writing executed by James H. Bartlett, dated May 13, 1856, purporting to transfer to George Raskt & Co. "all my (his) right, title and interest in the claims" in dispute, "in consideration of

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the sum of two hundred and two dollars and sixty-five cents, with interest from date till paid by me." Also, a note given by said Bartlett to said Raskt & Co., bearing the same date, for the sum of two hundred and two dollars and sixty-five cents, payable on demand with interest until paid, at three per cent per month. He then offered to prove by Bartlett, that, the said instrument transferring said claims was intended by the parties to be a mortgage to secure the payment of said note. Upon objection of defendant the testimony was excluded by the Court, and exception taken to the ruling by plaintiff. The ground of the objection, is, that the evidence is irrelevant, and that it is inadmissible to show by parol that the instrument was intended as a mortgage. The testimony is relevant; and it is now settled in this State that parol evidence is admissible to show that a deed absolute on its face was intended to be a mortgage. (*Pierce v. Robinson*, 13 Cal. 116; *Johnson v. Sherman*, 15 Cal. 291.) Nor can the rule be confined to cases that formerly were cognizable in equity alone. There is but one form of action in this State, and the same rules of evidence must be applied alike to all cases. It may be that formerly the rule prevailed only in cases in equity. But, however that may be, there is no distinction in this State.

Section two hundred and sixty of the Practice Act provides, that, "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." If the rule contended for by the respondent prevailed, this provision of the statute would be nugatory, for the reason that when the mortgage is in its terms an absolute conveyance, the mortgagor would be prohibited from showing the real character of the transaction. The position contended for by the respondent would resolve the question into one of pleading, rather than a question as to the competency of evidence. But there is no equitable title to be set up. The plaintiff, if he has any title at all, has a legal title. A mortgage under our system, as between the parties, does not pass the legal title to the grantees. The title

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remains in the mortgagor until it is divested by a foreclosure and sale, whatever the terms of the mortgage may be.

There was error in excluding the testimony, and as we cannot know but that the Court might have come to a different conclusion and decision, had the testimony been admitted, there must be a new trial.

The order denying a new trial is reversed, and a new trial ordered.

JOHN ANDERSON v. J. G. DOLL.

INTERLINERATION IN WRITTEN CONTRACT.—If the owner of a horse delivers him to another party in pledge to secure the payment of a debt, and the parties contract in writing that the pledgee may keep the horse one year, paying for his use a stipulated sum, and may further keep him a second year upon the same terms, by giving proper notice of his election to do so, and the copy of the contract kept by the pledgee is interlined the next day by consent of parties so as to allow the pledgee to keep the horse two years more, instead of one, and the owner afterwards sells the horse and contract to a third party, and the pledgee gives notice of his election to keep the horse one year more, and at the end of that time accepts from the purchaser the money due from the pledgee, these circumstances are evidence that the pledgee regarded the original contract as binding.

LICENSE TO DO BUSINESS NOT A TAX.—A license paid to keep a stallion is not a tax upon his assessed value.

APPEAL from the District Court, Second Judicial District, Tehama County.

Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The findings of the Court below show that the contract was executed in duplicate the day it bears date, and that on the subsequent day the alterations were made in the presence of Welsh, and with his consent, and for the express purpose of extending the time to three years.

Courts, in the construction of written contracts, always

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endeavor to give effect to the intention of parties, provided they can do so without violating any rule of law.

"A material alteration in a note or bill, made by the consent of all parties, is valid and binding. * * * Consent may be subsequent, as well as prior to the alteration, since the parties must be as competent to alter their contract after it was made as originally to make it."

The law of the alteration of other instruments is the same as that of negotiable paper. (2 Parsons, 581.)

While it might be true that Welsh, the vendor of Anderson, would be responsible to him for selling and assigning a paper that was not what it purported to be, it is extremely difficult to see what Doll had to do with the transaction, or how Doll is estopped from claiming his just rights under his contract by any transaction that might have occurred between Anderson and Welsh. It is not pretended that Doll was asked by what terms he held the horse, and that he made false representations on which Anderson acted to his injury. Nor is it possible to bring plaintiff's case within any definition of an estoppel. (*Boggs v. Merced Mining Co.*, 14 Cal. 279; *Davis v. Davis*, 26 Cal. 23.)

Townsend & Combs, for Respondent.

By the terms of the contract only the "taxes upon the horse" were to be refunded by Welsh, not the taxes upon the use of the horse in a particular manner, to wit: for public hire.

The Court finds that "before the commencement of the standing season of 1863, defendant, in accordance with the contract, gave notice that he elected to keep the horse during that season." This furnishes the strongest inference from the defendant's own act that he knew that his right of election was only for one year after the first, and not for two, as he afterwards set up in his answer.

By the Court, CURREY, J.

This is an action of replevin for a thoroughbred stallion called "Rifleman," valued in the complaint at six thousand dollars. It appears from the record that on the 18th of February, 1862, one Welsh, then the owner of the horse Rifleman, borrowed of the defendant one thousand dollars, for which he gave him his promissory note, bearing interest at the rate of one and one half per cent per month. To secure the payment of the sum so borrowed, Welsh delivered the horse in pledge to the defendant. The defendant, wishing to use the horse, agreed to pay Welsh one thousand dollars for the use of the horse one year, and it was further agreed between the contracting parties that the defendant should have the privilege of keeping the horse another year, upon the same terms, upon giving proper notice of his election to do so; in which event the note mentioned was not to become due until the lapse of the extended term. The defendant was to pay the expenses of keeping the horse, and also the taxes upon his assessed value. The taxes so paid were to be refunded with interest by Welsh to the defendant at the expiration of the term.

On the sixth of September, 1862, Welsh sold the horse to the plaintiff, and at the same time assigned to him the contract entered into between himself and the defendant. Early in the year 1863 defendant gave notice, in accordance with the terms of the contract, of his election to keep the horse the second year. Immediately after the second year had expired the plaintiff demanded of the defendant the horse, and at the same time tendered him the amount due on the note due him from Welsh, and also the sum due for the taxes on the assessed value of the horse for State and county purposes for the years 1862 and 1863, and the interest thereon at the rate stipulated. The sums so tendered the defendant accepted, but refused to surrender the horse. The plaintiff then brought this action. In defense the defendant alleged that by the contract he was entitled to have and hold the horse for three years, and also that the county

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license tax for the years 1862 and 1863 for keeping the stallion for hire was not paid him.

The Court found that by the original contract the defendant had the right by his election to extend the term of holding the horse in his possession for one year in addition to the first year stipulated, so that by its terms the whole period would expire in the spring of 1864. It was also found that the copy of the contract offered in evidence by the defendant was interlined so as to give him the right to elect to keep the horse two years instead of one, additional to the first year; and that it was in evidence that the interlineation was made by the defendant in the presence of Welsh and with his consent on the day after the original contract was executed, but that there was no evidence that the plaintiff had notice of the change so made in the defendant's copy or counterpart of the contract as first executed.

If it were admitted that the change made by the interlineation referred to, could have operated to give the defendant the right to elect to keep the horse two years in addition to the first year, instead of one only, even as against the plaintiff who purchased the animal without notice of the change, still it does not appear that he made such election, but on the contrary it is found by the Court that the defendant did elect in terms to retain the possession and use of the horse for the second year only; besides which it is also found that the defendant accepted the money on the note for one thousand dollars, and also the taxes on the assessed value of the horse with the interest thereon as due. These several circumstances are to our minds strong evidence that the defendant regarded the original contract as the one of binding validity. If the original contract was not subsisting and binding at the time he gave notice of his election to keep the horse the second year, then he was not entitled to have and hold him under such notice.

The defendant further controverted the plaintiff's right to recover, on the ground that the county license tax for the years 1862 and 1863 were not paid him. This objection we think

Statement of Facts.

not well founded. The amount paid for a license to do a particular kind of business could not be charged to the owner of the horse under the terms of the contract to refund the amount paid for taxes on the horse.

We are satisfied the Court below came to a correct conclusion as to the rights of the parties upon the facts found, and that the judgment should be affirmed.

Judgment affirmed.

Neither Mr. Chief Justice SANDERSON nor Mr. Justice SAWYER expressed any opinion.

A. DELAND v. HARVEY H. HIETT.

DISCHARGE OF A JUDGMENT.—A payment of part of the amount due upon a money judgment under an agreement that it shall operate as satisfaction in full will not discharge the judgment.

VOID AGREEMENT.—An agreement to discharge a judgment for a sum less than the amount for which it was rendered is void.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The complaint averred that on the 22d day of April, 1861, W. S. Webb recovered a judgment against the plaintiff in the District Court of Yuba County, for four thousand three hundred and forty dollars, to bear interest at three per cent per month, and that J. O. Goodwin was the attorney of record for said Webb. That on the 18th day of October, 1861, W. S. Webb assigned the judgment to J. R. Webb. That on the 31st day of May, 1862, plaintiff paid said Goodwin one thousand dollars in full satisfaction of said judgment, and that said Goodwin, then and there acting on behalf of said Webbs, and at the request of said Webbs, and being authorized by them to do so, agreed to receive and did receive said money in full satisfaction and payment of the judgment, and with the knowledge and consent of said Webbs, acknowledged in writing

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upon the margin of the judgment roll, satisfaction of the judgment, in the words and figures as follows:

"For value received, the within and foregoing judgment is hereby satisfied in full. May 31, 1862.

"J. O. GOODWIN,

"Attorney of record and a fact for W. S. and Josiah R. Webb."

That on the 13th day of October, 1862, J. R. Webb assigned the judgment to defendant Hiett, and that he received the assignment with full knowledge of the facts, and that he was threatening to compel payment of the judgment by execution and forced sale of plaintiff's property.

The complaint prayed that the judgment be decreed satisfied, and that the defendant be enjoined from proceeding to enforce the collection thereof by execution or otherwise.

The answer denied that defendant, when he received the assignment, knew that the judgment was paid in whole or in part, or that he knew satisfaction of the same had been entered of record, and admitted the other allegations of the complaint.

The case was submitted on the pleadings.

The Court adjudged that the judgment be credited with one thousand dollars, but denied the injunction.

Plaintiff appealed.

H. K. Mitchell, and *George Cadwalader*, for Appellant, cited as to satisfaction and receiving part in payment of the whole, 2 Parsons on Contracts, 129, and note; 5 Cranch, 11; 5 Johnson, 390.

N. E. Whitesides, for Respondent.

By the Court, SHAFER, J.

The question in this case, is, whether a payment of a part of the amount due upon a money judgment will discharge the judgment, the payment having been made under a dry agree-

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ment that it should operate as a satisfaction in full. It was held in *Cumber v. Wane*, 1 Strange, 426, the leading case upon the subject, that a liquidated indebtedness, presently due, could not be discharged by a payment of less than the whole sum; and in the case of *Fitch v. Sutton*, 5 East, 230, the doctrine is not only reasserted, but the reason of it is given—such a contract is *nudum pactum*. The question has been adjudged, probably in every State in the Union, and the rule has been uniformly affirmed, and on the ground stated. There is a diversity of cases that are sometimes spoken of as exceptions to the rule, but they are, more properly, not within its scope. A composition, going solely upon the grounds stated, is universally bad. Inasmuch as the discharge in this case was of record, it is possible that it might operate as an estoppel, were it not for the fact that the complaint itself goes behind the record and exposes the fact that the discharge was entered in pursuance of a *nudum pactum*. The cases bearing upon the main question are collected in 1 Smith's Leading Cases, page 147, where the present state of the law upon the point is fully and learnedly exhibited in the note on *Cumber v. Wane*.

The judgment is affirmed.

PATRICK CREIGHTON v. JOHN S. MANSON.

STREET IMPROVEMENTS BY A MUNICIPAL GOVERNMENT.—The municipal government of a city, in causing street improvements to be made, acts under the authority conferred upon it by the Legislature, and is subject to all the constitutional limitations and restraints imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act.

ASSESSMENT NOT A TAX.—An assessment levied by a municipal Government upon lots adjacent to a street to pay for improvements made on the street. If held to be a tax, cannot be maintained, because it lacks the constitutional requirement of equality and uniformity.

STREET IMPROVEMENTS IN A CITY.—The Legislature has not the power to charge the persons who reside on a street in a city with the expenses of an improvement on that street.

CONSOLIDATION ACT AS TO STREET IMPROVEMENTS.—The Legislature has not, by the Consolidation Act for the government of San Francisco, and the amendments thereto prior to 1862, done anything more than to provide for a lien upon lots adjacent to a street for improvements made on the street.

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and define the manner in which the same may be enforced. These Acts do not create any personal liability on the part of the owners of such lots for such improvements, nor does the amendment of 1862 create any personal liability for work done or to be done under contracts entered into before its passage.

ASSESSMENT ON LOT FOR IMPROVEMENT OF STREET.—If, under the power to take private property for public uses upon making a just compensation therefor, the Legislature possesses the power to levy an assessment upon lots in a city adjacent to a street to pay for improvements made on the street, the assessment cannot exceed the value of the benefit conferred on the lot or its owner by the improvement, and can be enforced only by proceedings to subject the lot to a sale in discharge of the lien.

SAME.—Such assessment cannot be laid on the lot or its owner when the lot has received only an injury by the work on the street for which the assessment is levied.

STATUTE CREATING A LIEN ON A LOT FOR STREET ASSESSMENTS.—A statute creating a lien upon a lot in a city to secure the payment of an assessment levied on the lot for improvements in the street adjacent, must be strictly construed, and the proceedings authorized by the statute to create and enforce the lien must be followed precisely as directed, or the whole proceeding will be void.

RESOLUTION TO GRADE STREET IN SAN FRANCISCO.—A resolution of the Board of Supervisors of the City and County of San Francisco of intention to grade a street, must be presented to the President of the Board for his approval; and if not so presented, no lien can be enforced on the lots adjacent to the street for assessments for grading the same.

HOW MUNICIPAL LEGISLATURE CAN ACT.—The legislative department of a city government can act only through the medium of an ordinance, but the ordinance may be in the form of a resolution, or be preceded by the words "Be it ordained," etc.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendant appealed from the judgment.

The other facts are stated in the opinion of the Court.

Haight & Pierson, for Appellant.

We know of no precedent in legislation or in judicial decisions under a Constitution like ours for creating a personal liability against an owner for an improvement of this kind over and above the value of the lot. The usual remedy is to assess the expense of the work upon the property responsible for it, without loading the owner with a heavy penalty over and above the value of his lot.

The adjudications on questions arising heretofore under similar laws do not control the present case, because no similar one has ever been decided.

Argument for Appellant.

The facts of this case being radically different from those of any previous one, present a different question for determination.

A law making one responsible without his knowledge or assent for an expenditure which results in impairing or destroying the value of his property, should manifestly receive a strict construction, and a strict compliance should be exacted in favor of the latter. It is a question not of moral or equitable obligation, but of naked technical legal liability.

The cases in which this principle has been decided are collected in the second chapter of Blackwell on Tax Titles, page 48, and following. (See, also, *Sharp v. Spier*, 4 Hill, 76; *Sharp v. Johnson*, 4 Hill, 92.)

Most of the cases referred to in Blackwell are those of a sale of land for taxes, and the rules applicable to such sales are too familiar to need comment.

There is an obvious duty to pay taxes, but no such obvious duty to incur a heavy expense in making a highway for the use of the population, resident and transient, of a great city. The rule is a most salutary one in the case of general taxes, as universal experience demonstrates, and should not be relaxed, but rather made more stringent; much more in the case of a special and onerous exaction, no argument is needed to show that the most severe and stringent rule should be adopted and the most exact compliance required. In such statutes nothing is left to the discretion of the officer. None of the provisions are directory, which can be obeyed or not without affecting the validity of the proceeding. Every step required to be taken by the statute must be taken, or the defendant will not be liable.

Whether the proceeding is one that creates a liability for a definite sum of money, or deprives a man of a piece of land equal in value, does not change the principle. Whether a man is made liable for one thousand dollars, or loses a piece of property of the value of one thousand dollars, the effect and rule of construction in both cases are the same.

Some have argued that a statute which authorizes taking

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from a man a sum of money without his consent, is not to be construed so strictly as one which takes from him a parcel of land of equal value. The bare statement of the proposition refutes it sufficiently.

The fact that in the case of a pecuniary liability a suit has to be brought is of no importance, if the defendant is not at liberty to require on the part of the plaintiff a strict compliance with the law. Of what advantage in such a case is the privilege of a defense, if the defendant cannot avail himself of omissions and failures to comply? The defendant cannot go outside of the statute to show equities in his defense. No matter how inequitable the plaintiff's claim may be, if the law has been pursued, there is no remedy. The plaintiff has simply to say, "*ita lex scripta est.*" He cannot complain, therefore, of being tried by the same rule which he invokes.

The first objection is that no legal or official action was taken by the Board of Supervisors to cause notice of their intention to be given. Section sixty-eight of the Consolidation Bill, (Stats. of 1856, p. 164,) provides that "*every ordinance or resolution of the Board of Supervisors, providing for any specific improvement, and for laying a tax or assessment, shall, after its introduction, be published five days;*" and "*every such ordinance, after the same shall pass the Board, shall, before it takes effect, be presented to the President for approval. If he approve he shall sign it; if not he shall return it,*" etc. "*If at any stated meeting thereafter, two thirds of all the members elected to the Board vote for such ordinance or resolution, it shall, despite the objections of the President, become valid.*"

Section forty provides that whenever the Board shall determine to grade any street, they shall cause notice of their intention to be published for the period of ten days, etc.

The resolution of intention is the foundation of the whole proceeding—the first step upon which the others rest. It provides for a *specific improvement*, and for laying an assessment; it must be presented to the President for his approval; without his approval it is no more the official act of the Board

Argument for Respondent.

of Supervisors than if it had been signed by a majority of the members not convened in session as a Board. Without the signature of the President it lacks the very element required by the statute.

Daniel Rogers, for Respondent.

Appellant's counsel contend that the assessment is void and unconstitutional; inasmuch as it conflicts with that part of section eight of Article I of the Constitution, which declares "nor shall private property be taken for public use without just compensation." It is also contended that the appellant cannot be made to pay an amount over the assessed value of the property. These positions are untenable. The Superintendent, in the execution of the contract, is the agent of the owner as well as the city. The principle involved is the same as laying a tax; upon failure to pay in either case, the property is liable to sale. The tax is for the benefit of the public, and yet it cannot be urged that upon a sale for taxes property is taken for public use without compensation. The improvement for which this suit is brought, is, to some extent, of general benefit—yet more chiefly for the benefit of the immediate neighborhood. The benefit is immediately to adjacent property holders, and only indirectly to the city. (*Argenti v. City of San Francisco*, 16 Cal. 283.)

This Court has already decided that assessments for street repairs are constitutional, without respect to the amount assessed being disproportionate to the assessed value of the property. (*Hart v. Gaven*, 12 Cal. 477.)

C. H. Parker, also for Respondent.

The first objection is based upon the assumption that the notice of intention falls within the provisions of section sixty-eight. This is a mistake. The *modus operandi* is this: The Superintendent, whose duty it is to see what street work ought to be done, recommends to the Board that a street should be graded. At the next meeting, the Board, acting

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upon this information, passes a resolution stating that it is their *intention to order* (or *provide* for) said grading. This *notice of an intention* is a *feeler* thrown out by the Board to ascertain the wishes of the parties interested, and to enable them to protest, if they choose, against "*providing*" for this "*specific improvement.*" Now, an *intention* to provide, is not *actually providing*, any more than the announcement of an *intention* to go to Sacramento necessarily involved the *actual going* to Sacramento. The Board may never proceed any further in the matter; if so, it cannot be said that they have *actually provided* for said specific improvement. It is one of a series of resolutions—a notice—but it is not *the* resolution of the series "*providing* for any specific improvement." After ten days publication, there being no objection to the grading of the street—all things being ready—the Board pass a resolution "*providing*" for the grading. This is the important resolution: and for this the old law required the formalities of section sixty-eight to make it effective. (The law of 1862 has dispensed with all this formality, so far as street improvements are concerned.)

It was never understood that the resolution of intention was within section sixty-eight, and it was seriously doubted whether the second resolution was within it. (9 Paige, Ch. R. p. 24.) Section sixty-eight was intended to cover only those resolutions which were not preceded by a *prior resolution* of intention.

By the Court, RHODES, J.

This action is brought to recover of the defendant the amount of the assessment levied upon a lot in San Francisco, by the Superintendent of Public Streets and Highways, to pay the plaintiff, as the contractor, for his services in grading Union street; also to enforce the assessment as a lien upon the lot.

The defendant was the owner of the lot when the services were performed, and still remains the owner. Previous to the making of the contract for the grading of the street between

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the Superintendent and the contractor, the lot was appraised, for revenue purposes, at fourteen hundred dollars. The assessment amounts to nineteen hundred and eighty-nine dollars and fifty-four cents. The lot is rendered worthless in consequence of the grading of the street. The Court gave judgment against the defendant for the amount of the assessment, and decreed that the plaintiff should have a lien on said lot to the amount of said judgment.

The construction and improvement of streets are public works, and are intended for the benefit of the public at large; and though the presumption may be indulged in that the larger portion of the benefit inures to the owner of the contiguous property, yet it is but a presumption which in a large proportion of cases is not true, and it remains but a presumption that is liable to be rebutted by proof of the truth. The streets, although public works and designed for public use, are not always constructed at public expense, but more generally they are graded and improved under the direction of the municipal authorities, at the expense of the contiguous lots and lands. The municipal governments, in causing street improvements to be made, act under the authority conferred upon them by the Legislature, the authority being a portion of the sovereignty delegated to them for the purposes of municipal government.

The municipal government, in the exercise of the authority thus conferred, is subject to all the constitutional restraints and limitations imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act. It can make no order for the improvement of a street, and make no provision for the payment of the expenses, that the Legislature might not do if it should act directly in the matter. When the improvement has been made, an assessment is levied upon the adjacent real estate by the city government, in such manner as the Legislature has directed, to pay for the expenses of the work. Is the right to levy the assessment thus conferred upon the city a portion of the power possessed by the Legislature of

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raising money for public purposes by taxation, or does it rather fall within the right of eminent domain? If not derived from one of these, it is difficult if not impossible to refer it to any source of legislative power under the Constitution. It appears to us very clearly that the assessment is not a tax, and though the authorities are not uniform on this point, we think the opinion of Mr. Chief Justice Bronson in *Sharp v. Spier*, 4 Hill, 76, and in *Sharp v. Johnson*, Id. 92, unanswerable and decisive against its being regarded as a tax. (See also the able opinion in *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. 209; and *Municipality No. 2 v. White*, 9 Louis. Ann. 446.) If held to be a tax, it would be in violation of the cardinal rule of the Constitution which requires taxation to be equal and uniform. The Legislature may lawfully divide the State into districts, as counties, townships, cities, etc., and may provide that the authorities of each district may raise money for local purposes by taxation, and the amount may vary in the several districts, but the tax must be equal and uniform upon the persons and property subject to taxation in each district. If the assessment for street improvements is a tax it would be no more competent for the city government to levy the entire amount of it upon the property contiguous to the street that had been improved than to levy upon the same property the whole amount of the expenses of any branch of the municipal Government.

It is also very difficult to uphold the power of levying the assessment on the adjacent property upon the theory that it is parcel of the right of eminent domain, transferred by the Legislature to the subordinate authority. When private property, whether lands or personal property, or the value of either of them, is taken for public use, just compensation must be made therefor. In order to overcome this apparently unsurmountable difficulty, it has been often held that the owner of the property should be deemed to be compensated by the benefits in the way of an increase of value that the property has received by the adjacent improvements. We do not under

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take to say whether such benefits, as fallacious as they are in many cases, and of which this case is a striking instance, do or do not constitute a "just compensation," according to the requirements of the Constitution; but for the purposes of this case, we admit that such benefits may satisfy the constitutional demand. The cases sustaining this view, generally, but not uniformly, hold that this benefit resulting from the street improvements attaches itself to the adjacent property, and does not directly accrue to the person who may happen to be the owner. The owner, as an individual disconnected from the property, receives no other or greater benefit from the making of the improvement than each person within the corporate limits. The doctrine that a limited number of persons, who may happen to own property in a given locality within the city, shall be chargeable personally with the expenses of a public improvement, is not in accordance with the presumption on which those cases proceed, and cannot be sustained upon any theory of the constitutional authority of the Legislature—neither as included in the taxing power nor the right of eminent domain, nor, indeed, upon any theory except that of the absolute power of the legislative department of the Government—for it would be merely the exercise of the power of taxation freed from the constitutional limitations of equality and uniformity, and would be as odious in all its features as a forced loan, without the justification of imperious necessity.

When expenses for the improvements have been incurred by the city, or some one acting under her authority, it has been usual to give a lien upon the adjacent property, or to authorize it to be sold for the payment of those expenses, or some part of them. This brings us to the inquiry whether, by the provisions of the San Francisco Consolidation Act, and the amendments thereto, the Legislature has in fact done anything more than to provide for a lien upon the adjacent property and define the manner in which the same may be enforced. Sections forty-two, forty-seven, and other sections of the Act of 1856, provide that the expenses of the several

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kinds of work shall be borne by the adjoining property and shall become a lien thereon; and the amendatory Act of 1859, which was in force when the contract in this case was let, in corresponding sections, makes similar provisions.

The Act of 1862, which was in force when the work under the contract was completed, in the eighth section prescribes in detail the property that shall be liable for the payment of the different kinds of improvements; and a subsequent section provides that upon the doing of certain official acts the amount assessed upon each parcel of property shall be and constitute a lien thereon. It is apparent from these provisions of the Consolidation Act, that it was intended that the expenses of each street improvement should be borne by the contiguous lots; and there is no clause in the Act of 1859, or of the Act of 1862, which, either directly or by necessary implication, charges the owner of the lot personally with those expenses that are required to be assessed upon the lot, unless that is done by those provisions of the Act prescribing the mode of procedure for the collection of the assessment. No cause of action accrued in any manner to the plaintiff as against the defendant, to recover the assessment until after the Act of 1862 took effect; for the work was not then completed, and the several official acts had not then been performed which were requisite before he could sue the defendant. The plaintiff, in his own right, acquired no cause of action against the defendant for the services performed, for there was no contract, express or implied, between the parties, but the right of action was transferred to him by a sort of legislative assignment, and when transferred to him he took it subject to the laws then in force, so far as his remedy against the defendant was concerned, though the contract with the Superintendent may have been made under a former Act.

It is provided in section twenty-nine of that Act that "All proceedings which may have been taken under the law, for which this law is a substitute, and which are pending at the time this law shall take effect, may be continued and completed

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under this law;" and it is further provided by section thirteen that "In all suits now pending or hereafter to be brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this Act." Section thirteen of the Act of 1862, which is the only section of the Act authorizing the contractor to sue the lot holder to recover the assessment made as in this case, provides that the contractor after thirty-five days from the date of the warrant may sue "the owner of the land, lots or portion of lots assessed on the day of the date of the recording of the warrant, assessment and diagrams, or on any day thereafter during the continuance of the lien of said assessment, and recover the amount of said assessment remaining due and unpaid." The language and plain meaning of the section includes not only the person who owned the lot at the date of the recording of the warrant, assessment and diagrams as liable to be sued, but also each person successively who may thereafter and during the continuance of the lien be the owner. The statute does not provide a different remedy against the subsequent owner from that given against the owner at the time the lien attached, but it affords the same remedy in every case. The action is to be brought, not in the county in which the defendant resides, but in the county in which the lot is situated. The form of the judgment is also prescribed, the Court being empowered to "adjudge and decree a lien against the premises assessed and to order such premises to be sold on execution, as in other cases of sale of real estate by process of said Courts." The proceedings authorized to be taken in the case indicate that it was intended that the action should be an action *in rem* to enforce the payment of the assessment by a decree for the sale of the lot, and in proceedings of that character it was proper that the person owning the lot charged with the lien at the commencement of the action should be made a defendant to the action.

No one would contend that a subsequent purchaser of the lot was personally liable for the assessment, or that in enforcing the lien a personal judgment could be rendered against

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him. And it will be observed that no provision is made that judgment against the person owning the lot when the assessment was made may be taken in the action brought against the subsequent owner. It is beyond all doubt that the Legislature intended to charge the lot with the assessment, to give a lien upon the lot to secure the payment of the assessment, and to authorize the Courts to enforce the lien by ordering a sale of the property, but not to give any recourse against the owner or make him personally liable. If there was any doubt upon this point, we would be justified, and indeed required, to give the owner of the lot the benefit of the doubt, because, under the well established rules of construction, it is our duty to so interpret the Act, if its terms will admit of it, that it shall harmonize with the recognized rules of law and rights of property. It is not to be presumed, unless the terms of the Act imperatively require it, that the Legislature intended that under this Act such a wrong might be perpetrated as would result if the personal judgment against the defendant could be maintained for the recovery of the assessment, levied to pay for work performed not at his request, but against his objections, and when by the work, as performed, the value of his property was wholly destroyed.

It is proper to mention another principle, which we think is sufficient to control the whole case. If it is admitted that the benefits received by the property or its owner, by means of the improvements, will satisfy the constitutional requirement of a just compensation for the assessment levied upon the property, that theory is subject to the rule that the assessment must not exceed the value of the benefit conferred by the making of the improvement. This doctrine is laid down in *Matter of Fourth Avenue*, 3 Wend. 452; *Matter of Albany Street*, 11 Wend. 149; *Matter of Canal Street*, 11 Wend. 154; *Matter of William and Anthony Streets*, 19 Wend. 678; *Matter of Flatbush Avenue*, 1 Barb. 286; and is affirmed in *Canal Bank of Albany v. Mayor, etc., of Albany*, 19 Wend. 244; and *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. 209; and we think the doctrine is correct and applicable to cases

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like the one at bar. And certainly an assessment should not be laid either upon the property or the owner, where instead of a benefit to the property the owner has received only an injury by the work on account of which it is proposed to levy the assessment.

Judgment reversed and the cause remanded for further proceedings.

SAWYER, J., concurring specially.

I dissent from some of the views expressed in the opinion, but concur in the reversal of the judgment.

By the Court, RHODES, J., on petition for rehearing.

We have carefully considered the respondent's elaborate petition for a rehearing, but in the view we take of the case, a decision of several of the points therein made is unnecessary.

As suggested by the learned counsel, it may be far more convenient, in enforcing the payment of street assessments, to be permitted to take a personal judgment than a judgment *in rem* only, but that consideration would certainly not be seriously urged as a sufficient reason for allowing a judgment to be taken which was clearly in conflict with constitutional law.

If it is said that in the absence of a personal liability of the lot owner for the assessment, the contractor is liable to lose that portion of the assessment which exceeds the value of the lot presumed to be benefited by the improvement, for which the assessment was made, it may be answered that the same result might happen if the lot was the only property possessed by the lot owner; and further, that it is the duty of the contractor to see that some sufficient responsibility exists for the payment of his work; that is to say, to ascertain whether the lot is of value enough to bear the burden proposed to be imposed upon it for its improvement. It is as unquestionably his duty to see that ample liability exists for his payment as it is to know that a valid ordinance passed authorizing the work to be done, for he

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is dealing with officers vested with special and limited authority, and he must bear the consequence of his own errors and negligence.

We are earnestly pressed by the learned counsel for the respondent to grant a rehearing, because the case cannot be fully argued on briefs, as the law is special and complicated, presenting many points for discussion; but if our view of the situation and rights of the parties is correct, the points arising out of the details—the machinery—of the Act are immaterial to the decision of the leading question in the present action.

We are referred to section seventeen of the Act of 1862 as decisive of the question of the personal liability of the lot owner in favor of the contractor. It will be noticed that the contract was made under laws in force prior to the passage of the Act of 1862, and what we said in respect to the question whether a personal liability for the assessment was given by the statute, had relation, not to a case that might arise out of a contract executed under the Act of 1862, but to the case then before us growing out of a contract made under laws in force anterior to the passage of that Act. Although the Act of 1862 purports to create a personal liability, it does not in terms, nor by necessary implication, have a retrospective operation so as to create a personal liability for work performed or to be performed under contracts made before the passage of the Act. The Legislature, by the Act, granted to parties proceeding under the statute then in force the benefit of the remedies provided in that Act; but the grant of a new remedy—a mere mode of procedure to maintain an existing right—which is clearly within the power of the Legislature, is very different in substance and effect from the grant of a new or additional liability for services performed or being performed under an existing contract. We do not now, nor have we in the opinion already delivered, attempted to controvert the position of the respondent—that the Legislature have in express terms, in the seventeenth section of the Act of 1862, declared that the lot owner shall be personally liable for the payment of the assessment, but we hold that such liability can attach, if at all, only

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to contracts made after the passage of the Act, and when we said that the Legislature did not intend that the lot owner should be personally liable, we had reference to an assessment for work done under a contract made before, not after, the passage of that Act.

The principles upon which we rely for a solution of the principal questions in this case, and the course of reasoning adopted, may tend to show the invalidity of the personal liability clause in section seventeen of the Act of 1863, but the question of the validity of that clause is not in issue, because it has no application to the present case.

An assessment for the improvement of a street, levied solely upon the owners of the lots lying adjacent to the street that has been improved as a public street, and which is authorized by law to be collected from the lot owners as a personal charge, without regard to the benefit actually accruing to them by means of the improvement, is a tax, and as such is obnoxious to the objection that it violates the constitutional requirement of equality and uniformity.

We rest our opinion mainly on the proposition that street assessments, of the form of the present one, can be maintained; if at all, only on the theory that the power to levy such assessments upon the lots adjacent to the street that has been improved under the direction of the city government is parcel of the right of eminent domain transferred by the Legislature to the city; and that to maintain them even on that theory, it must be assumed that the benefits that the lots have received from the improvements constitute a "just compensation" for the lien cast upon them. The requirement of a just compensation to be made for private property taken for public use attends every exercise of the power by an authority subordinate to the sovereign power of the State, as well as by the State itself, and applies as well where the value or a part of the value of the property is taken by being subjected to the payment of a sum of money, as where the property itself, or some interest therein, is directly taken for public use. As a necessary consequence of this doctrine, the amount of the

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charge or lien imposed upon the property cannot exceed the value of the property, and the payment of the amount can be enforced only by proceedings to subject the lot to sale in discharge of the lien. The personal judgment rendered against the appellant is therefore erroneous.

The validity of the lien thus asserted, and of the judgment ordering the lot to be sold, must be ascertained mainly by an examination of the acts and proceedings required by law to be done and had by the officers of the city and the contractor previous to the time at which the alleged right of action accrued to the contractor. We previously omitted to consider this branch of the case because, the parties admitting the lot to be of no value, we deemed it unnecessary to ascertain whether the proceedings requisite to charge the lot with the payment of the assessment had been taken according to law, but as the contractor is entitled to his judgment, without regard to the value of the lot, if the proceedings have been regular, it becomes necessary to pass also upon the judgment ordering the lot to be sold.

Upon this question the appellant maintains that when summary proceedings are authorized by statute, the effect of which is to divest or affect rights of property, the statute is to be strictly construed, and that the power conferred must be executed precisely as given, and that any departure vitiates the whole proceeding. This doctrine is well expressed in the axiomatic language of Mr. Justice Bronson in *Sharp v. Spier*, 4 Hill, 76: "Every statute authority in derogation of the common law to divest the title of one and transfer it to another must be strictly pursued or the title will not pass." We expressed our concurrence in this principle in *Curran v. Shattuck*, 24 Cal. 427, as applicable to proceedings to acquire the right of way for a public road, and proceedings as in this case to acquire a lien for the payment of a street assessment are within the reasons of the rule.

We shall notice but one of the objections made by the appellant to the proceedings, and that is, that the resolution of intention of the Board of Supervisors to grade the street in question,

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was not presented to the President of the Board for approval according to the requirements of section sixty-eight of the Consolidation Act. It is a general rule that the legislative department of a city government can act only through the medium of an ordinance, unless the organic law specially provides another mode. The instrument containing the expression of the legislative will need not necessarily be in the usual form of a municipal ordinance and be preceded by the words "Be it ordained," etc., but it may properly be, as in this case, in the form of a resolution, but whatever its form, it amounts in substance to an ordinance, and must be passed in the mode prescribed for the passage of ordinances.

It is provided in section forty of the Consolidation Act, that the Board may order a street to be graded after notice of their intention has been published in a daily newspaper for the period of ten days, unless the owners of a specified proportion of the lands or lots bounded by the street shall make written objection thereto. The declaration of intention is the fundamental act of the whole proceeding to grade the street, and in the absence of the declaration of intention manifested by an ordinance or some act that is its equivalent in substance and effect, though differing from it in form, the whole proceedings must fail of compulsory effect. The manner of making the declaration of intention is not specified in the Act, but the power to make the declaration is conferred upon the Board and expressed in the same general terms as in the preceding and subsequent sections, is the authority to lay out a street or to order a street to be graded, and it is impossible to see why an ordinance or a resolution is not as requisite in declaring the intention to grade the street, as in ordering the street to be graded. If it is said that the resolution of intention is not comprised within the meaning of the words "every ordinance or resolution of the Board of Supervisors providing for any specific improvement," as used in section sixty-eight, it may be answered that the declaration of intention, whatever may be its form, is a legislative act, and as such must be passed in

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the mode prescribed by law; and for that purpose it must be presented to the President of the Board for his approval.

Rehearing denied.

SAWYER, J. concurring specially.

I concur in denying a rehearing for reasons different from those expressed in the opinion. I also dissent from the construction given in the opinion to sections forty and sixty-eight of the Consolidation Act.

THE PEOPLE v. JESUS YSLAS.

IMPEACHING A WITNESS.—Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness.

SAME.—An inquiry into the character of a witness for the purpose of impeaching his testimony must be restricted to his character for truth and veracity.

AN ASSAULT.—The statutory definition of an assault is substantially the same as at common law.

SAME.—An intent to commit violence, accompanied by acts which, if not interrupted or avoided by the retreat of the other party, would be followed by personal violence, amounts to an assault.

SAME.—It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance.

TESTIMONY IN CRIMINAL CASE.—On trial for an assault with intent to commit murder it appeared that the defendant committed the assault in the prosecutrix's house, and the prosecutrix immediately escaped and went to a butcher shop a few rods away, and that the defendant followed her thither after some few minutes had elapsed; *Held*, that what occurred between the prosecutor and defendant at the butcher's shop was admissible in evidence, at least on the question of intent.

WHAT IS AN ASSAULT.—To constitute an assault the party must have the intent to strike, the ability to do so, and must make the attempt.

CURREY, J.

IMPEACHMENT OF WITNESS.—Testimony to impeach a witness should not be confined to his character for truth and veracity, but should extend to his entire moral character, and a witness may be impeached by testimony showing that his general moral character is bad.

APPEAL from the County Court of Santa Clara County.

The testimony for the prosecution showed that the defendant entered the house of the prosecutrix and called for liquor, and was refused. He insisted, and it was given to him, when he

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called on the prosecutrix to drink, and upon her declining to do so, throwed the tumbler on the floor, threatened to kill her, and seized a hatchet and started towards her having it raised in a threatening attitude. The prosecutrix, when the defendant had approached within seven or eight feet of her, fled through the door into an adjoining room, and locked the door after her. The defendant then went up to the door and struck it with his hatchet. The prosecutrix, after waiting a few minutes, passed through another door and went to a butcher shop a few rods distant. The defendant, after waiting a short time, followed the prosecutrix to the butcher shop and again threatened her life.

The attorney for the defendant asked the Court to give the following instructions, which were refused:

"If the jury believe from the evidence that when the defendant rose from taking the hatchet in his hand, and before raising it in a striking posture, the prosecutrix, on whom the assault is alleged to have been made, had left the room in which he and she were, and shut the door, they will find the defendant not guilty as charged in the indictment, because whatever may have been his intention in taking hold of the hatchet, there was an absence of ability to carry the same into effect.

"If the jury believe from the evidence that defendant, while with the hatchet in his hand, did not attempt to throw the same at the prosecutrix, and did not raise it to strike her while within striking distance, they will find him not guilty as charged in the indictment.

"The testimony of the witness as to what took place in the butcher shop does not go to sustain the charge in the indictment, because the defendant had not at the time or there any weapon in his hand as charged in the indictment."

The other facts are stated in the opinion of the Court.

J. Alexander Yoell, for Appellant, referred to the following authorities on the question of the impeachment of the witness: 1 Greenleaf on Ev., note 2, p. 59; *People v. Rector*, 19 Wend.

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570; *People v. Murphy*, 14 Mass. 387; *State v. Boswell*, 2 Dev. 209; 1 Hill, S. C. 251.

J. G. McCullough, Attorney-General, for the People.

An assault is committed when the defendant, with the intent, makes the offer to commit the violence, with the apparent though not the actual power, not necessarily within striking distance, but so near as to put a man of ordinary firmness not in actual but in well founded apprehension of peril. And these are the true ingredients of the common law and of the statutory assault. In both there is the "unlawful attempt, coupled with the present ability to commit the injury," etc.

And we refer to some authorities, and especially to Bishop, the most philosophical criminal law writer of the age: *State v. Davis*, 1 Iredell, N. C. 125; 1 Whar. Crim. Law, §§ 1,241-3; 2 Bishop's Crim. Law, §§ 32, 36, 37, etc.; 1 Bishop's Crim. Law § 409.

The defendant in such a case as this had no right to show the prosecutrix was unchaste. If the offer was because she was the party injured, then it was inadmissible. (3 Greenleaf on Ev., § 27.) If to impeach her like any other witness, then also the better opinion is it was inadmissible. The evidence as to character in every case, whether of party or witness, should bear some analogy and have some reference to the nature of the charge. In this case the trait in the character to be inquired into was that of the general reputation for truth and veracity *only* of the prosecutrix. (1 Greenleaf on Ev. § 461 n; 1 Wharton on Crim. Law, § 814; *People v. Josephs*, 7 Cal. 129.)

By the Court, SANDERSON, C. J.

The defendant was indicted for an assault with intent to commit murder, tried and convicted as charged.

At the trial the defense proposed to impeach the testimony of the prosecutrix by proving her to be of a notoriously bad character for chastity. The testimony was rejected by the

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ground that the decision of the Court in that respect was erroneous.

That the ruling of the Court is sustained by the great mass of authority is not disputed by counsel for appellant; but it is insisted, notwithstanding, that the better reason is opposed to it. We do not deem it necessary to enter into a discussion as to what the law ought to be upon this subject. There is much force in the argument made in support of the theory that the inquiry into the character of a witness, for the purpose of impeaching his testimony, ought not to be restricted to his reputation for truth and veracity; but the rule is too well settled the other way for us to disturb it. If it is thought that the ends of justice would be subserved by changing the rule so as to make the entire moral character of the witness in the estimation of society the subject of inquiry, let the change be made by the Legislature, and not the judiciary.

The instructions asked for on the part of the defendant were properly refused. The first and second seem to be founded upon the idea that there is a substantial difference between an assault at common law and an assault as defined in our statute. In our judgment no such distinction exists. The common law definition of an assault is substantially the same as that found in the statute. (1 Russell on Crimes, 748; 1 Wharton, Section 1,241.) The vice in the two instructions under consideration is found in the idea which they countenance that there may be an intermediate point between the commencement and the end of an assault where if the assailant is interrupted either by the escape of the party assailed or the interference of bystanders, the offense is thereby made incomplete.

In order to constitute an assault there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete. Thus riding after the prosecutor so as to compel him to run into a garden for shelter, to avoid

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being beaten, was held to be an assault. (*Martin v. Shoppee*, 3 Car. & Payne, 374.) So where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held that an assault had been committed. (*Stephen v. Myers*, 4 Car. & Payne, 349.) It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete. In such a case the attempt has been made coupled with a present ability to commit a violent injury within the meaning of the statute. It cannot be said that the ability to do the act threatened is wanting because the act was in some manner prevented. In the present case the defendant was guilty of an assault if he advanced on the prosecutrix in such a manner as to threaten immediate violence, notwithstanding she succeeded in making her escape without injury.

The third instruction asked for by the defendant was also properly refused because what occurred in the butcher shop appears to have been a part of the *res gestæ*, and at least was admissible on the question of intent.

The third instruction asked for by the prosecution, to the effect that the assault was complete if the defendant had the intent to strike and the ability to do so, when by itself considered, is a little inaccurate in so far as it can be said to ignore the idea of an attempt. But this portion must be read in connection with the residue of the charge, which sufficiently informed the jury as to what constituted the attempt, to wit, the defendant's rushing toward the prosecutrix with the axe in his hand in such a manner as to show that he could and would have struck her had she not escaped through the door.

Opinion of Currey, J., concurring specially.

Taking the entire charge together, we do not think the jury could have misapprehended the law of the case.

As to the question whether the verdict is sustained by the evidence, it is sufficient to say that the testimony is conflicting. Judgment affirmed.

CURREY, J., concurring specially.

The rule restricting the examination of impeaching witnesses to the general character for truth and veracity of the witness sought to be impeached, I do not understand to be settled to the exclusion of the broader inquiry as to his general character or general moral character, and in my judgment the examination ought not to be so restricted. In England the inquiry in such cases involves the entire moral character of the witness attempted to be impeached, and the estimation in which he is held in society. (2 Taylor's Ev. Secs. 1,082, 1,083.) The authorities on this point may be found collated in 3 American Law Journal, 145, where it is said, "So far as the decisions of the Courts of England are concerned, they are unanimous to the point that the true criterion of the credit of the witness, is his general character and conduct, and not his character for truth and veracity."

In New York the rule allowing an inquiry respecting the general character of the witness sought to be impeached obtains. (*People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 579; *Johnson v. People*, 3 Hill, 178; *Fulton Bank v. Benedict*, 1 Hall, 558.) In *Fulton Bank v. Benedict*, Mr. Justice Oakley—a very able Judge—held the true rule to be to inquire of the impeaching witness his means of knowing the general character of the witness impeached, and whether from such knowledge he would believe him under oath. And he further said, "To inquire only as to general character for truth seems too narrow. His general character for truth and honesty must be the ground of his general credit as a witness."

In Kentucky the rule is to allow an inquiry as to the general character of the witness attempted to be impeached.

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(*Hume v. Scott*, 3 A. K. Marsh. 261; *Blue v. Kibby*, 1 Monroe, 195.) In South Carolina (*Anonymous*, 1 Hill, 258,) the Court of Appeals of that State held that the inquiry need not be restricted to general character for truth only, but that the true inquiry was as to the witness' general character. The Court says: "If the witness assailed is of general bad moral character, his general character, in legal contemplation, is a bad one in all respects. For a general bad moral character can only exist where a man's vices so far preponderate over his virtues as to force the conclusion in the mind of a majority of his acquaintances that he is a bad man." In North Carolina, as early as 1804, it was decided that a witness might be discredited by proving him of bad moral character, and that the inquiry should not be confined to the general character of the witness for veracity. (*State v. Stallings, Martin & Harwood*, 490,) and twenty-five years afterwards the Supreme Court of that State reiterated the rule in an opinion of great cogency and power. (*State v. Boswell*, 2 Dev. 210.) The same rule is laid down by the Supreme Court of Pennsylvania in *Wilke v. Lightner*, 11 Serg. and Rawle, 198. Mr. Chief Justice Pennington, of New Jersey, in illustration of the fallacy of the rule confining the inquiry to the character of the witness for veracity, said: "Suppose a witness is a notorious cheat, sharper and swindler, although nothing has been alleged against him on the ground of his veracity under oath, is he to stand in point of credit on equal ground with a man of unblemished character and good standing in society? Reason revolts at the idea. I take it that the general character of the witness, so far as it goes to show turpitude of mind, is in issue, less credit being due to a corrupt mind than a pure one." (2 Cow. Treat. 451.)

The decisions and authorities to which I have referred, and the reasons on which they are founded, to my mind, are conclusive that the inquiry as to the character of the witness sought to be impeached ought not to be confined to his character for truth and veracity. Such a limitation necessarily excludes all discrimination between men of bad characters,

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except as the same may be generally known and understood as to their truth and veracity, and men of unsullied lives and corresponding reputations. If the general character of a witness which is proverbially and notoriously bad as a sharper or a swindler, or whose life is steeped in vice and immorality, may not be established to be as it is generally reported among his neighbors and acquaintances—though his character and reputation as to truth and veracity in terms may not have been the general subject of discussion—then such witness stands upon an equality with him whose character is without stain and whose life, at every stage of it, has been distinguished by the performance of every duty. For jurors, sworn to try the case before them according to the evidence, though they may know without the aid of testimony produced upon the trial of the wide difference between the characters of the two witnesses, are precluded notwithstanding their knowledge derived before the trial from observing such difference, for the reason that they are sworn a true verdict to give according to the evidence. Thus it is seen that the witness of bad character may secure by his testimony a verdict which would have never had existence, if the truth as to his general character could have been made manifest.

I am unable to perceive wherein any material inconvenience would be likely to result from the adoption of the broad rule opening the door to inquiry respecting the general character of witnesses upon whose testimony the rights of litigants are made to depend. Good men need not fear the ordeal of an examination of their character, while the vicious and dishonest, to a degree securing for themselves notoriously bad reputations, should be weighed in the balance by which their actual comparative worth and worthlessness may be determined.

The defendant proposed at this trial to impeach the prosecutrix on the ground that her character was notoriously bad in one particular, and the testimony was rejected. The offer was not within either of the rules of inquiry which I have considered, but was in violation particularly of the one which

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I have endeavored to show should be adopted; and therefore I think the judgment should be affirmed.

THE PEOPLE v. AWA.

COMPETENCY OF WITNESSES.—A restriction upon the competency of a witness must be strictly construed in favor of life, liberty, and public justice.

CHINESE WITNESSES.—A defendant in a criminal case who is a Chinaman is entitled to introduce Chinese witnesses in his behalf.

Per SANDERSON, C. J.—The words "in favor of or against any white person," in the Act prohibiting persons of one half or more Indian blood, or Mongolian or Chinese, from giving evidence, refer to the defendant alone in a criminal action.

APPEAL from the District Court, Eighth Judicial District, Del Norte County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

J. P. Haynes, for Appellant.

J. G. McCullough, Attorney General, for the People.

By the Court, *SAWYER, J.*

The appellant, a Chinaman, was convicted of manslaughter. On the trial he offered another Chinaman as a witness on his behalf. The District Attorney objected to his examination on the ground, that he is incompetent to testify for or against a white person, and the testimony of the witness was excluded by the Court. Section fourteen of the "Act concerning crimes and punishments," relied on by respondents, reads as follows: "No Indian, or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person." (Laws 1863, p. 69.)

This restriction upon the competency of a witness must be strictly construed in favor of life, liberty and public justice. The people as a political organization—the State—and not any individual member of the community, is the party on one

Opinion of Sanderson, C. J., concurring.

side. The terms of the Act do not strictly apply to the People as a political organization, and we think the plaintiff — the State — is not a white person within the meaning of its provisions.

For this error the judgment must be reversed and a new trial had, and it is so ordered.

SANDERSON, C. J., concurring.

The words "in favor or against any white person," found in the fourteenth section of the Act concerning crimes and punishments, are manifestly intended to refer to the defendant only in a criminal action, and not to the plaintiff. If we read them as referring to the People as well as to the defendant, the effect is to exclude the races in question from the witness stand in all cases, regardless of the race of the defendant, for in criminal actions the plaintiff is always the same. Such however was not the intention of the Legislature. Had it been, they would have declared the incompetency of the races in question in general terms unaccompanied by words of limitation. Where the defendant in a criminal action is a white person, Indians and Mongolians are incompetent witnesses, but in all other cases their competency is unaffected by the statute in question.

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REPORTS OF CASES

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THE SUPREME COURT

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CHARLES J. LEACH v. T. B. DAY.

INJUNCTION TO RESTRAIN TRESPASSES.—An injunction will not be granted to restrain the commission of trespasses where the party complaining has a complete and adequate remedy at law.

COMPLAINT TO ENJOIN TRESPASSES.—Where a complaint, in an action to restrain the commission of trespasses, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a Board of Supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a Court of law has decided against him, it does not state facts sufficient to constitute a cause of action.

AN ORDER LAYING OUT A ROAD.—An order of a Board of Supervisors laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law.

Argument for Appellant.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The complaint averred that the plaintiff was the owner of land lying between the land of defendant and the Upper Sacramento Road, and had applied to the Board of Supervisors to lay out a private road from defendant's land to said road, and that such proceedings were had in the Board that a private road was pretended to be laid out forty feet wide and forty rods, more or less, in length, and that plaintiff believed the acts of defendant were committed in order to open the road. The defendant demurred to the complaint, and the demurrer was overruled by the Court. A preliminary injunction was granted at the commencement of the action, which, upon the final trial, was made perpetual. The defendant appealed. The other facts are stated in the opinion of the Court.

John C. Byers, and Buck & Carr, for Appellant.

The complaint does not state facts sufficient to warrant an injunction, either preliminary or perpetual. It does not allege that the threatened injury would be irreparable, or that it went to the substance or value of the estate in the character in which it was enjoyed, or that defendant was insolvent. Some such allegation has always been held requisite to maintain an action for an injunction. (See *Jerome v. Ross*, 7 Johns. Ch. R. 315; *Frost v. Beekman*, 1 Johns. Ch. R. 318; *Hanson v. Gardiner*, 7 Vesey, 305; 2 Story's Eq. Jur. Sec. 925; *Burnett v. Whiteside*, 13 Cal. 156; *Branch Turnpike Company v. Sup. Yuba County*, 13 Cal. 196; *Tomlinson v. Rubio*, 16 Cal. 202; *Hihn v. Peck*, 18 Cal. 640; *Robinson v. Russell et al.*, 24 Cal. 467; *Fewis v. Ellis, Calderwood et al.*, 25 Cal. 520.)

Tyler & Cobb, for Respondent, referred to McCann v. Sierra County, 7 Cal. 121, as authority for the injunction, and also to *Hicks v. McMichael*, 15 Cal. 107.

By the Court, SANDERSON, C. J.

We deem it unnecessary to determine whether the road laws of this State are unconstitutional so far as they authorize the laying out and establishing of private roads. It is not necessary to determine that question in order to finally dispose of this action. All that the plaintiff claims on that score may be conceded without its following therefrom that he is entitled to the relief which he seeks. Admitting that the Act of the Legislature empowering the Board of Supervisors to lay out and open private roads is unconstitutional, and that therefore their acts in laying out and opening a private road for the use of the defendant across the land of the plaintiff are null and void, it only follows that the grounds upon which the defendant seeks to justify his acts have failed him, and he stands convicted of the trespass alleged in the complaint.

Leaving this constitutional question out of view it only remains to determine whether on the case made by the complaint the plaintiff is entitled to an injunction.

The complaint merely alleges that the defendant on a day stated, and at divers other times between that day and the commencement of the action broke and entered the close of the plaintiff and did by himself and servants tear down and destroy the fences of the plaintiff to his damage in the sum of fifty dollars, for which he prays judgment. Such is the nature and extent of the trespass alleged in the complaint.

For the purpose of obtaining an injunction the complaint thereafter proceeds and shows that the trespass in question was committed by the defendant under a pretended claim of a right of way over the plaintiff's land by virtue of a pretended order of the Board of Supervisors, opening and establishing a private road for his use, and that the defendant threatens to tear down the plaintiff's fences at each end of the road as often as he erects the same — wherefore he asks an injunction.

The bare statement of these facts is a complete answer to the prayer for an injunction. No reasons are given or attempted to be given why the plaintiff has not an adequate and

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complete remedy at law; on the contrary it is apparent, from the nature of the case stated, that he has. Where such is the case, equity will not interfere, but will leave the complainant to his action at law. The whole case made is merely that the defendant, under a claim of right, has torn down three or four lengths of the plaintiff's fence, and threatens that he will do it again if the plaintiff puts it up. By themselves considered, the acts in question have none of those elements which lie at the foundation of equity interference in cases of trespass. All that the defendant has done has been done under a claim of right, founded upon an order of a lawful tribunal, having, as he claims, full power and jurisdiction to make it. Whatever he threatens to do he threatens to do under the same claim of right. This being the first action which has been brought, and it appearing that the defendant is acting under a claim of right, there is no pretense for saying that he will continue his acts after a Court of law has once determined the right under which he claims to act against him. The threatened trespass is not irreparable, either from the nature of the injury itself, or from the want of responsibility in the party threatening its commission.

Anciently Courts of equity would not interfere at all by injunction in cases of trespass, but left the party to his legal remedy. In modern times, however, this doctrine has been very much relaxed, and although the general rule remains, yet there are exceptional cases where equity does and will interpose, but a strong case must be made. It will interpose for the purpose of quieting a possession or preventing a multiplicity of actions, or where the value of the inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries or woodland, whether the same result from the nature of the injury itself or from the insolvency of the party committing it. (*West v. Walker*, 2 Green's Ch. R. 279; *Van Winkle v. Curtiss*, Ib. 422; *Kerlin v. West*, 3 Ib. 449.) Obviously the case at bar does not come within either of the foregoing exceptions. It does no more than present a case of naked trespass for which an action at law, for

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ought that yet appears, affords an ample and adequate remedy.

But it is insisted on the part of the respondent that this is not an ordinary action of trespass, and it is argued that it is like the case of *McCann v. Sierra County*, 7 Cal. 121, and rests upon the same principle. The facts of that case were that the Board of Supervisors had, by resolution, extended a street or public thoroughfare through the land of the plaintiff without providing any compensation for the private injury consequent thereon, and were in the act of opening the street through the land of the plaintiff at the time the complaint was filed. The complaint asked for five hundred dollars damages and a perpetual injunction. The case went off upon demurrer to the complaint, upon the ground that the plaintiff's claim for damages had never been presented to the Board of Supervisors for allowance, and rejected in whole or in part, as required by law. In the course of his opinion, Mr. Chief Justice Murray remarks, that the act of the Supervisors in appropriating the land of the plaintiff to public use before compensating him for the value thereof, was illegal, and he might resort to a Court of equity to restrain them. That doctrine is undoubtedly correct. It proceeds upon the theory that the Board of Supervisors have the power to condemn private property for public use, upon making compensation therefor. Such condemnation, if legally accomplished, acts directly upon the title and takes it practically from the individual and vests it in the public; if not done legally and in accordance with the Constitution, it nevertheless, by reason of the existence of the acknowledged power, casts a cloud upon the title which is the ground of equitable interference in such cases.

In our judgment there is no analogy between the two cases, and however applicable the dictum, upon which respondents rely with so much apparent confidence, may have been to the facts of that case, it has no application here. This is not an action to restrain the Board of Supervisors from taking the land of the plaintiff and appropriating it to public use without

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providing any compensation whatever for its value. Had this action been brought against the Board of Supervisors before or at the time they were engaged in laying out the private road in question upon the theory that they had the power to do so, but were not proceeding according to law, and had made no provision for compensating the plaintiff for the value of his land, the doctrine and the case invoked would have been in point. But this is not an action against the Board of Supervisors, and it does not proceed upon the theory that they have the power in question, and are attempting to exercise it without first complying with the condition upon which its exercise is only permitted; on the contrary, it is an action against a private individual, who confessedly has not the power to take the plaintiff's property from him and apply it to either a public or private use, under any circumstances, and whose acts, therefore, are necessarily nothing more than a naked trespass, and can in no respect affect the plaintiff's title, or put the inheritance in jeopardy, or, as we have already seen, work in any respect an irreparable injury. Not does it even proceed upon the theory that the Board of Supervisors had the power to do the acts complained of, and thereby either totally deprive the plaintiff of his freehold, or at least cast a cloud upon his title, but, on the contrary, proceeds upon the theory that the Board had no such power, and, therefore, the title of the plaintiff to the land and his possession, and right of possession, are wholly unaffected thereby.

We may add that, so far as the plaintiff's right to equitable relief is based upon the alleged invalidity of the acts of the Board of Supervisors in laying out the road in question, the complaint is manifestly *felo de se*. If, as contended, those acts are absolutely null and void on their face upon the ground that the Act under which they were had is unconstitutional, it follows that they cannot hurt the plaintiff, for they have not even the appearance of legality, and, therefore, cannot affect or cloud in any manner his title. In such a case he has no need for an injunction, and, therefore, is not entitled to one.

Argument for Respondents.

Our conclusion is that the demurrer to the complaint ought to have been sustained.

Judgment reversed and cause remanded.

J. MARRINER AND D. WILLARD, v. RUFUS SMITH
AND HENRY GOODING.

REMOVAL OF LIEN OF A JUDGMENT FROM LAND.—One who purchases land subject to the lien of a judgment obtained by fraud against his grantor is not entitled to have a Court of equity remove the judgment lien and enjoin a sale of the land under the judgment, unless he shows affirmatively that he will be injured by an enforcement of the lien by a sale of the land on execution.

LIEN OF JUDGMENT AGAINST HUSBAND ON THE HOMESTEAD.—If, while a judgment is standing against the husband, the husband and wife make a sale of the homestead, and at the same time make a relinquishment of the homestead right in the manner required by law, so that the two constitute but one transaction, and the homestead does not exceed in value five thousand dollars, the lien of the judgment will not attach to the homestead, and a Court of equity will enjoin a sale of the same upon an execution issued on the judgment.

SAME.—If husband and wife make a relinquishment of the homestead right, and afterwards sell the homestead property, and the relinquishment takes effect before the sale, the lien of the judgment will attach to the property.

MAKING UP TRANSCRIPT ON APPEAL.—If an amended complaint and answer are filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript on appeal. Other abbreviations of transcript are indicated in the opinion.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellants.

Jo Hamilton, for Respondents.

There can be at this day little doubt that under authority of the following, besides numerous other decisions of like import, that a suit to remove or prevent a cloud upon plaintiff's title, may be maintained; indeed, it would be his only remedy. (*Shattuck v. Carson*, 2 Cal. 588; *Guy v. Hermance*, 5 Cal. 75; *Alverson v. Jones*, 10 Cal. 11; *Pixley v. Huggins*, 15 Cal. 133.)

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It will very readily be seen, that if Smith obtained his judgment, as in this instance, before the sale to respondents, and while the property was a homestead, and Goode and wife afterwards divest the lands of their homestead estate, for the purpose of sale to respondents, they came to defendants' hands cumbered with the judgment lien. If, then, the Sheriff be permitted to go on and sell the lands under this fraudulent judgment, a cloud would rest on respondents' title. It was not necessary to aver ignorance on the part of the respondents of the existence of this judgment, or that they had not bought the property, *cum onere*; the invalidity of the judgment once established, then knowledge or ignorance was not material.

By the Court, SAWYER, J.

On the 16th day of November, 1861, the defendant, Smith, recovered a judgment upon a promissory note in the District Court for the County of Placer, against one D. B. Goode for the sum of four hundred and sixty-four dollars. At the date of said judgment said Goode was the owner of the lands described in the complaint, which lands constituted his homestead. Subsequent to the entry of said judgment, an instrument of abandonment of said homestead was duly executed and acknowledged by said Goode and wife, and regularly recorded, and the premises were conveyed by said Goode and wife to plaintiffs; but whether the abandonment and conveyance were contained in one instrument, does not appear. In October, 1863, subsequent to said conveyance, Smith procured an execution to be issued upon his said judgment against Goode, and placed it in the hands of the defendant, Gooding, Sheriff of Placer County, who was proceeding thereunder by the direction of said Smith to sell said lands. Plaintiffs thereupon commenced this action to restrain the sale, and thereby prevent the defendants from further clouding their title, and to procure a cancellation of the judgment as a fraud upon their rights. In addition to the foregoing facts, the plaintiffs

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allege in their complaint, that on the 5th day of November, 1861, after the commencement of said suit by Smith against Goode, and before the entry of judgment therein, said Goode and said Smith settled said suit, and said Goode delivered to said Smith a horse of the value of three hundred dollars, and other property specified, exceeding in value, in the aggregate, the amount due in the matter in suit, and that said Smith accepted the said property in full payment and satisfaction of the entire amount due, and in consideration thereof, agreed with said Goode to dismiss said suit, and that the same should not be further prosecuted; that said Goode, relying upon said promise, and supposing the said suit would be dismissed, paid no further attention to it; that said Smith, in violation of said agreement, and without the knowledge or consent of said Goode, and in fraud of his rights, did, nevertheless, cause said judgment to be entered by default; and that said judgment was thereby obtained by fraud, upon a demand which had been fully paid, satisfied and discharged. The Court found the facts to be as alleged, and rendered a judgment annulling and setting aside the said judgment, also perpetually enjoining any sale under it; from which judgment defendants appeal.

The grounds of appeal are, that the facts alleged in the complaint, and found by the Court, are insufficient to entitle plaintiffs to the judgment rendered, or to any relief.

Goode, the defendant in the judgment vacated, is not a party to this action. He has made no complaint against the judgment. Of course the plaintiffs cannot interfere on his behalf, and they have no interest in the matter, except so far as the judgment lien may affect their property. They have no right to have the judgment absolutely vacated and annulled. The only question is, as to whether plaintiffs stand in such a relation to the judgment against Goode and the parties thereto, as to entitle them to the aid of a Court of equity to remove a judgment lien upon the land described in the complaint, and to an injunction against a sale under said judgment.

The judgment was in existence long before, and at the time plaintiffs took their conveyance, and they had record notice of

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the lien of said judgment, if any there was. It is not alleged, and it nowhere appears, that defendant Smith, and Goode, or either of them, practiced any fraud upon plaintiffs, or that plaintiffs did not assume the payment of the judgment as a part of the purchase price. It does not appear that they paid full value for the premises upon the understanding, that the judgment was satisfied, or void, or even that they paid anything at all for the land. If they took the land subject to the lien, and with an understanding that they were to discharge it, they certainly have no grounds to complain that they are compelled to pay the judgment. The presumption is that the plaintiffs have stated their case as favorably to themselves as the facts will admit. Yet it nowhere appears that they are, or can be, injured by the judgment. That Goode should pay the amount due defendant, Smith, twice is a matter of no concern to plaintiffs. If plaintiffs did in fact knowingly purchase the land, subject to the judgment, at a less price than its value in consequence of the lien upon it, they have no ground of complaint, and it rests upon them to affirmatively show that they are injured. This we think they have failed to do.

The complaint also alleges, that the premises in question were, on the twenty-third day of October, 1861, dedicated by Goode as a homestead in the mode prescribed by law, and that said premises at the date of said conveyance to plaintiff were still owned by said Goode, and occupied by himself, wife and family as a homestead, and that both said Goode and wife made, executed and delivered the conveyance therefor, and made the proper relinquishment of homestead in the manner provided by law for the sale of homesteads. These allegations are not denied by the answer, and for the purposes of the action must be taken as true. Conceding that it sufficiently appears that the relinquishment of the homestead and the conveyance constituted one transaction, and took effect at the same moment of time, and that the value of the homestead did not, at the time of said relinquishment and conveyance, exceed five thousand dollars, the judgment, even if valid, never constituted a lien; for, while the title remained in Goode, there

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was nothing subject to the lien of the judgment, or to a sale upon execution. Upon such a state of facts, the plaintiffs would perhaps be entitled to have the judgment against Goode adjudged not to be a lien upon the land, and to a perpetual injunction against a sale. A sale, notwithstanding the judgment, for the reasons stated, might not be a lien upon the land, would tend to cloud the title, upon the principle announced in the case of *Pixley v. Huggins*, 15 Cal. 128, and other cases affirming it. But it is nowhere averred that the value of the premises did not exceed five thousand dollars. Besides, as if to cut himself off from this ground of relief, the plaintiff, in a subsequent allegation, expressly avers the said judgment to be a lien upon said land of older date than the plaintiff's deed and relinquishment of homestead. The allegation is not very distinct, that the relinquishment and conveyance constituted one transaction and took effect at the same time, nor does the date very clearly appear. If the relinquishment of homestead took effect before the conveyance, the lien of the judgment attached. For the reasons stated we are of the opinion that the facts alleged and found are insufficient to entitle plaintiff to the relief sought and obtained. The judgment must therefore be reversed, and the cause remanded for further proceedings. We think the plaintiff should have leave to amend his complaint.

In this case, as in many others, the appellant has overlooked the amendment of 1864 to section three hundred and forty-six of the Practice Act, and has consequently incurred double the expense necessary in making up his transcript on appeal. The transcript, it is true, is not voluminous, but it is still nearly or quite three times as large as necessary. As will be seen by referring to the amendment indicated, it is not necessary in all cases to bring up the entire judgment roll. In this case the original pleadings and summons might have been omitted, as no question arises on them. The amended complaint and answer thereto formed the issues tried. The entire first half of the transcript, therefore, is utterly useless here. And no inconsiderable portion of the remainder is taken up

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with titles of the cause in the several papers, indorsements upon each paper filed, and verifications in full. Each time the style of the Court and title of the cause is repeated, one half of a printed page is taken up, and the indorsement of title, names, etc., on each paper, takes another half page. Where papers are short and numerous, such repetitions are frequent, and constitute a very large portion of a transcript. All this is unnecessary, especially where the transcript is made up and certified under the rules of Court by the attorneys of the respective parties, as is now usually done, and as was done in this case; and when the transcript is certified by the Clerk the certificate can easily be adapted to such omissions of irrelevant and useless matter. It is sufficient when the style of the Court, and title of the cause is given in the first paper, to afterward give the name of the document and at the head say, "Title of cause." And where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment to say, "Duly verified," or, "Duly acknowledged." *The date of the paper, date of filing, date of service, etc., and every indorsement that may be important should, of course, appear.* The rest may, with advantage, be omitted.

Attorneys, in making up their transcripts, by observing these suggestions, will still further greatly diminish the expense of making up and printing records, and thereby also facilitate the examination of the record on the part of the Court.

Judgment reversed and cause remanded, with leave to plaintiff to amend his complaint, as he may be advised.

Mr. Justice SHAFER expressed no opinion.

Points decided.

**THE PEOPLE OF THE STATE OF CALIFORNIA
rel. THE CENTRAL PACIFIC RAILROAD COM-
PANY OF CALIFORNIA v. THE BOARD OF SUPER-
VISORS OF THE CITY AND COUNTY OF SAN
FRANCISCO, AND WILHELM LOEWY, CLERK OF THE
CITY AND COUNTY OF SAN FRANCISCO.**

MANDAMUS.—The rules of the Civil Practice Act are applicable to pleadings and proceedings in mandamus.

ANSWERS TO PETITION FOR MANDAMUS AGAINST A BOARD OF SUPERVISORS.—In a proceeding against a Board of Supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one or more than one of the Supervisors in his or their own name or names, whether as Supervisor or otherwise, cannot be regarded as the answer of the Board, and, on motion, will be stricken from the files of the Court.

SAME.—In such case the answer should be in form the answer of the Board in its aggregate capacity.

SAME.—In such case, if an answer is filed in due form as the answer of the Board, the presumption is that it is the answer of the Board; and the fact that it was sworn to by one member of the Board does not make it his answer, nor is it necessary that such answer should aver that the Board by resolution adopted it.

SAME.—In such case, if two answers are filed each in form the answer of the Board, the Court may ascertain which is the return of the majority.

MOTION FOR JUDGMENT ON PLEADINGS IN MANDAMUS.—In proceedings to procure a writ of mandate, a motion of the relator for judgment on the pleadings is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense to the action. Objections to the answer which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such motion.

DENIALS IN ANSWER OF ALLEGATIONS OF COMPLAINT.—If the complaint contains averments of the rendition of a judgment against the defendant by a Court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity.

SAME.—If a complaint avers the passage of an ordinance by a municipal corporation, and the answer in reply states in general terms that the ordinance is illegal and void, no issue of fact is raised.

MATTERS *res judicata*.—If a judgment has been rendered by a Court of competent jurisdiction, and a certain matter was necessary to be averred in the complaint and found to be true by the Court, to authorize the rendition of the judgment, the truth of this matter becomes *res judicata*, and not subject to be again litigated between the same parties.

RIGHT TO SHOW THAT AN ELECTION WAS INFLUENCED BY BRIBERY.—If a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority vote is obtained, the municipal authorities, on proceedings to compel

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- them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption practised and perpetrated by the railroad company and its employes.
- CONTRACT PROCURED BY FRAUDULENT MISREPRESENTATIONS.**—An answer seeking to avoid a contract sued on by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matters of fact of which defendant was ignorant, and not of law.
- PUBLICATION OF AN ORDINANCE.**—The publication of an ordinance alone is sufficient to give it validity without a publication of the law authorizing it. All persons are charged with notice of a law on which the ordinance is founded.
- CONTRACT BETWEEN CORPORATIONS.**—A proposition made by some corporate act of a railroad corporation to the authorities of a municipal corporation, and an acceptance of the terms thereof by an ordinance of the municipal corporation, constitutes a contract between them.
- HOW MUNICIPAL CORPORATION MAY CONTRACT.**—A municipal corporation may contract by ordinance, and an ordinance accepting of the terms of a proposition made to the municipality amounts to an assent to the contract on the part of the corporation, and not a mere declaration of intention to enter into a contract.
- AID TO A RAILROAD BY A MUNICIPAL CORPORATION.**—If a municipal corporation has become bound by a vote of its electors, taken under a law of the Legislature, to subscribe to the stock of a railroad company, and pay the amount of its subscription in its bonds, and then makes a compromise with the railroad company by which it agrees to deliver the company a less amount of its bonds in consideration of being released from its subscription, the delivery of this less amount of bonds is not a donation to the railroad company, nor is the fact that the railroad does not touch the city and is not one of local interest, a defense in an action to compel the issuance of the bonds under the compromise.
- COMPROMISE OF CLAIM AGAINST A CORPORATION.**—A municipal corporation, if authorized to do so by law, may compromise a valid claim against it, and the valid claim is a consideration which will support the compromise.
- COUNTERSIGNING BONDS OF SAN FRANCISCO TO CENTRAL PACIFIC RAILROAD COMPANY.**—The Clerk of the City and County of San Francisco is not in default for not countersigning the bonds required to be issued by the Act of 1863; authorizing said city to subscribe to the capital stock of the Central Pacific Railroad of California, until the Board of Supervisors direct him to countersign the same or afford him an opportunity to do so in their presence, and he refuses.
- APPLICATION FOR MANDAMUS A CIVIL ACTION.**—A proceeding to procure a writ of mandate is a civil action, and the general rules of the Civil Practice Act are applicable to it.
- JUDGMENT IN MANDAMUS.**—If the relator, in proceedings to procure a writ of mandate, proceeds by petition and notice for a peremptory writ without procuring an alternative writ, the Court may grant any relief consistent with the case made by the petition and embraced within the issues, although it may be only part of that asked in the prayer of the petition.

The Board of Supervisors of the City and County of San Francisco consisted of twelve members. The Board held a

Argument for Relator.

meeting, and by a majority vote passed the following resolution:

"*Resolved*, That the City and County Attorney be, and he hereby is requested to *represent* the Board of Supervisors and the members thereof in the proceedings lately instituted against said Board and Wm. Loewy, by the People of the State of California, upon the relation of the Central Pacific Railway of California, and other litigation upon the same subject, with a view to an early and definite determination of all the questions involved. And that G. W. Bell, F. N. Torrey and Henry L. King be and are hereby appointed a committee of this Board to confer with the City and County Attorney, with power, if they upon such conference think it best for the public interest, to employ assistant counsel; the compensation of such counsel to be hereafter fixed and determined by the Board."

In *French v. Teschemaker et als.*, 24 Cal. 518, and *The People v. Coon et als.*, 25 Cal. 635, will be found a full statement of any facts not contained in the opinion of the Court.

· E. B. Crocker, for Relator.

The first question we propose to examine is that relating to the return made by the Supervisors, under the motion to strike out the answers of six of the Supervisors. Although no alternative writ of mandamus has been issued, yet the affidavit and notice under the statute occupies substantially the same position, and the affidavits in answer to the petition are properly subject to the same rules as a return to the alternative writ. The application differs materially from an ordinary action, as the *Supervisors* are the parties, and not the City and County of San Francisco, the corporation they represent. As Supervisors they are liable individually in this proceeding for *damages and costs*, (Practice Act, § 472,) which *they* must pay, and not the corporation they represent. The corporation of San Francisco has not refused to do the act required, but the Supervisors as individuals have, and are therefore liable.

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The proceeding is against an aggregate body, and the proper way for them to make a return is to meet together, and resolve by a majority vote what return shall be made. (Tapping, Mandamus, 384, 386,) [341].

In the absence of any return thus resolved upon, it is well settled that individual members dissenting from the return made, may file their separate returns, which will have force and effect according to the number thus dissenting. (Tapping, Mandamus, 384, 385, 386,) [341 to 344].

Apply these well settled rules to the present case. A paper purporting to be a return of the Board is drawn up, but never acted upon by them at any official or other meeting. It is sworn to by but one Supervisor, and thus it is virtually the return of but that one. Six of the Supervisors find that return to be false, and as they are liable to be mulcted in heavy damages and costs, file their returns, setting up the facts as they really are, as they have a perfect right to do, to protect themselves from personal liability.

Thus it follows that here are the returns of six members which admit the rights of the plaintiff, to one which deny them. If, however, the return made by McCoppin is to be treated as the return of himself and the other five members, who make no return, then it stands six affirming and six denying, and thus there is no issue raised. The allegations of the petition would stand undenied, and the plaintiff would be entitled to judgment. The Mayor might perhaps step in, and by siding with one or the other create a preponderance, but he has not done so.

It will be noticed that not a single allegation of fact in the petition is specially denied as required by section forty-six of the Practice Act. Every material allegation not "specifically controverted," is to be taken as true. (*Blankman v. Vallejo*, 15 Cal. 644; *Busenius v. Coffee*, 14 Cal. 93; *Anderson v. Parker*, 6 Cal. 200; *Swartz v. Hazlett*, 8 Cal. 126; *Dewey v. Bowman*, 8 Cal. 149.)

The only inquiry then is, does McCoppin's return *set up any new matter which shows that notwithstanding the truth of the facts stated in the petition*, the relator is not entitled to the writ?

Argument for Relator.

The first allegation, or rather series of allegations, are those charging fraud and corruption in bribing voters at the election in May, 1863.

These averments of alleged bribery should be disregarded for the reason *that the election cannot be attacked in this collateral proceeding*. The law regulating elections provides how the same shall be contested. Wood's Digest, page 380, section forty-six, requires the filing of a statement within forty days after the return day of the election. No such action having been taken in this case, the validity of that election cannot be contested in this proceeding. (*Satterlee v. San Francisco*, 23 Cal. 320, and the cases there cited.)

So, also, the validity of this election is *res judicata*. In the case of *French v. Teschemaker et al.*, in which the Board of Supervisors and the relator were parties, the validity of this election was one of the issues tried and adjudicated. The District Court found that the election was valid, and their judgment was affirmed by this Court, on appeal.

So, also, in the first mandamus brought by the relator against the Board of Supervisors to compel them to make the subscription and issue the bonds for six hundred thousand dollars, the Supervisors had an opportunity to raise the question of the validity of that election, but did not see proper to do so. The judgment in that proceeding is conclusive not only of the issues actually tried, but also of all questions which might have been put in issue, or which would have constituted a proper ground of defense. (2 Phillips' Ev., C. H. and E.'s Notes, 29, 30; 1 Blackford, 360.)

The next reason given is that the compromise was obtained by fraudulent representations, and is therefore void and should not be enforced.

The alleged false representations are, that the officers of the company stated to the Board and the Mayor, immediately previous to the passage of the ordinance, that *if the proposed compromise was not made, the whole subscription of six hundred thousand dollars, with at least a year's back interest thereon,*

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would be immediately due and owing to the company from San Francisco.

It then avers that this representation was false, *because the Company had not at the time and have not up to this date called in or collected from individual subscribers the whole amount, or any large portion of their subscriptions to the capital stock.*

But all these averments are *uncertain and evasive*, as well as too general. The facts and circumstances are not stated, as they must be in cases where fraud is charged. (*Kinder v. Macy*, 7 Cal. 207.)

There are certain rules on this subject of misrepresentation it may be well to refer to. In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act of the other party, and by which he is actually misled to his injury. So it must be of something in regard to which the one party *places a known trust and confidence in the other*. *It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment.* So, if the representation be of such a nature that the other party *had no right to place reliance on it, and it was his own folly to give credence to it.* So, if a party does not choose to avail himself of the knowledge or means of knowledge open to him, he cannot be heard to say that he was deceived. It is his own folly not to use the knowledge within his reach. (1 Story's Eq. Jur., Secs. 195-201.)

The next reason given is that the claim to the bonds is founded upon a contract to deliver obligations which have more than one year to run, and therefore it is "an agreement that by its terms is not to be performed within one year from the making thereof," and must be in writing under the Statutes of Frauds. If the ordinance on which the rights of the company are founded can be termed an agreement, it is clear that it merely provides for the *immediate delivery of certain specified bonds, and as an agreement it is fully performed by the delivery of the bonds.* It is not, therefore, within the statute.

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Even if it was within the statute, the record of the ordinance, with the vote on its passage, and the signature of the Mayor approving it, constitutes a writing within the statute. But the Board of Supervisors in passing this ordinance exercised the legislative power vested in them by the laws. The ordinances of the city possess the character, force, and effect of laws. (*McCracken v. San Francisco*, 16 Cal. 591; *Holland v. San Francisco*, 7 Cal. 377; *Zottman v. San Francisco*, 20 Cal. 161.)

John H. Saunders, and John B. Felton, for Defendants.

The question, then, is distinctly presented to the consideration of this Court, whether the Legislature can impose on a municipal corporation of the State the burden of exclusively building or aiding to build a work of general interest to the State, which is in no sense a work of local interest to the corporation on which the burden is imposed.

In this State the question comes up for the first time before these evils have arisen. No bonds have been issued under circumstances like the present, for in every other case the railroad aided has passed through the county called upon to subscribe, or has had its terminus there, and so the subscription can be justified as a local improvement.

In the case of *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 188, the road aided by the county was purely a local road, and the validity of the subscription was placed upon that ground.

In the case of *Robinson v. Bidwell et als.*, 22 Cal. 380, the road assisted by public subscription terminated at Sacramento.

The question as to whether the Act was unconstitutional on this ground was not raised in the main argument, but, to use the language of the Court, was "suggested" in the petition for rehearing. Mr. Justice Norton, in his opinion, puts the constitutionality of the subscription on the ground that he could not say that a road directly communicating with the

Argument for Defendants.

City of Sacramento, and passing through the county, was not a local work.

The leading New York cases go only to this extent, and while their reasoning justifies local taxation for local improvements, it also negatives the idea that a city or county can be exclusively taxed for an improvement which is in no sense a local one.

The leading case of *Bank of Rome v. The Village of Rome*, 18 N. Y. 32, was decided as late as September, A. D. 1858. The careful reasoning of the Court is remarkable. It says: "No Judge would, I think, venture to state a more restrictive rule than that the powers conferred on a municipal corporation must relate to the public interests of the territory or body of persons within its limits. Taking this definition, can a Court say that a railroad, *terminating at a village or city*, is so foreign to its public interests and those of its inhabitants, that it is beyond the legislative powers to authorize the village or city to become interested in its construction. The general judgment of men is, we all know, that a railroad, *so terminating*, does or at least may add to the value of property, promote trade, and contribute to the convenience of the inhabitants of the place."

The preceding case was decided on the authority of *Clarke v. Rochester*, 24 Barb. 474. But, in the latter case, the Court lays down the cardinal principle that a tax must be "general, and imposed on all, or all of a class of persons within prescribed limits or districts, upon some common principle or rule." (See page 481.)

Again: On page four hundred and eighty-two, the Court justifies these subscriptions on the sole ground that they are in aid of local improvements; and places its decision on the same ground on which it justifies the making and repairing of streets, that is, "upon the ground of benefit locally conferred."

Again: The Court, in resuming the points governing the case, (see page 489,) says, that works of internal improvement may be constructed by *general taxation*, and, *in case of local works, by local taxation*.

Argument for Defendants.

The two leading cases in Illinois are the cases of *Johnson v. County of Stark*, 24 Ill. 89, and *Perkins v. Lewis*, 24 Ill. 208. In the former of these cases, the Court puts its decision on the ground that "the construction of a railroad through a county is a county purpose," and expressly declines to pass upon the question whether a railroad, not confined to or penetrating the limits of a county or city, is a local work. The latter decision goes upon the authority of the former. These cases were decided in 1860.

The answer sets up that there had never been any legal assessment laid upon any of the capital stock of the Central Pacific Railroad, and that no assessment is now due thereon. There consequently would have been no bonds due from the city to the company, even if the city had subscribed. It further sets up that the railroad company never had accepted the city's subscription under the Act of 1863.

Two consequences result from this: First—That the company had nothing that could be called a claim against the city for bonds under the Act of 1863. There was, therefore, nothing to compromise or settle. Second—That inasmuch as no bonds were due by the city to the company, the power to compromise had not vested in the Board of Supervisors. By the Act of 1864 the power to compromise does rest in said Board of Supervisors "only after and in case said Board of Supervisors shall be compelled by final judgment to execute and deliver the bonds under the Act of 1863."

(1.) The relation which the city assumes to the company under the Act of 1863, is that of *subscriber to its capital stock*. What are the *rights* of a subscriber to stock? Is he exposed to bear the full burdens of the company while the other subscribers are exempt? Can one subscriber be thus singled out as a packhorse for the rest?

(2.) Again: These bonds are to be received at par, dollar for dollar. (See Section 4, Act 1863, p. 381.)

What is meant by receiving them at par? Evidently, the meaning is that a dollar in bonds is equivalent to a dollar in cash from the other subscribers. But what mockery to speak

Argument for Defendants.

of receiving them at par, if all of them are to be issued whether the other stockholders pay or not. We assume, then in arguing this point, that these bonds were in the nature of assessments, to be issued as regular assessments on the capital stock of the company when called in.

The claims, then, which the Act of 1864 authorized the compromise and settlement of, were claims for bonds to be issued as assessments on stock. When did these claims arise? It is clear that no claim arose from the Act of 1863, independent of subscription by the city and acceptance by the company. Until such subscription and acceptance the Act could be repealed. If the companies had a claim against the city, it is very clear that no legislative action could divest such claim. In the case of *Aspinwall et al. v. Commissioners*, 22 How. U. S. 376, the Court decided that a railroad company acquired no claim against a city by such an act; that it could be repealed, and that a subscription after such repeal and bonds issued was void. The same point was decided in *Covington and Lexington Railroad Company v. Kenton County Court*, 12 B. Monroe, 144. In *People ex rel. Peoria and Oquawka Railroad Company v. County of Tazewell et al.*, 22 Ill. 156, the Court say: "Until the city or county has subscribed there is no privity between the road and county or city."

There has, then, been as yet no acceptance of the terms of the Act of 1863, by the railroad company. It is not pretended that there has ever been any subscription by the city to the capital stock of this company, so that no contract has ever been made between the city and this company.

So far, then, we have these two proposition: First—That the Act of 1863 gives nothing which can be called a *claim* to the railroad company against the city. Second—That as yet no claim has arisen by contract; first, because the railroad company has never accepted the conditions of the Act of 1863; second, because as a matter of fact no contract has ever been made for subscription between the company and the city.

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If the Legislature, prior to this pretended compromise, had repealed the law of 1863, it would have found no vested claim of this company as an obstacle to its so doing. And this power of the Legislature to repeal the law is evidently the test of the existence of a claim; for if the claim exists, it cannot be affected by legislative action.

The alleged contract of compromise between the Board of Supervisors and the railroad company is void for want of consideration.

What does the company surrender as the consideration of such a contract? Evidently, nothing at all. It gives no stock, no obligation to build the road, no agreement to spend the bonds or any part thereof on the road. It simply says to the corporation: "I will release you from the public duty imposed upon you by statute of taxing the City of San Francisco, for a certain public purpose, for so much." But, clearly, no consideration moves from the company to the city, nor does the city receive any benefit from any source. True, it pays less money—but then it receives no public benefit. The private company can pay dividends with this money, and spend it as it chooses. Treating this compromise, then, as a contract, there is no consideration for it. The city receives nothing; the company gives nothing. (*Hampshire v. Franklin*, 16 Mass. 84; *Grogan v. The City of San Francisco*, 18 Cal. 590.)

No mandamus will lie to compel William Loewy to sign these bonds, because it is not a duty imposed upon him by his official position. The Clerk of the City and County of San Francisco is simply a County Clerk. His duties are defined by statute. (See Wood's Digest, Article 274, *et seq.*, p. 88.) Now his whole obligation to sign these bonds comes from the ordinance of the Board of Supervisors, and it is obvious that this Board, itself a Board of limited powers, has no authority to enlarge, change, or interfere with the duties imposed by statute on a wholly independent officer.

Some attempt to meet this was made on the argument by asserting that Loewy's obligation to sign these bonds comes

Argument for Relator in Reply.

from the statute of 1863. But it is so clear that that statute is only incorporated into this ordinance because the Supervisors selected the form and mode of executing these bonds there pointed out, and that they could just as well have selected any other mode of executing them, that we will not argue the question at length.

If the wrong person be made a party to a proceeding in mandamus, the whole proceeding must be superseded.

"If, therefore, the Mayor and *ex officio* President of the Board of Supervisors had been made a party to this proceeding the whole proceeding would have been superseded." And counsel cite *Rex v. Mayor of Hartford*, Salkeld, 701; *Rex v. Mayor of Ripon*, Salkeld, 433.

In support of this proposition, contended for on the other side, and conceded by us, we add the cases of *The People ex rel. Commissioners of Highways of Poughkeepsie and Fishkill v. The Board of Supervisors of the County of Dutchess*, 1 Hill, 50, and the case of *People ex rel. McSpedon v. The Board of Supervisors*, 10 Abbott Prac. R. 233.

John W. Dwinelle, and J. McM. Shafter, in reply.

The County Clerk can be compelled, by mandate, to countersign the bonds in question.

The office of County Clerk is created by the Constitution. (Article VI, § 7.) The only duties annexed to the office by the Constitution are those of Clerk of the District Court. (Ib. § 7.) All other duties are to be defined by law. (Ib. § 7.) It was competent, therefore, for the Legislature to throw upon the County Clerk the duty of countersigning the bonds of the city and county, by Laws of 1863.

Under the Civil Practice Act of California, the relator in this proceeding is entitled to any and all of the relief authorized by the case stated in the petition and affidavit.

"SECTION 147. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case, the Court

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may grant him any relief consistent with the case made by the complaint, and embraced within the issue."

The return of the six Supervisors must be taken as the true return.

Boards of Supervisors are dealt with by law as an aggregate, and for this reason, service of process, in this and the like proceeding, is sufficient if made upon a majority, and the decision is binding upon their members, and upon their successors. (*People v. Contracting Board*, 20 How. Practice R. 206; *Maddox v. Graham*, 2 Metcalf, Ky. 156.)

The Board of Supervisors in *this* case are to act ministerially only, in execution of their own ordinance, which stands unrepealed, and unrepealable, having been accepted by the railroad.

Mandamus will be maintained against the council of a municipal corporation to compel the execution of a ministerial act, when it is evident that they are bound to perform it, and their conduct shows that they do not intend to do the act required. And this although there may be an action against the corporation for the delinquency, and such an action has been commenced and discontinued. (*Maddox v. Graham*, 2 Metcalf, Ky. 156.)

Where a party has no other adequate remedy, and his right is clear and undoubted, mandamus is not only the proper remedy, but is one of the most efficient proceedings known to the law for the enforcement of a right. (*People v. The Contracting Board*, 20 How. Pr. R. 206; *Commonwealth v. Pittsburg*, 34 Penn. State Rep. 496.)

By the Court, RHODES, J.

Proceedings were commenced in this Court for a mandamus, to compel the Clerk of the City and County of San Francisco to countersign four hundred of the bonds of said city and county, and to compel the Board of Supervisors of said city and county to perform all the duties required on their part for

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the complete execution and delivery of the bonds to the Central Pacific Railroad Company, according to the provisions of the Acts of the Legislature of April 22, 1863, and April 4, 1864, and of the ordinance of said city and county, Number Five Hundred and Eighty-Two.

An answer, in form the answer of the Board of Supervisors, signed by the City and County Attorney and the assistant counsel, and verified by Frank McCoppin, one of the members of the Board of Supervisors, was filed in the case, and subsequent to the filing of this answer, six of the twelve Supervisors comprising the Board filed answers to the petition in their proper persons.

The counsel for the Board of Supervisors, upon the cause being called for hearing, filed their affidavit, stating that the answers of the six Supervisors were filed without the knowledge of said counsel, and that they had no information thereof until about twenty minutes before the meeting of the Court on that day; and they thereupon moved that those answers be stricken from the files of the Court. The counsel for the relator objected to the motion. It appears from the answer of the Board, that the Board, by resolution, requested the City and County Attorney to represent the Board and the members thereof in these proceedings, and authorized a committee of the Board to employ assistant counsel; and the counsel for the relator do not deny that Messrs. Saunders and Felton, the counsel who signed the answer of the Board, were duly authorized to appear for and represent the Board in the pending proceedings.

The answer of the six Supervisors, after the title of the cause, commences substantially in the following form: "For answer to the amended petition of the above named plaintiff, * * * one of the Supervisors of the City and County of San Francisco, and as such one of the defendants herein, for himself says that he is now and at the time of the commencement of this proceeding was one of the Supervisors of the City and County of San Francisco," etc.; and they do not purport to be the answer of the whole Board or of a majority of the

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Board, nor do the six Supervisors pretend to answer for the Board in its aggregate capacity. The Board of Supervisors, organized and acting as one body, in its corporate capacity is the defendant, and not the individual Supervisors who collectively make up the Board, "for this is not a proceeding against any individual until an attachment issues." (Spencer, J., in *People v. Champion*, 16 John. 60.) The answer of a Supervisor or of a number of Supervisors, in his or their own name or names, whether as Supervisors or otherwise, could with no more propriety be regarded as the answer of the Board, than could the answers of a number of citizens included within the municipality that elected the Board. The Supervisors constitute the Board, and possess the powers, and are capable of discharging the functions conferred by law upon the Board, only when they are assembled as a body, in the manner prescribed by law. Admitting that the members of the Board may severally answer, suppose that all make default except one, and he answering shows that the Board were not required to perform the alleged duty, could the writ issue either to the Board or to the members who made default? If it could issue, the Board or the members would be required to perform an act, that had been determined in the action, one of the members was not by law required to perform. If it could not issue, it would then appear that the answer of one member, traversing or confessing and avoiding the matters averred in the petition, was a sufficient defense to the whole proceeding, notwithstanding that the other members admitted every allegation in the petition. If one half of the members should make default and the other half should show good cause, still greater absurdities, if possible, would be manifest.

The answers of the six Supervisors, so far as they relate to the matters stated in the petition, amount to no more than would their default, for they do not deny nor confess and avoid any fact alleged in the petition; but it is attempted, by means of the answers, to raise issues between themselves and the Board, or the remaining members of the Board, respecting certain facts alleged in the answer of the Board. It is difficult to see how

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such issues could, under any rules of practice, be tried in this action, or how anything would result from the finding of the issues in their favor, as they do not demand any affirmative relief against either the Board or any of its members.

It is said in *Tapping on Mandamus* (p. 340) that the return to the writ should be made either by those to whom such writ is directed, or who are legally competent to execute it. There can be no question that the Board, and not any member or number of members, must execute the writ (if one should be issued) by the performance in its aggregate capacity, of the duty enjoined. The rules of the Civil Practice Act are as strictly applicable to the pleadings in mandamus as to those in any action, and under those rules no one may answer except those who are made, or are by the Court admitted as defendants. The remark found in the treatises on mandamus, that if two separate returns be made by different portions of the same corporation, the Court will take that which appears to be made by the majority, and other statements of similar import, do not mean that separate returns may be made by the several members of one "portion of the same corporation," as of one of the two boards composing the legislative branch of the municipal government, and that the Court may ascertain which return had the majority of the members; but in order to have any standing it must be made as the return of the whole corporation, or at least of a particular portion or branch of it, if the writ is directed to it, and then if two returns are made in that capacity, the Court will ascertain which is the true return; that is to say, the return of the majority. There might not be a majority to any return if made by individual members, for each member might make a separate return differing essentially from that of each of the other members.

The motion must be allowed, and the answers of the six Supervisors stricken from the files.

The relator moves for judgment on the pleadings; and in support of the motion it is insisted among other things that the answer filed by the counsel for the defendant is only the answer of Supervisor McCoppin, who verified it, and that if

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it is held to be either his answer or that of the Board, it does **not state facts sufficient to constitute a defense to the action.**

It is apparent upon inspection that it is not the answer of McCoppin, for its form is: "The Board of Supervisors do come, and for answer to the amended petition and affidavit, upon which the application of the above named plaintiff is made, allege and show," etc. The fact that it is verified by him has but slight, if any, tendency to show that it is his answer, and is entirely overcome by the fact that all the allegations are made in the name of the Board. If it can be regarded as a pleading in the cause, it must be held to be the answer of the Board of Supervisors.

The relator objects to the answer being considered as the answer of the Board, because it does not appear that the Board, as an aggregate body, resolved upon and made the return; or as we understand the objection, that the Board has not by resolution adopted the return, as prepared by their counsel, nor directed what matters should be set forth in their answer. It is not doubted, that the counsel who signed and filed the answer of the Board, were duly authorized to represent them, and such being the case, they were fully empowered to appear for them in the action, and do all those things that counsel might lawfully do in behalf of a person who was the sole defendant. In this respect they bear the same relation to the Board that they do to the Clerk of the City and County, and their authority is the same in either case, and similar presumptions will be indulged in, that the answer is the answer of the persons or body that it purports to be. No authority is cited, holding that it must be stated in the answer to the petition, or the return to the alternative writ, made by a corporation or a Board forming a constituent part of the corporate authority, that the corporation or Board had resolved upon the return or answer; and no reason suggests itself to our mind why such a statement should not be required in the petition, when a corporation is the relator, if it is necessary in the answer of the corporation. The general rules of pleading are substantially the same in mandamus as in other civil actions. (Tap. on

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Man.; 8 N. Y. 348; *Commercial Bank v. Canal Commissioners*, 10 Wend. 26; *People v. Ransom*, 2 Comst. 490.)

Among the numerous cases found in our reports of actions brought by or against corporations, none is noticed in which it is stated that the corporation had resolved upon the complaint or answer, or had, as a corporate act, directed what either should contain; and in examining many of the cases cited by Tapping on Mandamus, no such statement is found or said to be required in the return; but it would appear from those cases that it was neither usual nor necessary — the presumption being that it was the return of the officer or body it purported to be. In *Mayor of Thetford's Case*, 1 Salk. 192, which was mandamus to the Mayor and Common Council, the return was made in the name of the corporation, but without the common seal, or the hand of the Mayor set to it. After search of precedents, which were found both ways, the Court held the return good, because they were estopped by the record to say it is not their act; and the Court say that the City of London every year makes an attorney, by warrant, without either sealing or signing. In *Rex v. Mayor of Abingdon*, 2 Salk. 431, which was mandamus to the Mayor, Bailiffs and Burgesses, the Mayor made a return, and brought it in to file it, and it was objected to as the return of the Mayor and a minority; but Mr. Chief Justice Holt said: "It is not fit that we should examine upon affidavits whether there was the consent of the majority." (See also *Rex v. St. John's Coll.*, 4 Mod. 241.)

But it is said that there are, in effect, two returns, or answers, that in the name of the Board, and that composed of the answers of the six Supervisors; and that as the latter is inconsistent with the former, and is made by one half of the members, it must overrule the answer made in the name of the Board — at least that, taking all the answers together, they make such an inconsistent return, that they must be all disregarded. We have already said that the members of the Board are not parties to this action, and their answers as such members must be disregarded. The presumption is that the answer made and filed by the counsel for the Board in their name is

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the answer of the Board. "When a corporation aggregate, to which a writ is directed, has regularly resolved upon and made a return, individual dissentients cannot be allowed to dispute its propriety" (Tap. on Man. 341); but if the dissentients also file a return as the return of the corporation, the Court will ascertain which is the return of the majority; and doubtless without holding to the strict rule in 1 Salk. 192, that the members are estopped to say that the return is not the return of the majority, they may allege that the return is not the return of the majority, or has not been resolved upon by the corporation, and thereupon have the collateral issue determined by the Court. That, however, is not the case before us, but the dissentients merely undertake to controvert certain of the facts alleged in the answer of the Board, in avoidance of the facts stated in the petition.

The question then recurs, is the relator entitled to judgment on the pleadings, regarding the answer verified by McCoppin as the answer of the Board of Supervisors? The motion of the relator to that effect is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense. Section thirty-seven of the Practice Act providing that "All the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this Act" is applicable to proceedings in mandamus.

The principal facts upon which the right of the relator depends, briefly stated, are as follows: The Board of Supervisors had been commanded by the final judgment of this Court to subscribe six hundred thousand dollars to the stock of the Central Pacific Railroad Company, and to issue the bonds of the city and county in payment of such subscription, pursuant to the provisions of the Act of April 22, 1863; that afterward, under the provisions of the Act of April 4, 1864, the Board of Supervisors passed Ordinance Number Five Hundred and Eighty-Two, approved June 21, 1864, the terms of which were accepted by the relator, by which the parties compromised the claims of the railroad company upon the

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city and county, under the Act of 1863, it being agreed that the Board should in lieu of making the subscription and delivering the bonds to the amount of six hundred thousand dollars, deliver such bonds only to the amount of four hundred thousand dollars, without making any subscription to the stock, the bonds to be delivered to the relator, upon condition that they should be accepted in full discharge and satisfaction of all obligations, claims, etc., of the company against the city and county; that the company tendered to the city and county a full release and discharge of said obligations, claims, etc., to be delivered on the receipt of said bonds; that the Mayor, Auditor and Treasurer of said city and county, whose duty it was to prepare and sign said bonds, were in certain proceedings in this Court wherein they were the defendants and the company was the relator, ordered by a peremptory writ of mandamus, to execute and deliver without delay, to the company the four hundred bonds, of one thousand dollars each, as in said ordinance provided. It seems not to be doubted, and the decision in the last mentioned case (*People v. Coon, Mayor, et al.*, 25 Cal. 635) settles the point, that the four hundred bonds to be issued under Ordinance Number Five Hundred and Eighty-Two are parcel of the six hundred bonds provided for in the Act of 1863, they differing from the latter only in the date they were to bear.

In examining the answer somewhat in detail the only question will be whether it states facts sufficient to constitute a defense to the action, and many of the objections taken in the argument by the counsel for the relator, which might have been considered if made the grounds of a special demurrer, or of some proper motion to strike out, etc., must be disregarded.

The defendants' denial that they "became or were lawfully or duly or otherwise bound or obliged to subscribe six hundred thousand dollars, or any other sum to the capital stock" of the company, or to execute or deliver any bonds, is not the denial of any fact alleged in the petition. The judgment in the case of *The People ex rel. Central Pacific Railroad Company v. The Board of Supervisors, etc.*, whereby the defendants

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were commanded to subscribe to the stock not being denied stands admitted, and the denial that they were bound to obey the judgment, is only a denial of a conclusion or principle of law. (*People v. Commissioners of Fort Edward*, 11 How. Pr. 89.) If it is permitted to show collaterally that the judgment is void, the points of invalidity must be specified.

The remarks we have just made are applicable to the denial that they were "bound by law to execute or deliver" the four hundred bonds of the company, and the accompanying averment that Ordinance Number Five Hundred and Eighty-Two is "wholly illegal and void." The facts from which the Court might draw the inference that the ordinance was void, and not the assumed inference, should have been stated. The further allegation that neither the Board nor the Legislature have the right or power to make a donation to the company of four hundred thousand dollars of the money of the City and County of San Francisco, even assuming that it appeared that such a donation had been attempted, is rather a specification of a ground of demurrer, than an allegation of a fact.

The next averment of the answer is that the election in the City and County of San Francisco, held pursuant to the Act of April 22, 1863 — the Act authorizing the subscription to the stock of the company "was not fairly, or properly or legally conducted, but was affected, influenced and controlled by corruption and bribery" practised and perpetrated by the company and its agents and employés; and they specify nine instances, in which the alleged agent of the company employed the company's money, to corruptly influence the electors, to vote in favor of the proposition, to subscribe to the stock of the company. It will be seen on reading the Act of April 22, 1863, (Statutes 1863, p. 380,) that the Board could not be required, and were not permitted to subscribe to the capital stock of the company, unless a majority of those voting upon the proposition voted in favor of the subscription. It was absolutely essential, therefore, in instituting proceedings against the Board to compel the subscription to be made, that the relator should allege, and if it was denied by the Board, to

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prove on the trial, that a majority of the votes cast were in favor of the proposition. The fact must have been found by the Court or have been admitted by the pleadings—in other words the facts must have been alleged, and must have been true—for it was the fundamental fact in the action, and in its absence the Court could not have rendered the judgment that was pronounced, commanding the Board to make the subscription and issue the bonds. The matter thus became *res judicata*, and not subject to be again litigated in another action between the same parties. It is unnecessary to determine whether the alleged bribery and corruption could have been shown at the time the vote was canvassed, or in proceedings to contest the election, but if not admissible on either of those occasions, it would have been admissible in the proceedings against the Board to compel them to make the subscription, if they had alleged that the result at the election had been procured by those means. But now, in addition to the reason already given for excluding the alleged acts of bribery and corruption, they are immaterial and irrelevant, as they do not in any manner avoid the compromise, on which the relator proceeds in this action.

The allegations respecting the failure of the Board to procure an inspection of the books of the company, and to procure answers from the company to questions propounded to them, are so clearly immaterial that they require no notice.

They allege that the passage and approval of Ordinance Number Five Hundred and Eighty-Two were procured by the false and fraudulent representation of the company, that if the proposed compromise were not made the whole subscription of six hundred thousand dollars, with a year's interest, would be immediately due; but it is not stated that any fact was falsely and fraudulently stated, from which the inference might be drawn that the whole amount of bonds and interest was then due, and in the absence of an allegation that they were ignorant of the facts, upon the existence or occurrence of which the subscription became due, we must hold that the alleged representation was of a conclusion of law drawn from

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existing facts known to the defendants. Conceding the point contended for by the defendants, that the six hundred thousand dollars in bonds were payable in instalments, as assessments were called in from the stockholders generally, it yet is not alleged either that the company represented that assessments to the full amount had been levied, or that the Board were ignorant that they had not been so levied.

The defendants allege that Ordinance Number Five Hundred and Eighty-Two was never published and printed, as required by law; and by that which follows in the same paragraph we understand them to mean, not that the ordinance in the words in which it passed was not published, but that the several provisions of the law directly or indirectly referred to in the ordinance were not published with it. We do not understand that such a publication is required, but it was only necessary to publish the ordinance as passed—all persons being charged with notice of a public Act of the Legislature on which an ordinance is founded.

It is next alleged that the company did not accept said compromise after the passage of the ordinance, and did not comply with the conditions expressed in the ordinance. It is not stated wherein they failed to comply, and therefore that portion of the allegation is insufficient. They set out in the answer the resolution of the company accepting the terms of the ordinance, which had then passed to print, and say that they are advised that such resolution is not an acceptance of the terms of the compromise proposed in the ordinance. The objection amounts in substance to a demurrer to the resolution that it is not sufficient in law to amount to an assent on the part of the company to the terms of the compromise contained in the ordinance. It is not requisite that the assent to or acceptance of the terms of the compromise should have been made by the company after the ordinance had been approved by the Mayor. The company might by some proper corporate action have proposed the terms of the compromise, and the Board might thereupon have passed an ordinance, as they have done, and such acts would have con-

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stituted an assent by each party to the terms. The question as to how the contract must be proven is quite different from that which relates to the time of assenting to the terms proposed. It may be remarked that the commencing of this action, as well as the previous action against the Mayor, Auditor and Treasurer are very indicative of an acceptance by the company, even if it could be held that the acceptance of the terms by the company should have been subsequent to the approval of the ordinance.

The defendants say that the alleged contract, in order to be binding, must have been made in writing, and signed by the party to be charged. It requires no citation of authority to prove that a municipal corporation may contract by ordinance directly, and that a contract made in that manner as fully satisfies the Statute of Frauds as one made by the agents of the corporation who have been authorized to execute the contract. But they insist that the ordinance is not a contract; that it is but a resolution to do a certain thing—that is, to render to the company certain bonds; that the company resolved to receive bonds if all of them were tendered; and that when the bonds have been tendered by the city and received by the company, and the company have executed to the city a release, as provided for, then the parties will have made an executed contract; but as yet there is no contract between the parties, the ordinance of the city and the resolution of the company amounting to nothing more than declarations of intention to enter into an executed contract. This certainly was not the view of the Court in *The People v. Coon et al.*, nor do we think the position tenable. True, the company say, after accepting the proposal contained in the ordinance, that such acceptance shall be effectual only when the whole of the bonds shall have been delivered to them; but, taking the whole transactions of the parties together, it is manifest that the parties entered into a contract of compromise, but that the company would not yield their rights, or discharge their claims, under the Act of 1863, until the city had complied with the terms of the compromise contract. The parties did

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not contemplate a further contract, but the company, in assenting to the contract, insisted on a performance of its terms by the city, before the company would release the city from the obligations cast on her by the Act of 1863.

The defendants further say that the company have not, by any corporate act, consented to be bound by the provisions of the Act of 1863, nor agreed to receive the bonds mentioned in the Act. Such consent of the company was not required by the Act of 1864 to be the basis of the compromise, but it was only requisite that this Court should have commanded the Board to execute and deliver the bonds. The commencing of the proceedings by the company against the Board was sufficient evidence, in that cause, of the acceptance by the company of all the terms of the Act, and the judgment having been rendered compelling the Board to make the subscription and issue the bonds, the inquiry now whether the company had in fact agreed to receive the bonds which they, in that proceeding, demanded should be issued to them, is immaterial.

The denial in general terms that they became bound to execute and deliver the bonds to the amount of six hundred thousand dollars, or that they have ever been compelled by the judgment of this Court to execute or deliver the bonds, forms no answer to the allegation in the petition that a judgment of this Court was rendered by which they were commanded, by the peremptory mandate of the Court to execute and deliver the bonds, as no fact is alleged tending to invalidate the judgment. We have sufficiently indicated our opinion that a denial of this character is not a denial of a fact, but of a conclusion of law, and would be more properly classed among the grounds of demurrer than the allegations of the answer.

The question arising upon the facts alleged by the defendants that the company's road does not have a terminus at San Francisco, nor at any point nearer than the City of Sacramento, that the work is one of general interest to the whole State, but not of local interest to San Francisco, and that the city has subscribed to the stock of the San Francisco and San José Railroad, which has a terminus at San Francisco,

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etc., have been discussed by counsel with great ability, but the great length of the opinion will preclude us from considering them in detail. They are resolvable into the question whether the Legislature can impose upon a municipal corporation the burden of building or aiding in building a work which is in no sense a work of local interest to the corporation, but which is of general interest to the people of the State. The counsel for the defendants deny the power to the Legislature, and say that the facts alleged by the Board show that the railroad is not of local interest to the city. By the provisions of the Act of 1863, the city was required to become a subscriber, to a certain amount, to the capital stock of the railroad company, in the event that, at the election provided for in the Act, a majority of the electors of the city, voting on the proposition to subscribe, should cast their votes in favor of the proposition. The majority of the votes having been cast in favor of the proposition to subscribe, it became the duty of the Board of Supervisors to make a subscription to the amount of six hundred thousand dollars, whereupon the city would become a stockholder in the corporation, with all the rights of other stockholders, and subject to all the liabilities of other stockholders, except certain ones, from which she was exempted by the provisions of the Act, and having the right to pay her subscriptions in her bonds instead of money. Upon the subscription being made, and the bonds, or an instalment of them equal to the assessments upon other stockholders, being delivered to the company it could not be said that the city had made a donation to the company, or had been charged with the expenses of a work which was being constructed for the benefit of the public, in any other sense than the same could be said of any stockholder in the company, but she would be a stockholder in a work which was being prosecuted for the benefit of all the stockholders in the company. True, the work might not result in profit, but that is a risk incident to all enterprises of the kind. It became the duty of the city to subscribe to the stock, and to deliver her bonds to the company, and she was commanded so to do by the Court; and the

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company having accepted the terms of the proposed subscription, a claim accrued to the company against the city, that she should make the subscription and deliver the bonds, and thereby assume such liabilities as a stockholder, as were required of or cast upon her by law. But the city not wishing to become a stockholder and assume the liabilities incident to that relation, enters into a compromise with the company, under the authority of the Act of 1864, by which it is agreed that the city shall not subscribe nor deliver the stipulated amount of bonds, nor incur the liabilities of a stockholder, and that in satisfaction of the claim of the company against her, she shall deliver to the company a certain less amount of her bonds. The bonds are the price she pays in extinguishment of the company's claim against her; and the transaction cannot be regarded as a donation in any other sense than as any compromise may be, nor as a burden imposed on her to aid in the construction of a public work. The facts, therefore, that the work is not one of local interest to the city, and that she has already subscribed to a railroad that is of local interest to her, are immaterial and constitute no defense to the action.

The remaining allegations of the answer have been disposed of in considering other points in the case, but it may be added that in our view it makes no difference as to the validity of the compromise, whether the bonds were payable in instalments or in gross, nor whether a legal assessment had been laid on the capital stock of the company, for irrespective of the time when the bonds under the Act of 1863 might become due, the company held a claim against the city, which was a proper subject of, and formed a good consideration for, a compromise.

The answer of the Clerk of the City and County remains to be considered. It is provided in section five of the Act of 1863, authorizing the subscription of the city to the stock of the company, that upon the bonds being signed by the Pacific Railroad Loan Commissioners, they "shall be presented by the President of the Board of Supervisors to the Clerk of said city and county, who shall countersign the same as such Clerk,

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in the presence of a quorum of such Board, at a meeting thereof," etc.; and it is provided by Ordinance Number Five Hundred and Eighty-Two that the bonds thereby required to be issued should be executed in all respects, except as to date, as required by the Act of 1863. The relator alleges in his petition that when the bonds had been signed by the Pacific Railroad Commissioners they were, by the President of the Board, at a meeting of the Board, in the presence of a quorum thereof, on the 7th day of September, 1864, presented to the Clerk for the purpose of being countersigned by him, in the presence of a quorum of the Board, but that he did not countersign the same; and that on the 27th day of September the relator notified him that there would be a meeting of the Board on the evening of that day, and requested him to attend and complete the countersigning of the bonds, but that the Clerk did not present himself and countersign or offer to countersign any of the bonds. The relator shows that at the meeting on the 27th of September the Clerk was not requested by the Board to countersign the bonds, and had no opportunity so to do; but, on the contrary, that the Board refused to adopt a resolution requesting the Clerk to countersign the bonds, and, by resolution, directed him to deposit them with the County Treasurer, subject to the order of the Board, which was immediately done.

The Clerk denies that on the 7th of September, or at any other time or meeting of the Board, he had an opportunity to countersign the bonds, or that he was ever authorized to countersign them; and he denies that he has authority so to do without the request of the Board. The bonds, from the first step in their preparation up to their delivery to the company, are under the control of the Board, and everything relating to their execution is done under the direction of the Board. The Clerk of the City and County, in proceeding to countersign them, is as completely subject to their orders, as the Clerk of the Board is, in entering in their journal the fact of countersigning, and the number, date and amount of the bonds. It will not be contended that the Clerk could have proceeded

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to countersign the bonds after the Board directed him to deposit them with the Treasurer, and it is equally clear that he had no authority to proceed, unless the Board directed him to do so, or afforded him an opportunity to proceed with the countersigning in their presence. His denial raises a material issue of fact, for if his answer is true in that respect, and the motion admits it to be true, he is not in default in the performance of the duties imposed upon him by the Act, and continued by the ordinance.

Our conclusion is that the answer of the Board does not state facts sufficient to constitute a defense; and that the answer of the Clerk sets up a valid defense to the action.

The point presented by the defendants that as the relator is not entitled to all the relief he claims, the peremptory writ must be denied, may be passed upon now, though strictly speaking, the issues of fact raised by the answer of the Clerk should be first disposed of upon the evidence that may be introduced by the parties, but the action, so far as the Clerk is concerned, cannot be disposed of under this motion, on the ground of a misjoinder of parties defendant or of causes of action, as those objections should have been taken by demurrer, for if they exist they are apparent upon the face of the petition. The defendant cites two cases: *The People v. The Board, etc., of Dutchess*, 1 Hill, 50, and *The People v. The Board, etc.*, 10 Abbott's Pr. 233, to sustain the proposition "that if the relator is not entitled to what he demands in the alternative writ, his motion for a peremptory writ should be denied, though it appear that he is entitled to a portion of the relief." The doctrine of those cases is that the peremptory writ should follow the alternative writ, and that if the alternative writ demands too much — something more than the relator is entitled to — the judgment must be for the defendant; for there cannot be a judgment for the relator for a part of the relief demanded in the writ and for the defendant for the other part. To the same effect also is *Tappan on Mandamus*, 402, 403. Without commenting upon the distinctions that might be found between such a case, when the question is: Shall the alterna-

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tive writ be made peremptory? and a case in which the proceeding is by petition and motion for a peremptory writ, when the Court would doubtless have the right to frame the writ according to the exigencies of the case; we think the point may be solved on other principles. A proceeding to procure the issuing of a writ of mandamus is a civil action. In *Kendall v. United States*, 12 Peters, 615, the Court say: "It is an action or suit brought in a Court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." (See *People v. Ransom*, 2 Comst. 490; *Commercial Bank v. Canal Commissioners*, 10 Wend. 26; *Tyler v. Houghton*, 25 Cal. 26.) The final determination of the Court in the matter is a judgment, and if rendered in any Court but the Supreme Court an appeal lies from the judgment. The parties appear, and by their pleadings form issues, and if of fact they may be tried by a jury, and new trials may be had. The relator may in the same action recover the damages he may have sustained, and execution may issue for the damages and costs. In *People v. Croton Aqueduct Board*, 5 Abbott's Pr. 372, it is held that the rules of the code of New York do not apply to mandamus, because Sec. 471 expressly excludes from their operation that class of cases. There is no such reservation in our Practice Act, and in our opinion the general rules of that Act are applicable to mandamus, in the same manner as to an action for an injunction or of *quo warranto*; and whatever may be the rule when the relator, after having procured the alternative writ, moves for the peremptory writ, we have no doubt that, when the relator proceeds by petition and notice for the peremptory writ, without procuring an alternative writ, the Court, under the enlarged discretion conferred by Sec. 147, may grant any relief consistent with the case made by the petition, and embraced within the issues, although it may be only a part of that demanded in the prayer of the petition.

We have omitted to comment on many of the cases cited by the respective counsel, for the obvious reason that the attempt to do so, in a case brought before this Court, as a

Opinion of Sawyer, J., and Shafter, J., concurring specially.

Court of original jurisdiction, in which all the numerous points are presented that suggest themselves to the minds of able and ingenious counsel, as is usual at *nisi prius* trials, would involve very great labor, without any corresponding benefit.

The relator is entitled to judgment for a peremptory mandamus on the pleadings against the Board of Supervisors, but not against the Clerk of the City and County, and as to him the proceeding must be dismissed.

SAWYER, J., and SHAFTEE, J., concurring specially.

We are not prepared to say that the individual answers of the six Supervisors, alleging a willingness to perform the duties sought to be enforced, ought to be struck out. But disregarding them, and conceding the answer verified by McCoppin to be the answer of the Board, we are satisfied that said answer does not "raise a question as to a matter of fact essential to the determination of the motion;" and that complainants are entitled to a peremptory mandamus against the Board of Supervisors, as prayed for in the petition.

Loewy, the County Clerk, substantially denies that he had an opportunity to countersign the bonds, and the inference from his answer is that he is ready to countersign when a proper opportunity is given. We think his answer raises a material issue as to him; but we do not understand that the relators propose to put in any evidence on that issue; and taking the answer as true, Loewy is not in default. The proceeding must, therefore, be dismissed as to Loewy, and a peremptory writ of mandamus issued against the Board of Supervisors.

HENRY LEVY v. HENRY GETLESON AND ERNEST
PESTNER.

SETTLEMENT OF STATEMENT AND AMENDMENTS THEREON.—The Court should not settle a statement made in support of a motion to set aside a nonsuit which does not specify the errors upon which the moving party will rely, nor

Statement of Facts.

should it entertain a motion to amend the same after it has been filed and served on the opposite party.

SAME.—Such statement should, on motion of the opposite party, be stricken from the files of the Court.

STATEMENT ON APPEAL.—A statement which does not purport to be a statement on appeal, cannot be considered on an appeal from the judgment.

REVIEW OF ORDER GRANTING NONSUIT.—The District Court cannot review an order granting a nonsuit upon a motion to set aside the nonsuit.

APPEAL FROM ORDER REFUSING TO RETAX COSTS.—An appeal cannot be taken from an order denying a motion to retax costs made before final judgment.

SAME.—An order denying a motion to retax costs should be reviewed by an appeal from the judgment, and annexing a statement to the judgment roll.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

This was an action on a promissory note alleged to have been executed by the defendants as copartners, under the name of H. Getleson & Pestner. Defendant Getleson made default; defendant Pestner answered, denying his liability on the note.

The case was tried October 16, 1863, before a jury, and after the close of the testimony the Court, on motion of the attorney for defendant Pestner, granted a nonsuit as to him, with leave to plaintiff to move to set aside the nonsuit, and directed the jury to find a verdict for plaintiff against defendant Getleson. October 19th, plaintiff's attorney filed and served on defendant Pestner's attorney, the following notice:

"Please take notice, that the plaintiff intends to move the Court to set aside the judgment of nonsuit herein, and for a judgment against both of the defendants, and that the proposed statement of the case, upon which said motion will be made, is herewith served upon you."

Plaintiff's attorney, on the same day, filed and served a statement embodying the evidence and rulings of the Court, with his exceptions thereto. This statement, after the title of the case, was headed:

"Statement of case on motion to set aside nonsuit in favor of defendant Pestner, and on motion for judgment upon the pleadings and proof, against both defendants."

Argument for Appellant.

The statement did not contain a specification of the errors upon which plaintiff would rely. On the 28th of October plaintiff's attorney served on the attorney for Pestner a specification of the grounds upon which he would rely on his motion to vacate the judgment of nonsuit, but the latter returned it. Plaintiff then moved the Court to be allowed to amend his statement by inserting the specification of grounds upon which he would rely, but the Court denied the same May 2, 1864. June 29, 1864, on motion of the attorney for defendant Pestner, an order was made striking the statement from the files of the Court. July 2d plaintiff's attorney moved the Court to sign the statement as the settled statement of the case, which was denied July 11th.

The other facts are stated in the opinion of the Court.

Wm. W. Chipman, for Appellant.

In a case of this kind, no specification of grounds is necessary. None are contemplated nor provided for in the statute. A motion to set aside a nonsuit, and for judgment *non obstante veredicto*, may, I conceive, be made without asking for a new trial, and such a motion may be granted without a new trial.

The Court ought to have allowed an amendment of the statement, if an amendment be deemed necessary; and the order denying the motion is not discretionary merely. It is a matter of right, and is appealable. It is an order subsequent to judgment, and authorized by statute to be reviewed by appellate Court. Transcripts have been sent back to lower Court to allow statements to be amended, restated, and reformed. (*Powell v. Waters*, 8 Cow. 55; *Codwise v. Hecker*, 1 Cain, 74; *Smith v. Grant*, 7 How. Pr. 381; *Westcott v. Thompson*, 16 N. Y. 613; *Johnson v. Whitlock*, 3 Kernan, 344; *Tillotson v. Cheatham*, 3 Johns. 95; and see *Loucks v. Edmondson*, 18 Cal. 203, citing *Valentine v. Stewart*, 15 Cal. 396; *Howe v. Briggs*, 17 Cal. 385; *Branger v. Chevallier*, 9 Cal. 351.)

W. P. C. Whitney, for Respondent.

By the Court, SHAFER, J.

One of the questions presented is whether it is error for a District Court to refuse to settle a "statement" made in support of a motion to set aside a nonsuit—or to refuse to entertain a motion to amend such statement after it has been filed and served on the opposite party—or error to grant an order striking such statement from the files of the Court.

The District Courts cannot be called upon to review a case upon the testimony, nor upon an allegation of errors of law occurring at the trial, except in the way pointed out in the Practice Act. That method is simple and straightforward, and, in our judgment, was intended to exclude all others. If the plaintiff desired to have the nonsuit entered against him investigated upon its merits in the District Court, he should have moved for a new trial upon a statement; or if he preferred to bring the case to this Court directly, he could have done so by an appeal from the judgment aided by a statement annexed to the roll. There is a statement in the transcript but it does not purport to be a statement on appeal from the judgment. The result is that the Court did not err in refusing its sanction to a method of reviewing decisions made in the course of a trial, altogether unknown to our system.

The plaintiff has not only appealed from the judgment in favor of Pestner, but also from an order overruling a motion to retax the costs. The memorandum of costs was duly filed October 17, 1863; the notice of motion to retax was served June 20, 1864, and the order denying the motion was made on the twenty-seventh of that month. The judgment was entered July 18, 1864. The order appealed from is not in itself appealable, inasmuch as it was not made after final judgment. The proper course would have been to appeal from the judgment—raising the question of the correctness of the taxation by a statement annexed to the judgment roll. (Practice Act, Sec. 344.) We cannot approach the alleged error through an appeal from a non-appealable order.

Judgment affirmed.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

VOLUME XXVII.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

27 Cal. 11-49; 85 Am. Dec. 211. **HOOPER v. WELLS, FARGO & CO.**

Forwarders are responsible for ordinary care, skill, and diligence. They are not, it is true, insurers, like common carriers, but they are responsible for all injuries to property while in their charge, resulting from negligence or misfeasance of themselves, their agents, or employees, p. 27.

Cited in *Alabama Co. v. Thomas*, 89 Ala. 302, 18 Am. St. Rep. 123, holding that a forwarder is liable as a bailee for lack of ordinary care; *Overland Co. v. Carroll*, 7 Colo. 50, holding an express company liable for neglect of its agent in failing to seal a valuable package; note to 88 Am. Dec. 418, on forwarders; and in notes, on common carriers as insurers, in 91 Am. Dec. 363; 93 Am. Dec. 106; 99 Am. Dec. 586.

Limitation of Liability, by an express company in its contracts for forwarding, must be construed most strongly against the company; and a stipulation, that the company are "not to be responsible except as forwarders," does not relieve the company from liability for loss of the goods, while in transit, by negligence of their agents. The fact that defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendant's purposes the managers of those various conveyances were their agents and employees, pp. 28-30.

Cited in *California Powder Works v. Atlantic & Pacific Co.*, 113 Cal. 336, holding that where a shipping order stipulated that a railway company should not be liable for loss by fire, the company was not liable for such loss occurring without negligence of its employees; *Bank v. Adams etc. Co.*, 1 Flipp. 253, Fed. Cas. No. 889, but distinguished, holding express company liable for ordinary care only under stipulation of contract; *The Queen*, 61 Fed. 218, construing stipulation for presentation of claims; notes to *Bullard v. Express Co.*, 61 Am. St.

Rep. 363, 364, 365, and Pittsburgh etc. Co. v. Mahoney, 62 Am. St. Rep. 525, on general subject; Alabama Co. v. Little, 71 Ala. 616, holding that a limitation of liability by a railway company did not release it from responsibility for damage caused by lack of ordinary care; Grace v. Adams Express Co., 100 Mass. 506, 97 Am. Dec. 118, 1 Am. Rep. 133, holding that where an express company stipulated against liability for loss by dangers of navigation and fire, it was not liable for loss by fire at sea; McLean v. Burbank, 11 Minn. 291, where a stage company was held liable for the death of a passenger on a ferryboat that was carrying the stage; Christenson v. American Express Co., 15 Minn. 286, 2 Am. Rep. 129, holding that an express company, that had limited its liability to that of a forwarder, was liable for a loss caused by negligence of employees of a steamer; to same effect, as to loss by fire on a steamer, in the United States Express Co. v. Bachman, 28 Ohio St. 151; American Express Co. v. Second Nat. Bank, 69 Pa. St. 402, 8 Am. Rep. 272, holding an express company not liable for loss of money in the hands of a connecting company, there being no negligence on the part of the first company; Ballou v. Earle, 17 R. I. 445, 33 Am. St. Rep. 885, where an express company's receipt limited its liability to fifty dollars unless a higher value was declared therein, and it was held for a loss occasioned by the company's negligence, there could be no recovery beyond fifty dollars, because the actual value of the goods had not been declared; and in Galveston Co. v. Allison, 59 Tex. 198, where a railway agreed that melons should go through to their destination in the same car, and a connecting road put them in another car, and the first road was held liable for damage caused thereby, notwithstanding it had limited its liability to loss occurring on its own line. Approved in Bank of Kentucky v. Adams Express Co., 93 U. S. 186, holding the company liable for loss of money in a railway accident. Distinguished in Harding v. International Navigation Co., 12 Fed. Rep. 170, holding that where a railway company issued a through bill of lading stipulating against liability for loss on any line but its own, it was not liable for damage on a connecting line. Cited in Milne v. Douglas, 13 Fed. Rep. 39, holding that where several railway companies signed a bill of lading stipulating that only the company on whose road a loss occurred should be liable for it, the companies were jointly liable for a loss; also in notes, on limitation of liability by a common carrier, in 32 Am. Dec. 497, 500; 50 Am. Dec. 666; 55 Am. Dec. 345; 62 Am. Dec. 130; 82 Am. Dec. 295, 379; 88 Am. Dec. 765; 92 Am. Dec. 56, 610; 93 Am. Dec. 73, 167; 94 Am. Dec. 566; 97 Am. Dec. 182; 13 Am. St. Rep. 783; note on liability of express companies in 91 Am. Dec. 789; note on liability for connecting carriers in 89 Am. Dec. 163; note on contracts by agents in 9 Am. St. Rep. 795; and in note, on master and servant, in 22 Am. St. Rep. 461.

Amendment in Appellate Court.—Where the complaint alleges damages in a definite sum, and the verdict is for a larger sum, to include

interest, it is too late, on appeal, to amend the complaint to make it correspond to the verdict, though it might have been done before judgment in the lower court, p. 35.

Cited in *Farmer's Bank v. Stover*, 60 Cal. 396, holding it error not to have allowed an answer to be amended in the lower court; to the same effect in *Burns v. Scoofy*, 98 Cal. 276, notwithstanding that allowing the amendment would have necessitated a continuance; and in notes to 89 Am. Dec. 337, and 95 Am. Dec. 557, on amendment after appeal.

Interest.—Where a complaint prays for a certain sum as damages, and the verdict is for a larger sum, to include interest, the excess over the amount prayed for must be struck off by the respondent, or judgment will be reversed, p. 35.

Distinguished in *Cassacia v. Phoenix Co.*, 28 Cal. 631, holding that where the complaint prayed for judgment for a certain amount "and for such other and further relief as may seem meet," and the verdict included interest, this was "consistent with the case made, and embraced within the issues."

27 Cal. 50-57. HURLBUTT v. BUTENOP.

Certified Copy of Recorded Instrument held admissible, where party offering it testified that he "never had control of the original," p. 55.

Cited in *Mayo v. Mazeaux*, 38 Cal. 449, holding that the instrument must have been duly recorded, and that an objection to insufficiency of evidence as to its control must be raised at the time, or be deemed waived.

Lis Pendens having been filed at the beginning of a suit, purchasers from defendant, pending the suit, are bound by the decree, p. 56.

Cited in *Sharp v. Lumley*, 34 Cal. 615, holding that the object of filing a *lis pendens* "being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of *lis pendens* had been filed"; *Amador Co. v. Michell*, 59 Cal. 178, holding that a purchaser at a judicial sale with notice of pendency of a foreclosure suit on the property, is bound by the judgment therein; and in note to 56 Am.-St. Rep. 857, on *lis pendens*.

Valuation in Assessment-roll is defective where it is expressed in figures without indicating for what they stand, p. 57.

Affirmed in *Braly v. Seaman*, 30 Cal. 619; *People v. San Francisco Savings Union*, 31 Cal. 135; and *Emeric v. Alvarado*, 90 Cal. 467. Distinguished in *Dyke v. Bank*, 90 Cal. 401, holding that a judgment was properly docketed where numerals were written without the dollar

mark in the column headed "amount of judgment," and the ruling of the column plainly indicating that the figures to the left were dollars and those to the right were cents, and, "when so written not only courts, but all persons of common education, readily read and understand the figures as representing a definite number of dollars and cents." Cited in *Hopper v. Lucas*, 86 Ind. 51, holding that a transcript from a justice's docket, where the amount of judgment was expressed in figures without a dollar mark, was not evidence of the amount. Denied in *Ward v. Commissioners*, 12 Mont. 34, holding, as to an assessment roll, that "the omission of the dollar mark, when the position of the figures, the value of the property, or some other fact, indicates the meaning of the numerals in said exhibit, is an informality which does not vitiate the assessment." Cited in *Morrill v. Taylor*, 6 Neb. 244, holding that the statute regulating an assessment must be strictly complied with. Affirmed in *Tilton v. Oregon Central Co.*, 3 Sawy. 24; and *Gray v. Larrimore*, 4 Sawy. 652; 2 Abb. U. S. 558; also in *In re Boyd*, 4 Sawy. 265, as to a judgment docket of a superior court.

27 Cal. 57-65. REED v. SPICER.

False Description in a deed must be rejected, p. 63.

Affirmed in *Reamer v. Nesmith*, 34 Cal. 627, and *People v. Blake*, 60 Cal. 509. Cited in *Terry v. Berry*, 13 Nev. 524, holding that parole evidence is admissible to ascertain whether a description is false, and if false it must be rejected; also in note on this point in 30 Am. Dec. 735.

Ejectment.—Deed of a mining ditch held to be of the ditch itself; for if it were only of an easement or incorporeal hereditament, ejectment would not lie, p. 63.

Affirmed in *Integral Co. v. Altoona Co.*, 75 Fed. Rep. 383; *Ada Co. etc. Co. v. Farmers' etc. Co.*, 5 Idaho, 799, action to establish right to possession of right of way on public domain over which to divert water may be maintained without first acquiring right to divert water; note on easements in 11 Am. Dec. 663.

Deeds by Cotenants, of a ditch in the common land, held to be good between the parties, and to constitute the grantees cotenants with the grantors, p. 64.

Cited in *Meagher v. Hardenbrook*, 11 Mont. 389, holding that appropriators of water from a stream through a ditch were cotenants, and one of them could preserve his right to the water to such an extent as he could use it; and in *Holbrook v. Bowman*, 62 N. H. 321, holding that a deed by a tenant in common was good against his cotenants, so far as it operated without prejudice to them.

Statute of Limitations, as to a mining ditch, begins to run only from the date of the issuance of a patent therefor, p. 65.

Cited in *Bissell v. Henshaw*, 1 Sawy. 559, 560, holding that ejectment

on a Mexican grant may be brought within five years from the final confirmation thereof by the United States.

27 Cal. 65-68. PEOPLE v. BLACKWELL.

Presentment of Indictment in proper form will be presumed, where the record shows nothing to the contrary, p. 67.

Cited in *Collins v. State*, 13 Fla. 657, holding that the record sufficiently showed that defendant was properly indicted; and in *Bass v. State*, 17 Fla. 689, holding that objection to the form of filing an indictment cannot be raised for the first time on appeal.

Special Counsel for Prosecution may be allowed in the discretion of the court, on request of the district attorney, p. 67.

Affirmed in *Wood v. State*, 92 Ind. 271, *Tull v. State*, 99 Ind. 239, and *Approved in State v. Tighe*, 27 Mont. 333, all following rule.

Prosecuting Witness may be asked if he employed special counsel to prosecute, p. 68.

Cited in *People v. Lee Au Chuck*, 66 Cal. 667, holding that questions to the prosecuting witness as to his bias must be allowed, "unless it could be said as a matter of law, that they had no tendency, if answered in the affirmative, to show bias on the part of the witness." Affirmed in *People v. Gillis*, 97 Cal. 543.

27 Cal. 68-69. ALLEN v. FENNON.

Appeal from Judgment.—Where no motion for new trial has been made, the findings of the court and verdict of the jury are conclusive as to the facts, p. 69.

Affirmed in *Green v. Butler*, 26 Cal. 599, saying: "The practice is the same in all cases, whether at law or in equity"; also in *People v. Banvard*, 27 Cal. 475. Cited in *Doe v. Vallejo*, 29 Cal. 391, to the point that there is no distinction between law and equity in this respect. Affirmed in *Hihn v. Peck*, 30 Cal. 287. Cited in *Carpentier v. Small*, 35 Cal. 359, holding that the judgment cannot be modified to suit the facts, as to do this "would be substantially to disregard the finding of the district court and substitute a new finding of our own in its place," and a new trial must be granted. Affirmed in *Federico v. Hancock*, 1 Ariz. 512. Cited in *Burbank v. Rivers*, 20 Nev. 84, to the point that the same rule applies in equity; and in *Silva v. Pickard*, 14 Utah, 254, holding that insufficiency of the evidence to justify the findings is no ground for reversal of an equity decree.

27 Cal. 69-80; 85 Am. Dec. 231. PEOPLE v. BATCHELDER.

Self-defense.—An instruction, that if defendant was "attacked with deadly weapons and murderous intent by the deceased, and his life

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placed in immediate danger, he was not obliged to retreat, but might stand his ground and, if need be, kill his assailant," held proper under the circumstances, p. 75.

Affirmed in *People v. Macard*, 73 Mich. 22. Cited in notes, on this point, in 91 Am. Dec. 760; 92 Am. Dec. 422; 100 Am. Dec. 181; and 24 Am. St. Rep. 294.

27 Cal. 80-84. **OTIS v. HASELTINE.**

Statute of Frauds.—Promise to indorse a note, written on the back of a contract for sale of goods, before sale and delivery, held to be a sufficient compliance with the statutory requirement that in such case there must be a note in writing, expressing the consideration for the promise, p. 84.

Cited in *Bagley v. Cohen*, 121 Cal. 606, construing section 2808, Civil Code, and holding guarantors absolutely liable on principal's default; *Ford v. Hendricks*, 34 Cal. 675, to the point that "the promise of a guarantor is not within the statute of frauds, if made before the delivery of the note"; and to same effect in *Howland v. Aitch*, 38 Cal. 135, 136. Cited in notes to 87 Am. Dec. 126, and 60 Am. St. Rep. 437.

27 Cal. 84-87. **HASTINGS v. McGOOGIN.**

Pre-emption of Suscol Rancho.—The act of Congress of 1863 withdraws the lands of the Suscol Rancho from the operation of the general laws providing for the disposal of the public lands, p. 87.

Affirmed in *Page v. Hobbs*, 27 Cal. 487; *Page v. Fowler*, 28 Cal. 609; *People v. Shearer*, 30 Cal. 650; *Hutton v. Frisbee*, 37 Cal. 490, 491, 502, 503.

27 Cal. 87-91. **KERNAN (ALIAS KERMAN) v. GRIFFITH.**

Grant of Swamp Lands to the state, by the act of Congress of 1850, operated "as a full and perfect conveyance in praesenti"; and a patent, issued later to the state, would have no operation except by way of further assurance, p. 89.

Cited in *Megerle v. Ashe*, 27 Cal. 327, to the point that "a legislative grant is as effectual to pass the title to lands, in all respects and for every purpose, as a grant evidenced by a patent." Affirmed in *Sherman v. Buick*, 45 Cal. 668. Cited in *Tubbs v. Wilhoit*, 73 Cal. 63, to the point that "the provision made for a patent in the second section (of the act of 1850) is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title." Affirmed in *GrosLouis v. Northcut*, 3 Oreg. 397, 399; *Blakesly v. Caywood*, 4 Oreg. 288; *Gaston v. Stott*, 4 Oreg. 57, 58; *Miller v. Tobin*, 16 Oreg. 542. Cited in *Wells v. Pennington Co.*, 2 S. Dak. 9, 39 Am. St. Rep. 763, holding that an act of Congress, as to highways over public lands, was a grant in praesenti,

and settlers on the lands thereafter took them subject to the right of way. In *Wright v. Roseberry*, 121 U. S. 504, Field, J., says, after citing the principal case and others: "The result of these decisions is that the grant of 1850 is one in praesenti, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but where that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object." Affirmed by Field, J., in *San Francisco Savings Union v. Irwin*, 11 Sawy. 670; 28 Fed. Rep. 710.

Swamp Lands.—The question whether lands in dispute were "swamp and overflowed," at the date of the act of 1850, must always be responded to by the jury on evidence submitted to them and applicable to the question, p. 91.

Affirmed in *Thornton v. Thompson*, 28 Cal. 603, 87 Am. Dec. 78, and *Robinson v. Forrest*, 29 Cal. 319, 322. Cited in *Keeran v. Griffith*, 31 Cal. 464, saying that "the question whether a given subdivision of land is within the act will remain a question of fact, to be determined not upon official certificates, but upon evidence that would be competent to prove the fact if it arose in issue upon a conveyance between private persons. And we do not undertake to say that the action of the two governments in that behalf will preclude a person claiming under either government, by right of title having its origin previous to such action, from showing the truth as to the character of the land claimed by him." Cited in *Keeran v. Allen*, 33 Cal. 545, holding that swamp lands must be "unfit for cultivation." Affirmed in *Keeran v. Griffith*, 34 Cal. 584, and *Read v. Caruthers*, 47 Cal. 182. Denied in *French v. Fyan*, 93 U. S. 172, where Miller, J., says: "With all the respect we have for that learned court, we are unable to concur in the views therein expressed"; and holds that a United States patent for swamp lands cannot be contradicted by parol evidence to show that the lands were never "swamp and overflowed."

27 Cal. 92-99. MCGILLIVRAY v. EVANS.

Partition of Water Rights in a mining ditch can be made only by sale of the ditch and distribution of the proceeds, p. 98.

Affirmed in *Lorenz v. Jacobs*, 59 Cal. 263. Cited in *Lenfers v. Henke*, 73 Ill. 411, 24 Am. Rep. 267, holding that a dower interest in mines could not be assigned except by the sale of the mines and division of proceeds; to same effect, as to partition of a spring and aqueduct, in *Allard v. Carleton*, 64 N. H. 25; also, as to partition of a water right, in *Brown v. Cooper*, 98 Iowa, 455; 60 Am. St. Rep. 197. Cited in *Head*

v. Amoskeag Co., 113 U. S. 211, to the point that "water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use or by a sale of the right and a division of the proceeds."

27 Cal. 99-104. **LAMPING v. HYATT.**

Judgment by Default cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons, p. 102.

Distinguished in *Lane v. Gluckauf*, 28 Cal. 294, 87 Am. Dec. 124, saying: "Where judgment is by default, the court cannot grant greater relief than is demanded in the complaint; but where there is a trial, the court may grant any relief consistent with the case made in the complaint and embraced within the issue." Cited in *Ellis v. Rademacher*, 125 Cal. 557, noted under *Raun v. Reynolds*, 11 Cal. 19; *Gautier v. English*, 29 Cal. 168, holding that where judgment by default was entered for the sum demanded in the complaint, and interest thereon at the rate demanded, it was error to add that the judgment should bear interest at the same rate, because the complaint did not demand it; also, in *Bond v. Pacheco*, 30 Cal. 535, holding that where the clerk of the court, in entering judgment by default, included too much interest by mistake, it was "an error committed in the performance of an act within his jurisdiction to perform, which could be corrected on motion made in time, or on appeal, but which would not vitiate the judgment if not corrected. There is no want of jurisdiction over the subject-matter but only an error in its exercise." Affirmed in *Lowe v. Turner*, 1 Idaho, 112. Cited in *Bank v. Dyer*, 14 Wash. St. 283, holding that a judgment for foreclosure of a mortgage could not also include a personal judgment for deficiency, because the complaint did not ask for such relief; and in *Wilbur v. Maynard*, 6 Colo. 488, holding that judgment by default on a note should be only against a wife, where the complaint joined her husband but asked for no relief against him.

Judgment for Money, "to be enforced and collected in gold coin," is erroneous, where the complaint and summons do not specify any particular kind of money, but the note sued on stipulated that if it was not paid in gold, the maker should pay the difference between gold coin and paper currency, p. 103.

Distinguished in *Lane v. Gluckauf*, 28 Cal. 292, 87 Am. Dec. 122, where the intent of a contract, for payment in gold coin or its equivalent in currency at current rates, was held to be to compel payment in gold coin, and a judgment for gold coin was held to be proper; also, in *Reese v. Stearns*, 29 Cal. 275, holding that where a judgment was for "U. S. gold coin or its equivalent," those words must be stricken out, saying: "In contemplation of law, a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin." Cited

in *Hazard v. Cole*, 1 Idaho, 287, holding that a judgment for gold coin was not void but irregular, and might have been modified on motion in the lower court, or by appeal; and in note on this point to 87 Am. Dec. 126.

Judgment cannot be rendered against defendants who were served, but were not named in the complaint or summons, p. 104.

Cited in *King v. Randlett*, 33 Cal. 322, holding that where a suit was brought in justice's court against the Independent Company, summons was issued against the Independent Tunnel Company and served on a member of the Independent Company, a judgment against the Independent Tunnel Company was void.

N. B.—The principal case is referred to in *Johnson v. Lamping*, 34 Cal. 298, which is a subsequent phase of the same transaction, on other points.

27 Cal. 104-106. *BOLTON v. LANDERS*. S. C. 26 Cal. 393.

Tenant, who denies landlord's title, in a suit between them, becomes a trespasser, and is not entitled to notice to quit, p. 105.

Cited, as an illustration, in dissenting opinion in *Campbell v. Jones*, 38 Cal. 512, a majority of the court holding that in an action for unlawful detention of personal property the complaint must allege a demand before suit. Affirmed in *Simpson v. Applegate*, 75 Cal. 345, and *McCarthy v. Brown*, 113 Cal. 20. Cited in note to 42 Am. Dec. 134, on notice to quit.

Pendency of Another Suit held no ground for abatement, for "although the same questions are litigated in both, the relief sought is different, p. 106.

Affirmed in *Coles v. Yorks*, 31 Minn. 215, holding that an action to foreclose a mortgage was not barred by the pendency of a suit in ejectment; and in note on this point in 84 Am. Dec. 456.

27 Cal. 106-107. *BOLTON v. LANDERS*.

Jurisdiction of the supreme court being of cases where the amount in dispute exceeds two hundred dollars, a judgment for two hundred dollars and costs cannot be reviewed, for "costs constitute no part of the matter in dispute," p. 107.

Referred to in *Dashiell v. Slingerland*, 60 Cal. 657, where under a constitutional limit of jurisdiction to three hundred dollars, the amount sued for being nine hundred dollars, and a recovery being only for two hundred dollars, it was held that the supreme court had jurisdiction, for the amount sued for was the test of jurisdiction. Affirmed in *Payne v. Davis*, 2 Mont. 381.

27 Cal. 107-115. *HARPER v. MINOR*.

Judgment-roll.—On an appeal from the judgment, where there is

no statement, Supreme Court only considers matters appearing in the judgment-roll. A referee's report, and clerk's minutes, form no part of the judgment-roll, p. 109.

Affirmed as to clerk's minutes, in *More v. Del Valle*, 28 Cal. 174, and *People v. Empire Co.*, 33 Cal. 173. Cited in *Batchelder v. Baker*, 79 Cal. 267, holding that where the appeal is on the judgment-roll, the court cannot look outside of it; *Lee Sack Sam v. Gray*, 104 Cal. 246, to point that report of a referee, and testimony, are no part of the judgment-roll; *Wood v. Nissen*, 2 N. Dak. 30, holding that a stenographer's transcript of proceedings and evidence is not a bill of exceptions or statement; *Hecla etc. Co. v. Gisborn*, 21 Utah, 75, noted under *Dawley v. Hovious*, 23 Cal. 103; *Zeile v. Moritz*, 1 Utah, 285, holding that a judgment on demurrer can be reviewed on appeal without a statement or bill of exceptions.

Intermediate Orders do not form part of the judgment-roll, but the appellant "must, by means of a statement on appeal, bring them into the record, together with such facts, forming the basis of the orders, as are necessary to explain the action of the court below," p. 109.

Affirmed in *Abbott v. Douglass*, 28 Cal. 299, by Sawyer, J., dissenting on other points; also, in *Wetherbee v. Carroll*, 33 Cal. 554, and *Sutter v. San Francisco*, 36 Cal. 114; and in *McClelland v. Dickenson*, 2 Utah, 107. Cited in *Spence v. Scott*, 97 Cal. 182, to the point that an order striking out part of an answer cannot be reviewed "without a bill of exceptions"; and to same effect in *Graham v. Linehan*, 1 Idaho, 781.

Statement on Appeal is for the purpose of bringing into the record orders and rulings, with the facts necessary to explain them, that do not arise during the progress of the trial, and are not contained in the motion for new trial or judgment-roll; also, if the appellant from an order refusing a new trial desires only a review of rulings of law during the trial, he may introduce such rulings upon questions of law, with sufficient evidence to point them, into his statement on appeal, or make a bill of exceptions, p. 110.

Approved in dissenting opinion of Sawyer, J., in *Quivey v. Gambert*, 32 Cal. 322. Cited in *Sharp v. Daugney*, 33 Cal. 515, holding that objections to legal sufficiency of an affidavit and order of publication must be raised by motion made in the action, or on an appeal supported by a statement; *Treadwell v. Davis*, 34 Cal. 605, 94 Am. Dec. 772, saying: "There is no controversy as to any material fact, and the action of the court below is sought to be reviewed on questions of law alone. In such cases a statement on appeal is not only a proper method, but is often the most convenient, expeditious, and economical mode of bringing the alleged errors before this court." Cited in *Gates v. Walker*, 35 Cal. 290, where an appeal was dismissed for lack of statement and judgment-roll, the court declining to refer to the record of another appeal by other parties in the same case, in the absence of a stipulation;

and *Cooper v. Pac. M. Co.*, 7 Nev. 121, holding that objections to rulings of law at the trial should be brought up by statement on appeal or bill of exceptions.

Statement on Motion for New Trial is for the purpose of bringing into the record matters arising during the trial that the appellant wishes reviewed, p. 110.

Affirmed in *Graham v. Stewart*, 68 Cal. 376. Referred to in *Quivey v. Gambert*, 32 Cal. 305, holding that an order striking out a statement is not appealable, and saying that though such appeal was allowed in the principal case, the point was not made, "and it escaped our notice"; *Sawyer, J.*, dissenting, on page 327.

Costs may be imposed on a prevailing party, for introducing irrelevant matter into a statement on appeal or motion for new trial, p. 111.

Cited as an illustration in dissenting opinion in *Quivey v. Gambert*, 32 Cal. 316. Affirmed in *Stark v. Hill*, 31 Mo. App. 109.

Notice of Intention to move for a new trial must be filed and served within the statutory time, subject to the court's power to extend the time as the statute provides, pp. 112-114.

Affirmed in *Cottle v. Leitch*, 43 Cal. 321, 322.

Statement on Motion for New Trial must be filed within five days after service of notice of intention, unless the court extends the time as provided by statute, p. 114.

Affirmed in *Stevens v. Northwestern Co.*, 1 Idaho, 606.

Statement on Appeal, not filed and served within the statutory time, held properly stricken out, p. 115.

Cited in *Kavanagh v. Maus*, 28 Cal. 262, holding that a statement was not served in time. Approved in dissenting opinion of *Sawyer, J.*, in *Quivey v. Gambert*, 32 Cal. 325. Cited in *Cody v. Filley*, 4 Colo. 437, holding that where a statement was filed on the last statutory day, service of it on the next day was invalid; and in *First Nat. Bank v. Irvine*, 2 Mont. 556, holding that where an appeal was from the judgment and also from the refusal of a new trial, and the statement was filed too late for the first, but in time for the second, it did not operate as a waiver of any rights.

Statement, on motion for new trial, need not itself be included in the statement on appeal from the order of refusal, where the only question is not as to the sufficiency or character of the statement, but as to whether or not it was filed in time, p. 115.

Approved in dissenting opinion of *Sawyer, J.*, in *Quivey v. Gambert*, 32 Cal. 315.

27 Cal. 119-148. **MILLARD v. HATHAWAY.**

Waiver.—Where an order refusing a new trial recites that the motion

was submitted on a statement by consent of counsel, the respondent is precluded from saying that the statement was not filed in time, p. 138.

Cited in *Meredith v. Santa Clara Assn.*, 60 Cal. 620, holding that sureties to an undertaking on appeal waived their right to object to the jurisdiction of the court by signing the undertaking; and in note to 76 Am. Dec. 467, on this point.

Resulting Trust arises where a deed is made to one person, but the consideration is paid by another. These trusts are expressly exempted from the operation of the statute of frauds, p. 139.

Affirmed in *Sandfoss v. Jones*, 35 Cal. 487. Cited in *Case v. Coddington*, 38 Cal. 193, holding that if "the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, pro tanto. The party setting up the trust must show that the money was paid by him at or before the execution of the conveyance"; to the same effect in *Roberts v. Ware*, 40 Cal. 637; *Walton v. Karnes*, 67 Cal. 256; and *Tripp v. Duane*, 74 Cal. 91; *Savings etc. Soc. v. Davidson*, 97 Fed 712, noted under *Hidden v. Jordan*, 21 Cal. 92; *O'Connor v. Irvine*, 74 Cal. 439, holding that a purchaser of land at a tax sale held it in trust for the owner, who furnished the money to buy it in; *Hellman v. Messmer*, 75 Cal. 170, to the point that the consideration "may have been paid by the party who took the title, but advanced as a loan to the other party, and if so, a trust results"; and to same effect in *Thomas v. Jameson*, 77 Cal. 93; *Broder v. Conklin*, 77 Cal. 338, holding that an attorney who bid in property, at a sale by the assignee of an insolvent, for the benefit of the insolvent and his creditors, held it in trust for them. Affirmed in *Riley v. Martinelli*, 97 Cal. 580, 33 Am. St. Rep. 211. Cited in *Warren v. Adams*, 19 Colo. 522, holding that a trust results from acts; dissenting opinion in *Towle v. Wadsworth*, 147 Ill. 99, a majority of the court holding that the statute of frauds is no defense; *Lyons v. Bodenhamer*, 7 Kan. 478, holding that one who borrows a land warrant, settles on and improves the land without any claim by the owner, becomes the beneficiary of a resulting trust; *Tenny v. Sampson*, 37 Kan. 363, 365, to the point that the consideration need not come directly from the beneficiary; dissenting opinion in *Grumley v. Webb*, 48 Mo. 596, a majority of the court holding that accord and satisfaction had been made of plaintiff's claim to an equitable interest in lands, based on his furnishing money for their purchase. Cited in *Mannix v. Purcell*, 46 Ohio St. 143, 15 Am. St. Rep. 576, saying: "The distinction between resulting trusts and trusts for charitable or pious uses is almost as clear and as broad as that between legal and equitable estates. . . . A resulting trust is to be performed or executed by the trustee by transferring the title of the cestui que trust at his request"; and in *Chenoweth v. Lewis*, 9 Oreg. 152, holding that an agreement, for sale of an interest in land acquired under a resulting trust, must be in writing under the statute.

Findings cannot be altogether detached from each other and considered piecemeal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning, p. 141.

Affirmed in *Alhambra Co. v. Richardson*, 72 Cal. 604, remarking that "the counsel treats the findings as if they were dug up from the ruins of ancient cities at different epochs." Cited in *Patent Brick Co. v. Moore*, 75 Cal. 211, saying that an assignment "is pleaded in the same language as that of the findings, and this is sufficient." Affirmed in *Mott v. Ewing*, 90 Cal. 235, and *Barnes v. Sabrom*, 10 Nev. 248.

Parol Evidence is admissible to explain or contradict a recital in a deed as to payment of consideration; if the evidence is merely parol, it will be received with great caution, and the court will look anxiously for some corroborating circumstances to support it, p. 142.

Affirmed in *Duffy v. Duffy*, 104 Cal. 607, and *Dalton v. Dalton*, 14 Nev. 428; *Brooks v. Union Trust etc. Co.*, 146 Cal. 137, parol evidence is admissible to establish resulting trust in realty arising under Civil Code § 853, though money consideration recited which was not in fact paid by trustees.

Statute of Limitations.—Where a trustee under a resulting trust agrees to convey land to the beneficiary upon payment by the latter of the purchase price and interest, the statute does not begin to run until such payment is made, pp. 145, 146.

Cited in *Day v. Cohn*, 65 Cal. 509, holding that where a vendee under a contract of sale remained in possession, paying installments of the purchase price, and the last of such payments was made two years before bringing of suit by him to enforce the contract, his equitable right to compel performance of it was not barred by the statute of limitations; note to 85 Am. Dec. 78.

27 Cal. 151-152, PEOPLE v. COUNTY JUDGE.

Prohibition will lie to prevent a county judge from punishing contempt against a district court, p. 152.

Cited in *Huerstal v. Muir*, 62 Cal. 481, holding that an order adjudging one guilty of contempt cannot be appealed from "simply on the ground that the record shows want of jurisdiction to render the judgment," but certiorari is the proper remedy; also in *Phillips v. Welch*, 12 Nev. 177, where, on certiorari to review a judgment punishing for contempt, the court said that where the lower court "acquired jurisdiction of the subject-matter and of the person of the petitioner, this court has no jurisdiction either on appeal, writ of error, habeas corpus, or certiorari"; *People v. Carrington*, 5 Utah, 532, holding that prohibition lies against a commissioner of the supreme court to prevent his inflicting a punishment for libel, certiorari and habeas corpus not being adequate or

speedy remedies; *State v. Circuit Court*, 97 Wis. 15, 65 Am. St. Rep. 98, awarding writ to terminate improper contempt proceedings; *In re Litchfield*, 13 Fed. Rep. 869, holding that one court cannot punish a contempt against another; and in note to 12 Am. Dec. 184, on contempt.

27 Cal. 153-163. **HIGGINS v. BEAR RIVER CO.**

Legal Tender Act is valid, p. 162.

Affirmed in *Belloc v. Davis*, 38 Cal. 254, 255. Cited in note to 87 Am. Dec. 128.

27 Cal. 163-170. **SEMPLE v. HAGAR.**

Fraud must be specifically alleged, p. 166.

Affirmed in *Kent v. Snyder*, 30 Cal. 674; *Green v. Hayes*, 70 Cal. 281; dissenting opinion in *Spring Valley v. San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 34; *Leavenworth Co. v. Commissioners*, 18 Kan. 178; *Parley's Park Co. v. Kerr*, 3 Utah, 246; *United States v. Tichenor*, 8 Sawy. 154; 12 Fed. Rep. 425. Cited in note to 25 Am. Dec. 96.

Judicial Notice is taken as to the statutory procedure required on the part of a claimant under a Mexican grant, p. 167.

Cited in *United States v. Williams*, 6 Mont. 389, taking judicial notice of the rules of the interior department as to timber on public lands; and in notes to 11 Am. Dec. 781, and 89 Am. Dec. 690, on judicial notice.

Patent on a Mexican Grant cannot be issued until the grant has been confirmed by the land commissioner or the federal courts; and the decisions of federal courts on this point cannot be attacked collaterally by the state courts, p. 170.

Cited in *Botiller v. Dominguez*, 130 U. S. 255, where Miller, J., says: "There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the district or supreme court of the United States." Cited also on this point in *Hagar v. Lucas*, 29 Cal. 311, 312; *Bernal v. Lynch*, 36 Cal. 143, and *Yates v. Smith*, 40 Cal. 668.

27 Cal. 171-175. **STANFORD v. WORN.**

Condemnation of Land.—Provisions of the statute must be strictly followed. The power must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings, p. 174.

Cited in *Smith v. Davis*, 30 Cal. 537, to same effect as regards a street assessment; dissenting opinion in *Appeals of Houghton*, 42 Cal. 68, as an example of special proceedings where an appeal was allowed, though the statute did not provide for it. Affirmed in *Godchaux v. Car-*

penter, 19 Nev. 418, and *Pettis v. Providence*, 11 R. I. 375. Cited in note to 73 Am. Dec. 584.

Publication of Notice must be for the period prescribed by the statute, p. 174.

Affirmed in *State v. Tucker*, 32 Mo. App. 629, and *Leonard v. Sparks*, 63 Mo. App. 596.

27 Cal. 175-228. **PEOPLE v. PACHECO.**

Appropriation for payment of coupons on Pacific Railway bonds is not a debt or liability within the meaning of article 8 of the constitution, limiting the amount of the state debt, pp. 207-221.

Cited in *Bickerdike v. State*, 144 Cal. 695, construing and sustaining coyote bounty acts; *State v. City*, 24 Mont. 529, quoting *City v. Edwards*, 84 Ill. 626. Distinguished in *Eaton v. Mininaugh*, 43 Or. 476, holding void an act requiring election for selection of county seat and directing county clerk to issue warrants to pay cost of constructing new courthouse if new location selected and to levy tax to pay off such warrants; *Napa Valley Co. v. Board of Supervisors*, 30 Cal. 439, to the point that the legislature may appropriate funds for aid of a railway; also in *Carr v. State*, 127 Ind. 209, 22 Am. St. Rep. 628, holding that the question of making an appropriation is for the legislature. Disapproved in *Coulson v. Portland, Deady*, 498, saying: "I have never been able to bring my mind to assent to the reasoning by which the court arrived at the conclusion that the act in question did not create a debt"; and holding that an appropriation for erection of public buildings, to be paid for by issuance of bonds, was void; in *Pleasant Valley Co. v. County Commrs.*, 15 Utah, 166, holding that salaries not due until the first of January should not be included in an appropriation for December. Cited, also, in the following cases (for which see note, ante, to *State v. McCauley*, 15 Cal. 429), viz.: 9 Colo. 411; 84 Ill. 631; 87 Ill. 409, 422; 97 Ind. 11; 49 Am. Rep. 424; 127 Mo. 641; 48 Am. St. Rep. 660; 6 Mont. 540; 5 Nev. 26; 5 Oreg. 34, 35; 26 Oreg. 246, 247; 6 S. Dak. 522; 55 Am. St. Rep. 855; 7 S. Dak. 9; 14 Wash. St. 63; 35 West Va. 619.

Power of Taxation is vested in the legislature, and that power is unlimited, p. 209.

Affirmed in *Emery v. San Francisco Gas Co.*, 28 Cal. 355. Cited in *Chapman v. Morris*, 28 Cal. 395, holding that the legislature could authorize interest to be paid on deferred county warrants.

27 Cal. 228-238; 87 Am. Dec. 66. **WILCOXSON v. BURTON.**

New Trial is not granted on the ground that the evidence does not support the findings, where the evidence is conflicting, p. 232.

Cited in notes to 93 Am. Dec. 409, 3 Am. St. Rep. 579; 7 Am. St. Rep. 201.

Confession of Judgment by a debtor without the knowledge of his creditor, and for a greater amount than is actually due, is void, p. 235.

Cited in *Anderson v. Bank*, 140 Cal. 698, sustaining action by creditor on behalf of himself and other creditors to set aside such judgment; *Tully v. Harloe*, 35 Cal. 308, 95 Am. Dec. 105, holding that "a mortgage knowingly and intentionally given and taken for a larger amount than is due, and not as security for future advances, is fraudulent as against the other creditors of the mortgagor"; if given for future advances, "it must show upon its face the utmost amount intended to be secured, but it need not show whether that amount represents an existing debt or future advances." Cited, also, in *Lee v. Figg*, 37 Cal. 336, 99 Am. Dec. 274, holding that a judgment by confession, though fraudulent against creditors, "is valid till vacated upon a direct proceeding for the purpose"; *Pond v. Davenport*, 44 Cal. 487, holding that though a confession of judgment was defective for failure to set forth sufficient facts as to the indebtedness, yet the presumption of fraud thereby arising was successfully rebutted by evidence. Cited in *Lowenstein v. Caruth*, 59 Ark. 592, holding that a confession of judgment without the knowledge of the creditor estops neither party from denying anything set forth in it, but the creditor may ratify it so far as he can do so without affecting rights under intermediate attachments; *Swain v. Gilder*, 61 Miss. 672, holding a confession of judgment void, because there was no plaintiff; *Mendes v. Freiters*, 16 Nev. 397, holding that where the amount named in a complaint and attachment was in excess of what was actually due, but plaintiff acted in good faith, the judgment was not void but good as to the actual indebtedness, as against subsequent attaching creditors; *Beazley v. Sims*, 81 Va. 648, holding that a valid confession of judgment has all the attributes of other judgments; and in notes on this point to 65 Am. Dec. 522; 99 Am. Dec. 276; 4 Am. St. Rep. 659; 11 Am. St. Rep. 821; 12 Am. St. Rep. 659; 45 Am. St. Rep. 810.

Estoppel.—Where an answer averred a certain amount and nature of indebtedness, defendant was held thereby estopped from proving a different amount and nature, p. 236.

Cited in notes to 22 Am. St. Rep. 781, and 36 Am. St. Rep. 245, on estoppel by pleadings.

27 Cal. 238-248. McMINN v. O'CONNOR.

Certified Copy of deed, that had been improperly recorded because not legally acknowledged, is evidence, if the existence of the original is proven, p. 245.

Cited in *Mayo v. Mazeaux*, 38 Cal. 449, to the point that "a certified copy of an instrument duly recorded may be read in evidence without proof of the original, if it be shown to the satisfaction of the court that the original is not under the control of the party"; also in *Cannon v.*

Deming, 3 S. Dak. 429, holding that where the statute requires that an instrument must be acknowledged before being recorded, recording it without acknowledgment is not constructive notice of its contents.

Execution of Deed in a foreign country, improperly acknowledged, may be proved without producing the attesting witness or proving his handwriting, p. 245.

Affirmed in McMinn v. Whelan, 27 Cal. 310.

Jurisdiction over the Person of defendant appearing never to have been acquired in a case of ejectment, the judgment-roll therein is not evidence of title, p. 248.

Cited in Forbes v. Hyde, 31 Cal. 348, to the point that "when it appears in the record that the court has no jurisdiction of the person of the defendant against whom judgment is rendered, the judgment may be collaterally attacked."

After-acquired Title by defendant is ejectment must be pleaded by supplemental answer, p. 247.

Affirmed in Moss v. Shear, 30 Cal. 473; Calderwood v. Pyser, 31 Cal. 336; Bagley v. Ward, 37 Cal. 129, 153; 99 Am. Dec. 259, 270; Reily v. Lancaster, 39 Cal. 356; McLane v. Bovee, 35 Wis. 35.

Sheriff's Certificate of Sale of land on execution is not evidence for defendant in ejectment; if the time for redemption had not expired, the evidence was wholly incompetent to establish any right in the defendants, either legal or equitable; if the time for redemption had passed, the defendants should have obtained their deed, p. 248.

Cited in Pollard v. Harlow, 138 Cal. 392, but held inapplicable under later Code provisions; **Page v. Rogers, 31 Cal. 301**, to the point that the legal title does not pass to the purchaser until the delivery of the sheriff's deed; also in note on sheriff's deed in 15 Am. Dec. 252.

Amendments are in discretion of the court, p. 248.

Cited in note to 34 Am. Dec. 158.

27 Cal. 248-253. DOLL v. ANDERSON.

Statement on Appeal failing to include evidence on a point, the presumption is that the fact was sufficiently proven to warrant the verdict, p. 252.

Cited in Frevert v. Swift, 19 Nev. 402, holding that where questions as to evidence are not specified in the statement, they will not be considered on appeal.

Notice of Assignment of contract by defendant held to have been given to plaintiff, and the effect of failure to give it not decided, p. 252.

Cited in Hogan v. Black, 66 Cal. 42, to the point that plaintiff's as-

signee must notify defendant of the assignment or have himself substituted as plaintiff.

27 Cal. 253-255. FRISBIE v. PRICE.

Notice to Quit is necessary to give a right of action against a tenant at will, p. 255.

Cited in *Simpson v. Applegate*, 75 Cal. 345, holding that where a tenant at will denied the tenancy, notice to quit was not necessary before bringing suit; *Pomeroy v. Bell*, 118 Cal. 638, holding that a vendee under a contract of sale "is sometimes termed a quasi tenant at will for the purpose of recovering possession by the vendor; . . . he has been held in some cases entitled to a demand for possession before his holding can be deemed unlawful"; *Treadway v. Sharon*, 7 Nev. 48, holding that where a license to occupy is determinable by a mere demand, notice to quit is not necessary; and in note to 42 Am. Dec. 129.

27 Cal. 255-258; 87 Am. Dec. 75. HALL v. AUBURN CO.

Officers of a Corporation have no power to authorize the execution of a note as surety for another, in respect to a matter having no relation to the corporate business, and in which the corporation has no interest, p. 257.

Cited in *Melone v. Ruffino*, 129 Cal. 523, 524, as referred to in a later case; *Hall v. Crandall*, 29 Cal. 568; note to *In re Assignment etc. Co.*, 70 Am. St. Rep. 164, on ultra vires. Affirmed in *Hall v. Crandall*, 29 Cal. 570, 572, 89 Am. Dec. 65, 66, holding that neither were the officers liable personally, for "it is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiffs so understood it." Cited in *Chamberlain v. Pacific Wool Co.*, 54 Cal. 106, holding that a note signed by the president of a corporation, describing himself as such, was his personal note and not the corporation's. Distinguished in *Seeley v. San Jose Co.*, 59 Cal. 24, holding that the president of a lumber company had power to borrow money to carry on the business of the corporation. Cited in *National Bank v. German American Co.*, 116 N. Y. 292, holding that a corporation had no power to indorse an accommodation note; *Park Hotel Co. v. First Nat. Bank*, 86 Fed. Rep. 747, holding that the president of a corporation had no power to make a note of the corporation payable to himself, and get it discounted for his own use; *Lyon v. First Nat. Bank*, 85 Fed. Rep. 122, to the point that "it is ultra vires of a commercial corporation and its officers to make accommodation paper, or to guarantee the payment of the obligations of others"; and in notes to 90 Am. Dec. 644, and 31 Am. St. Rep. 753, 754.

27 Cal. 258-273. WILSON v. BRANNAN.

Chattel Mortgage and Pledge.—Chattels mortgaged or pledged may be

sold by the creditor after the debt is due, at public sale, after reasonable notice to the debtor. pp. 270, 271.

Cited in *Heyland v. Badger*, 35 Cal. 411, holding that "in the case of a pledge the title remains in the pledgor, but in the case of a chattel mortgage, whether possession of the chattel be delivered to the mortgagee or not, the title passes to the mortgagee, subject to be defeated upon performance of the condition, and in case of a breach it becomes absolute at law in the mortgagee"; *Wright v. Ross*, 36 Cal. 429, to the point that "the pledgee may have the property sold for the payment of the debt secured by it, after calling upon the pledgor to redeem, by a judicial decree, or he may himself sell the property after due notice to the owner"; *Everett v. Buchanan*, 2 Dak. 263, holding that where a mortgagee of chattels sold them at private sale contrary to the terms of the mortgage, it was a conversion and extinguished the mortgage title; *Lee v. Fox*, 113 Ind. 102, holding that if possession has been taken, the equity of redemption may be foreclosed by a sale on due notice; *Bryant v. Carson Co.*, 3 Nev. 318, 93 Am. Dec. 407, holding that a statute regarding foreclosure does not deprive the mortgagee of the right to sell without action, on due notice; *Blackburn v. Selma Co.*, 3 Fed. Rep. 699, holding that where a decree requires a sale to be confirmed in order to bar equity of redemption, the sale is not complete without it; notes to 45 Am. Dec. 447, and 51 Am. Dec. 313, on chattel mortgage; note to 75 Am. Dec. 710, on notice of sale; and notes to 79 Am. Dec. 501, and 32 Am. St. Rep. 730, on pledge.

General Citation.—*Meeker v. Waldron*, 62 Neb. 697.

27 Cal. 274-282. **SCHROEDER v. JAHNS.**

Statute of Limitations.—An averment in an answer that the suit is barred by the statute is not a statement of a fact but of a conclusion of law, p. 278.

Affirmed in *Table Mountain Co. v. Stranahan*, 31 Cal. 393. *Spaulding v. Howard*, 121 Cal. 197, noted under *Caulfield v. Saunders*, 17 Cal. 571.

Continuing Trust.—If the trustee has not, by act or declaration, manifested a determination to repudiate the trust and violate the contract under which the money came to his hands, there must be a demand by the cestui que trust for the money, and a refusal, before he is liable to an action for the money. The statute of limitations, therefore, would not commence to run in such case unless the demand was made, p. 280.

Affirmed in *Roach v. Caraffa*, 85 Cal. 446, and *Millet v. Bradbury*, 109 Cal. 176. Distinguished in *Bills v. Silver King Co.*, 106 Cal. 23, holding that a claim by an administratrix for dividends on mining shares was barred in two years from date of the claim, on account of laches of plaintiff in making demand.

Defective Finding, that does no harm, is not cause for reversal of judgment, p. 282.

Cited in *Tage v. Alberts*, 2 Idaho, 252, holding that if findings are sufficient to sustain the judgment, failure to find upon certain allegations of the complaint is not ground for new trial.

27 Cal. 282-287. REDDING v. WHITE.

Pueblo Lands.—Leases by the municipal authorities of five hundred acre tracts for nearly a thousand years, at a rent of only three dollars per annum, were void, p. 287.

Cited in *Holladay v. San Francisco*, 124 Cal. 356, and *City of Monterey v. Jacks*, 139 Cal. 551, noted under *Hart v. Burnett*, 15 Cal. 568; *San Francisco v. Canavan*, 42 Cal. 556, to the point "that in respect to pueblo lands it is competent for the legislature to control and direct how they shall be managed and controlled or disposed of by the municipal corporation."

27 Cal. 287-295. PEOPLE v. SKIDMORE.

Former judgment is a bar when cause tried on merits irrespective of ground on which judgment was based, p. 293.

Cited in *Town v. Pomeroy*, 111 Wis. 671, holding prior judgment a bar under facts stated.

27 Cal. 295-299. STEINBACH v. LEESE.

Affidavit of Publication of summons in a newspaper must aver that the affiant is one of the persons authorized by statute to make it, p. 298.

Cited in *Sharp v. Daugney*, 33 Cal. 514, holding that an affidavit by the "publisher and proprietor" of a paper was a sufficient compliance with the statute; *Hahn v. Kelly*, 34 Cal. 419, 428, 94 Am. Dec. 760, holding that where the affidavit did not aver the position of the affiant, but the judgment stated that service had been made according to law and the order of the court, the presumption was "that proof of publication by the proper person was in fact made." Cited in *McChesney v. People*, 174 Ill. 49, holding mere recital of status of affiant insufficient; *Scott v. Brackett*, 89 Ind. 418, holding that notice of petition for location of a ditch must be advertised as prescribed by the statute. Affirmed in *Odell v. Campbell*, 9 Oreg. 306. Cited to the point that service by publication must strictly comply with the statute, in *Cissell v. Pulaski Co.*, 3 McCrary, 449, 10 Fed. Rep. 893, and *Martin v. Barbour*, 34 Fed. Rep. 708; also in *Gray v. Larrimore*, 4 Sawy. 646, 2 Abb. U. S. 551, where Field, J., holds that evidence is inadmissible to supply omissions in an affidavit of publication, saying: "The statute prescribes the character of the evidence which shall be produced and by whom it shall be given. It is not sufficient that other proof equally persuasive and convincing may be offered. The statutory proof will alone suffice"; and in note to 42 Am. Dec. 63, on this point.

Appearance by defendant is when he answers, demurs, or files notice of appearance; service of this notice should antedate or be contemporaneous with the service of all other notices and papers; notices the purpose of which is "not to give notice of appearance but to give notice of a step taken or about to be taken," are not included in the statutory definition, p. 299.

Cited in *Glidden v. Packard*, 28 Cal. 651, holding that notice of motion to dissolve attachment is not such an appearance as authorizes the clerk to enter judgment by default; *Coombs v. Parish*, 6 Colo. 297, holding that defendant may enter a special appearance for the purpose of making a motion to dismiss. Denied in *Curtis v. McCullough*, 3 Nev. 213, holding that a statute prescribing what shall constitute an appearance does not preclude appearance in a different manner for other purposes, and saying that a different rule, "so manifestly against the universal practice of all courts, should not be adopted, except upon the most unequivocal language of the statute." Cited in *McCoy v. Bell*, 1 Wash. St. 510, holding that the personal presence of defendant is not an appearance; "some act must be performed; he must answer, demur, or give the plaintiff written notice, or, if an attorney appears, he must give notice of appearance."

Notice of defects in publication is presumed where plaintiff is himself the purchaser at sheriff's sale on foreclosure, p. 299.

Affirmed in *Plummer v. Whitney*, 33 Minn. 428, as to sale on execution.

27 Cal. 300-322. **McMINN v. WHELAN.**

Attesting Witness to Foreign Deed is presumed to be out of the court's jurisdiction at the trial, p. 310.

Cited in note to 33 Am. Dec. 723.

Publication of Summons.—The statute must be strictly complied with, p. 314.

Affirmed, as to publication of notice of locating a ditch, in *Vizzard v. Taylor*, 97 Ind. 94; also, as to publication of summons and attachment, in *Stewart v. Anderson*, 70 Tex. 601; *Park v. Higbee*, 6 Utah, 416, noted under *Ricketson v. Richardson*, 26 Cal. 152; note to *Miller v. White*, 76 Am. St. Rep. 814, on general subject; as to service of notice of publication, in *Beaupre v. Brigham*, 79 Wis. 441.

Jurisdiction.—If it appear by the record or otherwise that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question; and this is so whether the court be of inferior or superior jurisdiction. It is a fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it, p. 314.

Affirmed in *McMinn v. O'Connor*, 27 Cal. 246. Cited in *Wallace v. Mayor*, 29 Cal. 188, holding with regard to a corporation that "no officer can acquire power or jurisdiction by the mere assertion of it": also in *Forbes v. Hyde*, 31 Cal. 348, to the point that when it appears in the record that the court had no jurisdiction of the person of the defendant, the judgment may be collaterally attacked. Modified in *Hahn v. Kelly*, 34 Cal. 402, 94 Am. Dec. 746, saying that in the principal case "the rule may be stated too broadly," and that the language there used "implies that a want of jurisdiction may be shown aliunde, but no such question was involved in that case, and what was said upon that subject must be considered dictum"; and holding "the true rule to be that . . . where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done; but when the record states what was done, it will not be presumed that something different was done," p. 407. Cited in *Galpin v. Page*, 18 Wall. 369, where Field, J., says: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." Cited in *Hall v. Melvin*, 62 Ark. 444, 54 Am. St. Rep. 302, saying: "Where a bill shows no cause of action against the defendant with reference to the subject matter of the suit, . . . a decree based upon such a bill is a nullity, no matter how attacked"; *Adams v. Adams*, 154 Mass. 297, where a divorce record from a California court is held invalid for lack of jurisdiction therein of the person of defendant. Affirmed in *Palmer v. McMaster*, 8 Mont. 192.

Attachment Lien on land cannot be effectual to impeach a conveyance of the land by the defendant in the attachment suit, until judgment is rendered therein, p. 315.

Cited in *McClellan v. Solomon*, 23 Fla. 444, 11 Am. St. Rep. 387, holding that a "judgment lien relates back to the date of the levy, as against the judgment debtor and his fraudulent grantee, or as against anyone purchasing the real estate as the property of the judgment debtor subsequent to the attachment"; and that the "title of the purchaser at a sale under the judgment dates as against such parties from the date of the levy of the attachment."

Creditor's Bill, to impeach for fraud a conveyance by the debtor, must be brought by a judgment creditor; as between the grantor and grantee, a conveyance executed to defraud creditors is valid, p. 316.

Cited in *Aigeltinger v. Einstein*, 143 Cal. 614, but denying right of attaching creditor to set aside conveyance before judgment and execution;

Hoffman v. Tucker, 58 Neb. 462, on point that administrator of estate cannot sue to vacate fraudulent conveyance by accident before creditor's claims have been allowed; *Ohm v. Superior Court*, 85 Cal. 548, 20 Am. St. Rep. 247, holding that where a decedent made a deed in fraud of creditors, "any creditor is entitled to maintain an action to set aside such a fraudulent conveyance, but he must be a creditor whose claim has been allowed by the administrator or is evidenced by a judgment"; to same effect in *Field v. Andrada*, 106 Cal. 110, and *Murphy v. Clayton*, 114 Cal. 536. Distinguished in *Quarl v. Abbett*, 102 Ind. 244, 52 Am. Rep. 670, holding that the rule that only judgment creditors can sue is not in force in Indiana, and even under the old rule there were exceptions. Cited in note to 90 Am. Dec. 288, 290, on creditor's bills.

Tax Deed of land to a grantee in possession thereof under claim of right, does not pass the title; when he paid the taxes properly levied, he only discharged his own obligation under the law, p. 318.

Affirmed, as to purchase by an administrator's agent, in *Bernal v. Lynch*, 36 Cal. 146. Affirmed in *Barrett v. Amerein*, 36 Cal. 326; *Garwood v. Hastings*, 38 Cal. 223; *Reily v. Lancaster*, 39 Cal. 356; *Burns v. Lewis*, 86 Ga. 604; *Stears v. Hollenbeck*, 38 Iowa, 551. Cited in *Wambole v. Foote*, 2 Dak. 27, holding that one owning land under recorded deeds is bound to pay the taxes. Distinguished in *Seaver v. Cobb*, 98 Ill. 204, saying: "Here the appellee was in possession, but claimed no title in himself, but that it was in the general government. . . . Conceding the correctness of the rule [in the principal case], it does not govern this." Cited in *Hadley v. Musselman*, 104 Ind. 461, holding that a bailee for hire may be purchaser, saying: "Where the person who buys is under a contract or duty to pay taxes, he cannot become a purchaser, but where there is no contract and no duty he may buy"; also in *Curtis v. Smith*, 42 Iowa, 671, saying that where possession is held neither as tenant, trustee, nor agent of the owner, it can be no impediment to acquisition of a tax title; and in notes on this point to 75 Am. St. Rep. 250, 15 Am. Dec. 685, 686, and 85 Am. Dec. 100.

Comment by the Judge, after a ruling on evidence, as to the respectability of the witness, held to be an irregularity that would warrant reversal of the judgment, if the judgment depended in any material degree upon the testimony of the witness, p. 320.

Cited in *Estate of Blake*, 136 Cal. 311, as to comments on credibility of expert evidence; *Barlow etc. Co. v. Parsons*, 73 Conn. 707, reversing judgment for action of judge; *Penn. Co. v. Hunsley*, 23 Ind. App. 50, holding instruction reflecting on credibility erroneous; *State v. Kerns*, 47 W. Va. 269, ruling similarly as to instruction as to defendant's guilt; *People v. Willard*, 92 Cal. 490, where an expression by the court, in ruling on evidence, to the effect that a witness "had contradicted herself several times," was held error; *People v. Van Ewan*, 111 Cal. 152, where an instruction as to the credibility of the defendant in a crimi-

nal case was held error; *Sharp v. State*, 51 Ark. 155, 14 Am. St. Rep. 33, holding that a question asked of a witness by the court was ground for a new trial; *Garner v. State*, 28 Fla. 146, 29 Am. St. Rep. 247, where remarks of the court in a ruling on evidence were held error; to same effect in *State v. Harkin*, 7 Nev. 383, *State v. Tickel*, 13 Nev. 512, *State v. Lucas*, 24 Oreg. 174, and *Neill v. Rogers Co.*, 38 W. Va. 232; *State v. Pomeroy*, 30 Oreg. 29, holding an expression of opinion as to motives of a witness, in a charge to a jury, to be error; and in notes on this point to 72 Am. Dec. 546, 547, and 14 Am. St. Rep. 47.

Statement on motion for new trial should contain only necessary evidence; and the lower court should exact a compliance with the law on the subject, p. 321.

Approved in dissenting opinion in *Quivey v. Gambert*, 32 Cal. 318.

General Citations.—*Kirk v. Territory*, 10 Okla. 62. *Wilson v. Territory*, 9 Okla. 335.

27 Cal. 322-329; 87 Am. Dec. 76. **MEGERLE v. ASHE.**

Selection and Location by the state, of lands granted under the act of Congress of 1841, vests in the state and her grantee "a title superior to that asserted by the holder of a subsequent patent issued by the general government," p. 328.

Cited in *Megerle v. Ashe*, 33 Cal. 81, holding that plaintiff, claiming under a United States patent, had failed to show his prior right under a pre-emption claim, as against a location of school land warrants by defendant and a state patent thereon; *Bludworth v. Lake*, 33 Cal. 262, to the point that "when the selection and location are once made, pursuant to the directions, of lands not reserved, but subject to location, the general gift of quantity becomes a particular gift of the specific lands located, vesting in [the state] a perfect and absolute title to the same, and that title passes by her patent"; *Smith v. Athern*, 34 Cal. 512, to the point that public lands are not liable to location on school land warrants until after they are surveyed by the United States; *Poppe v. Athearn*, 42 Cal. 608, holding that an unsigned indorsement on plat of survey in the register's office fixed the time of filing thereof. Distinguished in *Roberts v. Columbet*, 63 Cal. 24, holding that where defendant located a school land warrant on unsurveyed lands that had been donated to the state, the location was good as against a later patent issued by the state to another claimant after survey of the lands. Cited in *Knabe v. Burden*, 88 Ala. 439, holding that where plaintiff claimed under a United States certificate of entry, and defendant claimed under a state patent, the presumption was legitimate that proper selection of the land had been made before the state asserted title to it and issued the patent; note to *GrosLouis v. Northcut*, 3 Oreg. 399, to the effect that

title passes by virtue of the statute and not by the patent; and in notes to 85 Am. Dec. 94, and 99 Am. Dec. 186.

27 Cal. 329-337; 87 Am. Dec. 81. **DE UPREY v. DE UPREY.**

Partition.—Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action, p. 335.

Affirmed in *Morenhout v. Higuera*, 32 Cal. 294; *Bollo v. Navarro*, 33 Cal. 465, 468; *Gates v. Salmon*, 35 Cal. 597; 95 Am. Dec. 150; *Sutter v. San Francisco*, 36 Cal. 116; *Hancock v. Lopez*, 53 Cal. 371; *Martin v. Walker*, 58 Cal. 593, 594, saying: "The proceeding in partition is here held to be one in which the rights of all parties may be fully inquired into and finally determined; it answers the double purpose of dividing the land and settling the title, and the mere fact of an adverse holding by the defendant constitutes no objection to the proceeding." Cited in *Bartlett v. Mackey*, 130 Cal. 182, 183, holding allegation as to prejudice to owners unnecessary in complaint; *Adams v. Hopkins*, 144 Cal. 29, applying rule to alleged adverse occupants; *Ivancovich v. Weilenman*, 144 Cal. 763, discussing effect of judgment as to liens not litigated; dissenting opinion in *Heinze v. Butte etc. Min. Co.* 126 Fed. 28, majority holding where intervener in partition files cross-bill setting up equitable title to interest claimed by complainant and prays for cancellation of deeds on ground of fraud and insanity of grantor, and that he be declared owner of such interest, court need not stay partition suit; *Emeric v. Alvarado*, 64 Cal. 618, saying that "before any partition is ordered or can be made, the interests and shares of the parties are to be determined and adjudged by the court. . . . In no case should a question of title be left to the referees." Cited in *Christy v. Spring Valley*, 68 Cal. 76, holding that a defendant in a suit for partition "was bound to disclose its adverse claims to the land, so that the court might ascertain and determine them"; *Jameson v. Hayward*, 106 Cal. 687, 46 Am. St. Rep. 270, saying: "It was the evils and inconveniences of cotenancy which gave rise to the writ of partition in the English courts, and it was to avoid these detriments to full and complete enjoyment of realty that statutes have been created to enforce partition. This court has gone to great length in upholding the right of a tenant in common to maintain the action where he had a right to the present possession, although not in actual possession." Distinguished in *Grant v. Murphy*, 116 Cal. 431, 432, 58 Am. St. Rep. 191, holding that where the interest of the estate of a decedent in partition had been ascertained, but a contest between claimants to the estate was pending in the probate court, it was proper to proceed to a division, leaving the contestants to settle their claims among themselves in the proper court. Cited in *Glasscock v. Hughes*, 55 Tex. 469, to the point that rights of all parties are to be determined in a partition suit; to same effect in *Kromer v. Friday*, 10 Wash. St. 640, and *Royston v. Miller*, 76 Fed. Rep. 58; and in

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notes on partition in 67 Am. Dec. 707; 89 Am. Dec. 433; 95 Am. Dec. 152; 33 Am. St. Rep. 156; 37 Am. St. Rep. 100.

Answer cannot cause dismissal of suit on the pleadings, p. 334.

Distinguished in *Kelley v. Kriess*, 68 Cal. 212, holding that "if a complainant fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon a motion for new trial."

27 Cal. 337-339. JENKINS v. FRINK.

Statement on Motion for New Trial.—If it is not filed in time, the motion is waived, p. 338.

Cited in *Quivey v. Gambert*, 32 Cal. 305, holding that an order striking out a statement is not appealable; also in dissenting opinion on page 313 of same case, contra. Affirmed in *Campbell v. Jones*, 41 Cal. 518. Cited in *Wallace v. Lewis*, 9 Mont. 403, holding the mere filing does not constitute a motion, but "the attention of the court must be called to it in some way by some movement of counsel."

27 Cal. 340-342. PEOPLE v. HODGES.

Accessory must be tried in the county where he committed the offense, p. 341.

Affirmed in *People v. Stakem*, 40 Cal. 602. Approved in dissenting opinion in *Gibbs v. Gibbs*, 26 Utah, 427, majority holding where defendant answers district court of county in which plaintiff in divorce suit on ground of adultery resides has jurisdiction, though adultery committed in another county.

27 Cal. 346-349. REED v. ELDREDGE.

Judgment is a contract for the payment of money, p. 348.

Affirmed in *Bean v. Loryea*, 81 Cal. 153. Cited in *Dore v. Thornburgh*, 90 Cal. 66, 25 Am. St. Rep. 101, holding that an English judgment is not a contract barred in two years under section 339 of the Code of Civil Procedure.

Judgment requiring that the amount thereof be paid in current coin is erroneous, p. 349.

Cited in *Howe v. Nickerson*, 14 Allen, 405, holding that a bill in equity does not lie to enforce specific performance of an award ordering an amount paid in gold coin; dissenting opinion in *Louisville Co. v. State*, 8 Ind. App. 381, a majority of the court holding that a court can furnish a remedy for an existing right; and in note to 87 Am. Dec. 126, on legal tender.

27 Cal. 350-357. ELLIS v. POLHEMUS.

Probate Claims.—Interest on shall not exceed ten per cent when estate is insolvent, p. 354.

Distinguished in *Visalia etc. Bank v. Curtis*, 135 Cal. 353, and held inapplicable to action to foreclose decedent's mortgage, allowing interest at conventional rate.

Claim, within the meaning of section 131 of the Probate Act, includes a note and mortgage securing it, p. 354.

Cited in *Pitte v. Shipley*, 46 Cal. 160, 161, holding that a mortgage is a claim that must be presented against a probate estate; *Verdier v. Roach*, 96 Cal. 472, 474, holding that under section 1493 of the Code of Civil Procedure a contingent claim must be presented to an administrator for allowance, although the contingency does not happen until more than two years after the expiration of time for presenting claims; *Reid v. Sullivan*, 20 Colo. 501, holding that a statute barring claims after one year does not apply to a claim secured by trust deed; *Toulouse v. Burkett*, 2 Idaho, 175, 176, holding that a vendor's lien is not a claim; *Bush v. Adams*, 22 Fla. 190, holding that a mortgage is within a statute of nonclaim; dissenting opinion in *Corbett v. Rice*, 2 Nev. 337, 338, a majority of the court holding that "equity courts have jurisdiction to foreclose mortgages against estates of deceased persons"; *Northwestern Bank v. State*, 18 Wash. St. 76, holding that the word "claim" in a statute regarding suits against the state, had the meaning of "cause of action"; and in note to 81 Am. Dec. 146, on claims.

27 Cal. 358-360. **VANCE v. OLINGER.**

Pending Suit in Ejectment, between the same parties for the same land, is not ground for dismissal of a second suit, unless the latter is for the same injury on the same issues, p. 359.

Cited in *McCormick v. Gross*, 135 Cal. 305, and *Beardsley v. Morrison*, 18 Utah, 483, 72 Am. St. Rep. 798, holding plea insufficient as stated; *Marshall v. Shafter*, 32 Cal. 195, holding that "there is but one title between the parties to the action to recover the possession of the premises, though there may be many evidences of title. It is impossible that two persons claiming adversely to each other can at the same time hold such right or title in the premises as will entitle each as against the other to the possession. . . . The court determines which of the two holds it." Affirmed in *Larco v. Clements*, 36 Cal. 134; *Martin v. Splivalo*, 69 Cal. 615. Cited in *Leonard v. Flynn*, 89 Cal. 541, 23 Am. St. Rep. 503, to the point that "a plaintiff may have two suits against the same defendant for the recovery of the possession of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first"; *Arnold v. Woodward*, 14 Colo. 167, saying: "The judgment in the former suit would not estop prosecution of the present suit, so that suit cannot abate this"; and in note on this point in 85 Am. Dec. 211.

27 Cal. 360-369. **AMERICAN CO. v. BRADFORD.**

Special Verdict may be rendered by the jury, in their discretion, in

a suit for the recovery of money only on specific real property. In other cases the court may direct a special verdict, and it is the court's province to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to the jury, and for refusing to comply with such a request no error can properly be assigned, p. 365.

Affirmed, as to discretion of court, in *Smith v. Occidental Co.*, 99 Cal. 472; also, as to discretion of jury, in *Thompson v. Gregor*, 11 Colo. 534. Cited in *Prosser v. Montana Central Co.*, 17 Mont. 386, saying: "In the case at bar no findings were requested by the appellant. He did not ask that the court submit special findings upon any branch of the case. Not having made this request, he cannot complain of the action of the court. It certainly would have thrown the jury into inextricable confusion to instruct them, as appellant requested, that they might find special findings or a special verdict, when not the slightest intimation was given to them upon what questions of fact they should find." Cited in *Bank v. Marshall*, 8 Sawy. 39, 11 Fed. Rep. 28, to the point that "submission of particular questions of fact to the jury is a matter wholly within the discretion of the court"; and *Mangum v. Bullion Co.*, 15 Utah, 551, holding it was not error to refuse to submit to the jury defendants' request for special findings in a suit for damages for negligence.

Easement in Water is created by an exclusive and interrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely. The right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden proving this is on the party claiming the easement, pp. 366, 367.

Cited in *Bree v. Wheeler*, 129 Cal. 147, *Strong v. Baldwin*, 137 Cal. 438, and *Smith v. Water Co.*, 16 Utah, 203, holding evidence insufficient to sustain finding of adverse user of water; *Franz v. Mendonca*, 131 Cal. 208, on point that permissive use is not adverse; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 597, holding prescriptive right properly pleaded; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Or. 216, as against riparian owners one who diverts water may require title by prescription in same time necessary to acquire title by adverse possession; *Lux v. Haggin*, 69 Cal. 358, holding (on page 355) that "both the right to appropriate water on the public lands and that of the occupant of portions of such lands are derived from the implied consent of the owner, and as between the appropriator of land or water the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority. Since the United States, the owner of the land and water,

is presumed to have permitted the appropriation of both the one and the other, as between themselves the prior possessor must prevail." Cited in *Stanford v. Felt*, 71 Cal. 250, to the point that "the diversion by lapse of time may grow into a right;" also in *Alta Co. v. Hancock*, 85 Cal. 226, 20 Am. St. Rep. 221, holding that the use must be "adverse" and "uninterrupted" on which to base a claim by prescription, and saying (on page 230): "So far the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast." Affirmed, as to burden of proof of adverse possession of land being on the party relying on it, in *DeFrieze v. Quint*, 94 Cal. 663, 28 Am. St. Rep. 157; and to same effect, as regards appropriation of water, in *Ball v. Kehl*, 95 Cal. 613; also in *Faulkner v. Rondoni*, 104 Cal. 146, holding that after adverse and uninterrupted user of water for five years "the law will presume a grant of the right." Cited in *New Mercer Co. v. Armstrong*, 21 Colo. 365, saying as regards abandonment: "Nonuse alone is not sufficient evidence; the intent to abandon must also be present. . . . Y. never made use of any portion of either of his ditches for more than nine years, and of no part of this water in excess of three and five tenths cubic feet per second of time during a period of from eighteen to twenty-one years, and this was an unreasonable time for an owner of a water right not to make any use thereof, to entitle him afterward to reclaim it as against intervening rights." Cited in *Carmody v. Mulrooney*, 87 Wis. 554, which was a case of right of way, to the point that while burden of proof is on one claiming the right by prescription, an uninterrupted user for twenty years is presumed to have been under claim of right; also in *Union Co. v. Dangberg*, 81 Fed. Rep. 91, holding that "a mere scrambling possession of the water, or the obtaining of it by force or fraud, gives no prescriptive right, nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for all other claimants;" and in note on this point in 85 Am. Dec. 151.

Easement as a Defense must be specially pleaded, p. 367.

Cited in *Lux v. Haggin*, 69 Cal. 267, to the point that "a party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer"; *McKeoin v. Northern Pacific Co.*, 45 Fed. Rep. 465, holding that an easement must be set up as new matter in defense; and in note to 69 Am. Dec. 706, on this point.

N. B.—In *Courtwright v. Bear River Co.*, 30 Cal. 585, the principal case is cited as an example of a suit to abate a nuisance being brought

in a district instead of a county court; and it is also cited, evidently by mistake, in *Knight v. Fisher*, 15 Colo. 180, to the point that an error of a two cents in a verdict was immaterial.

27 Cal. 372-375. ELGIN v. HILL.

Deposition held sufficiently show the date when it was taken, but the date is of no consequence, p. 374.

Affirmed in *Birmingham Co. v. Alexander*, 93 Ala. 135.

Overdue Note.—Indorsee takes it subject to all existing defenses, p. 375.

Affirmed in *James v. Yaeger*, 86 Cal. 187.

27 Cal. 375-376. McEVOY v. IGO.

Forcible Entry and Detainer must be alleged in a complaint for it, p. 376.

Affirmed in *Morse v. Boyde*, 11 Mont. 249.

27 Cal. 376-394. CROWTHER v. ROWLANDSON.

Mental Incapacity of grantor is ground for canceling a deed, p. 382.

Cited in note to 1 Am. St. Rep. 88.

Motion for New Trial cannot be made until a case has been "tried"; and a reference having been ordered, the trial of case was not complete until the final report of the referee was filed, p. 385.

Affirmed in *Harris v. San Francisco Sugar Co.*, 41 Cal. 406, *Hinds v. Gage*, 56 Cal. 488, and *Duff v. Duff*, 71 Cal. 519. Cited in *Bixby v. Bent*, 59 Cal. 532, holding that an appeal from a decree in partition, pending proceedings for its modification, was premature. Criticised as a dictum in *Arnold v. Sinclair*, 11 Mont. 567, 28 Am. St. Rep. 493, holding that "the fact of a residence being had after judgment does not in itself determine that the judgment is not final." Cited in *Rhodes v. Williams*, 12 Nev. 26, holding an appeal premature, because the decree appealed from had ordered an accounting and sale.

Statement, on motion for new trial, must specify alleged errors of fact, p. 385.

Affirmed in *Graham v. Stewart*, 68 Cal. 376.

27 Cal. 394-404. PEOPLE v. SHOTWELL.

Where Court Directs Sheriff to Discharge Jury if they do not agree by certain hour, discharge by sheriff at hour named is not once in jeopardy, p. 398.

Approved in *State v. Costello*, 29 Wash. 370, plea of once in jeopardy cannot be based on discharge of jury where they had been out nineteen hours and reported that they could not agree.

Indictment can charge but one offense; but objection on this ground must be raised by demurrer, not by motion in arrest of judgment, p. 401.

Cited in *People v. Frank*, 28 Cal. 513, holding that an indictment for forgery may charge all the acts enumerated in the statute in the same count or in different counts; *People v. Garnett*, 29 Cal. 626, to the point that objection must be taken by demurrer; *People v. De La Guerra*, 31 Cal. 461, holding that only one offense was charged; *People v. Jim Ti*, 32 Cal. 62, to the point that objection to description of money stolen must be taken by demurrer. Affirmed in *People v. Burgess*, 35 Cal. 118. Cited in *People v. Mitchell*, 92 Cal. 591, holding that while it was proper to combine in the same information charges of forging and of uttering, yet the intent to defraud not being specifically alleged, a new trial must be granted, and a new information filed; *People v. Smith*, 103 Cal. 565 holding that where one count is bad and another good, but the lower court holds both good and there is a verdict of guilty on both, it is error; dissenting opinion in *People v. Thompson*, 111 Cal. 254, a majority of the court holding that where several acts were charged in one count, the offense was established by proof of any one of them; and in *People v. Gusti*, 113 Cal. 179, holding that a number of acts charged in one count were really but one offense. Cited in dissenting opinion in *Territory v. Duffield*, 1 Ariz. 70, a majority of the court holding an indictment bad for charging two offenses; *People v. Stapleton*, 2 Idaho, 52, to the point that objection to sufficiency of indictment must be raised by demurrer; *People v. O'Callahan*, 2 Idaho, 146, holding that conviction may be for a lower degree of the offense charged, but not for a higher; *People v. Morris*, 80 Mich. 636, holding that on a plea of guilty to two counts, charging different degrees, it was proper to punish for the highest, and to same effect, as to a verdict of guilty, in *State v. Core*, 70 Mo. 496; *Territory v. Poulier*, 8 Mont. 150, holding that two counts for forgery of a note charged different offenses, because it was not averred that the notes were the same; *Thompson v. People*, 4 Neb. 526, holding that it was too late on appeal to raise the objection that an indictment charged several offenses; *State v. Malim*, 14 Nev. 290, holding that two counts charged but one offense; and in note on this point in 58 Am. Dec. 247-250.

27 Cal. 404-408. **PEOPLE v. ANTONIO.**

Indians.—The act of 1850, regarding punishment of Indians, applies only where they are living in separate communities, and not to an Indian living among white men, p. 405.

Cited in *State v. Williams*, 13 Wash. St. 339, holding that an information against an Indian need not aver that he is not a member of a tribe and that the offense was not committed on the reservation; *State v. Dostater*, 27 Wis. 294, holding that the criminal laws of the state apply to Indians on reservations within the state; *United States v.*

Sacoodacot, 1 Dill. 277, 1 Abb. U. S. 383, where a federal court turned over an Indian, charged with murder, to a state court, the offense having been committed off the reservation and within the state of Nebraska.

Larceny.—Possession of property recently stolen is a circumstance to be considered in determining guilt, and "with proof of other circumstances indicative of guilt would make a prima facie case," p. 407.

Affirmed in *People v. Kelly*, 28 Cal. 427; *State v. Cassady*, 12 Kan. 560; *Foster v. State*, 52 Miss. 699. Distinguished in *Thompson v. People*, 4 Neb. 529, saying: "The better rule seems to be that if possession be recent, it makes out a prima facie case to be left to the jury." Cited in note on this point in 70 Am. Dec. 447.

27 Cal. 408-413. BURNETT v. PACHECO.

Statement, on motion for new trial, must specify alleged errors, p. 410.

Affirmed in *Beans v. Emanuelli*, 36 Cal. 120, and *Graham v. Stewart*, 68 Cal. 376. Cited in note to 85 Am. Dec. 73.

27 Cal. 413-415. ECKSTEIN v. CALDERWOOD.

Motion for New Trial, if not prosecuted with due diligence, should be dismissed, p. 415.

Cited in *Storke v. Storke*, 132 Cal. 352, and *Galbraith v. Lowe*, 142 Cal. 296, dismissing motion for delay; dissenting opinion in *Quivey v. Gambert*, 32 Cal. 327, as an example of appeal from an order of dismissal.

27 Cal. 415-418. PARTRIDGE v. SAN FRANCISCO.

Statement on motion for new trial must specify alleged errors, p. 417.

Affirmed in *Graham v. Stewart*, 68 Cal. 376; *Thorp v. Freed*, 1 Mont. 663; *Gill v. Hecht*, 13 Utah, 8.

27 Cal. 418-425. ELIAS v. VERDUGO.

Parol Partition.—"Agreements in relation to land, resting in parol, ought to be very satisfactorily proved," p. 425.

Cited in *Lanterman v. Williams*, 55 Cal. 66, holding a parol partition invalid; and in note on this point in 92 Am. Dec. 122.

Homestead "cannot be carved out of land held in joint tenancy or by tenancy in common," p. 425.

Affirmed in *Seaton v. Son*, 32 Cal. 483; *Cameto v. Dupuy*, 47 Cal. 80; *First Nat. Bank v. De La Guerra*, 61 Cal. 111; *Carroll v. Ellis*, 63 Cal. 442; also in *Fitzgerald v. Fernandez*, 71 Cal. 507, holding that under the act of 1868, allowing a homestead on land held in cotenancy, if in exclusive occupation of claimant, the facts did not show a valid homestead; and in

Rosenthal v. Merced Bank, 110 Cal. 202; also in dissenting opinion in *McGuire v. Van Pelt*, 55 Ala. 357, a majority of the court disapproving the principal case. Cited in *Newton v. Summey*, 59 Ga. 400, holding that a partnership had no right to an injunction against the allowance of a homestead to the wife of one of the partners, for if her claim was subordinate to partnership claims the allowance of a homestead would not protect it; also in *Lindley v. Davis*, 6 Mont. 456, holding that a homestead cannot be carved out of partnership property by a partner; but in a rehearing of the same case in 7 Mont. 214, the former decision was reversed, and the court held that a cotenant was entitled to a homestead exemption, there being no reason why homestead laws should be strictly construed. Cited in *re Parks*, 9 Bank. Reg. 273, holding it unnecessary to decide the question; and in *In re Blodgett*, 10 Bank. Reg. 147, holding there is no separate exemption to individual members of a firm out of partnership property.

Affirmed in *West v. Ward*, 26 Wia. 581. Cited in note on homestead in 63 Am. Dec. 122, 123.

Foreclosure Decree should save the rights of any defendants who claim adversely to the title mortgage, p. 425.

Affirmed in *Odell v. Wilson*, 63 Cal. 160. Cited in note to 79 Am. Dec. 192.

27 Cal. 425-432; 87 Am. Dec. 87. **AGNEW v. STEAMER.**

Carrier of Animals.—Where the cause of damage is unconnected with the conduct or propensities of the animal, "the carrier is subjected to the ordinary responsibilities connected with his vocation," p. 429.

Cited in notes to 92 Am. Dec. 56; 97 Am. Dec. 408; 411; 2 Am. St. Rep. 500; 37 Am. St. Rep. 639; *Heller v. Chicago etc. Co.*, 63 Am. St. Rep. 550.

27 Cal. 433-438; 87 Am. Dec. 90. **BUCKOUT v. SWIFT.**

Issues of Facts raised by the answer are presumed to have been found for defendant, when the judgment is for him without findings, p. 435.

Affirmed in *Lount v. Lount*, 1 Ariz. 425. Cited in note to 92 Am. Dec. 548.

Mortgage.—Severance of a house from mortgaged premises by a flood changes it from real to personal property; it is withdrawn from the operation of the mortgage lien, and the mortgagor has the right to sell it, p. 437.

Cited in *Hill v. Gwin*, 51 Cal. 50, holding that severance of machinery from a mortgaged mill, by consent of the mortgagee, frees it from the lien; to same effect in *Lavenson v. Standard Co.*, 80 Cal. 247, 13 Am. St. Rep. 149; also in *Moisant v. McPhee*, 92 Cal. 79, as to taking bark from trees on mortgaged land. Cited in *Robbins v. Sackett*, 23 Kan. 304, holding that a mortgagee cannot claim to own a house on the mortgaged

land; *Tomlinson v. Thompson*, 27 Kan. 73, holding that where a mortgagor moved a house from the land and sold it after beginning of foreclosure proceedings, an action did not lie by the mortgagor against the buyer; *Harris v. Bannon*, 78 Ky. 571, holding that a mortgage lien cannot be enforced against buildings removed to other than the mortgaged land; *Verner v. Betz*, 46 N. J. Eq. 267, 19 Am. St. Rep. 391, holding that where a mortgagor removed a building to another lot and sold it and the lot, the building could not be ordered back in foreclosure proceedings, but the remedy was at law for its removal; *Willis v. Moore*, 59 Tex. 639, 46 Am. Rep. 291, holding that the buyer of land at a foreclosure sale is not entitled to the crops thereon as against a buyer of them from the mortgagor, the crops being no part of the realty; to same effect in *White v. Pulley*, 27 Fed. Rep. 441; *The Canada*, 7 Sawy. 182, 7 Fed. Rep. 250, holding that where a mortgaged ship was recaptured, the old copper belonged to the mortgagor; and in notes to 92 Am. Dec. 245, 95 Am. Dec. 798, and 28 Am. St. Rep. 325. Disapproved in *Patton v. Moore*, 16 W. Va. 440, 37 Am. Rep. 792, holding that an engine and machinery, fixtures in a mill, did not lose this character by being washed out by a flood, and they were not subject to levy as chattels.

Injunction Against Waste of mortgaged premises will not be granted unless the waste renders the security inadequate, p. 437.

Affirmed in *Perrine v. Marsden*, 34 Cal. 18; *Miller v. Waddingham*, 91 Cal. 381; also in *Stowell v. Waddingham*, 100 Cal. 9, holding that injunction could not be granted after removal of buildings from mortgaged land, even though the removal rendered the security inadequate. Cited in *Williams v. Chicago etc. Co.*, 188 Ill. 32, but holding complaint sufficient to warrant injunction against removal of fixtures; *Beaver Lumber Co. v. Eccles*, 43 Or. 402, upholding injunction suit by mortgagee of timber lands and timber to restrain operation of sawmill by mortgagor; *Moriarty v. Ashworth*, 43 Minn. 2, 19 Am. St. Rep. 204, refusing to enjoin quarrying of granite on mortgaged premises, because it did not render the security inadequate. Disapproved in *Dakota Co. v. Parmelee*, 5 S. Dak. 346, 347, holding that neither severance of a building by the mortgagor nor its being annexed to other land destroyed the right of the mortgagee to enforce his claim against it after exhausting the land. Cited in *Morgan v. Gilbert*, 2 Fed. Rep. 838, holding that where the mortgagor is insolvent the mortgagee may bring trespass for his cutting timber on the land, impairing the security; and in note in 43 Am. St. Rep. 433, on this point.

27 Cal. 439-451. **NORRIS v. HENSLEY.**

Rule in *Shelley's Case*.—Devise to one for life, then to his heirs and assigns, vests a fee simple in the devisee, p. 442.

Cited in *Barnett v. Barnett*, 104 Cal. 299, holding that the rule in *Shelley's case* is abrogated by section 779 of the Civil Code. Affirmed in

Mulvane v. Rude, 146 Ind. 482; *Rona v. Meier*, 47 Iowa, 610; 29 Am. Rep. 495; *Pierce v. Pierce*, 14 R. I. 516. Cited in *Jones v. Port Huron Co.*, 171 Ill. 507, to the point that a restriction of an estate in fee by will, though for a limited time, is void, as depriving the first taker of his inherent power of alienation; and note to 57 Am. Dec. 489, 490.

27 Cal. 451-465. **McLAUGHLIN v. PIATTI.**

Sale of chattels, mingled with others, by number, weight or measure, is incomplete until the property is separated and identified, p. 463.

Cited in *Blackwood v. Cutting Co.*, 76 Cal. 217, 218, 9 Am. St. Rep. 203, 204, holding that on an agreement for sale of successive yearly crops of apricots, to be not less than seventy-five and not more than two hundred tons per annum, the title did not pass till the fruit was weighed; *Carpenter v. Glass*, 67 Ark. 139, denying right of plaintiff to maintain replevin under facts stated; *Commercial Bank v. Gillette*, 90 Ind. 269, 46 Am. Rep. 223, holding a sale of five hundred and ten wheels out of a lot of eleven hundred void, because they were not segregated; to same effect, as to sale of wood in a factory, in *New England Co. v. Standard Co.*, 165 Mass. 330; 52 Am. St. Rep. 518; and in note to 70 Am. Dec. 797.

Specific Enforcement of contract for sale of chattels is decreed in equity only where there can be no adequate compensation in damages at law, p. 463.

Affirmed in *Senter v. Davis*, 38 Cal. 454. Cited in note to 26 Am. Dec. 665.

Claim and Delivery.—This action under the code "is at least commensurate with the action of detinue at common law," p. 465.

Cited in *Everett v. Buchanan*, 2 Dak. 252, holding that it is not absolutely necessary to aver in a complaint the particular facts of an unlawful detention, but it is better pleading to do it; *Adams v. Wood*, 51 Mich. 415, holding that a buyer is entitled to a reasonable time to pay for goods, if no time is fixed, and the seller cannot replevy them before the time has elapsed; and in note to 9 Am. Dec. 107.

27 Cal. 465-469. **SOLANO CO. v. NEVILLE.**

County may sue to recover money from a tax collector that the law requires him to pay into the general fund, p. 469.

Cited in *Commissioners v. Lineberger*, 3 Mont. 239, holding that county commissioners are proper plaintiffs in a suit on the county treasurer's bond.

Tax Collector's compensation is fixed by the legislature, and any excess over this amount he must pay into the treasury, p. 469.

Affirmed, as to auditor's pay, in *Patton v. Placer Co.*, 30 Cal. 176, and as to tax collector in *Ream v. Siskiyou Co.*, 36 Cal. 622.

27 Cal. 470-475. PEOPLE v. BANVARD.

Motion for Nonsuit should particularize the supposed defects in the plaintiff's case, p. 474.

Affirmed in Coffey v. Greenfield, 62 Cal. 609; Loring v. Stuart, 79 Cal. 201; also in Daley v. Russ, 86 Cal. 117, saying that, "ordinarily, a ground which is not stated cannot be considered. . . . But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. . . . Where the defects cannot be corrected, the error of not specifying the grounds of the motion is immaterial"; and in Quimby v. Boyd, 8 Colo. 197; Wright v. Fire Ins. Co., 12 Mont. 477; and Mattoon v. Fremont Co., 6 S. Dak. 198. Cited in note to 52 Am. Dec. 312, on nonsuit.

Term of Office of an incumbent of a public office may be shortened by the legislature, p. 475.

Cited in Spring Valley v. San Francisco, 61 Cal. 7, to the point that, unless otherwise provided by law, "the legislature may change such term or compensation even while the officer is in office"; and in Ford v. State Harbor Commrs., 81 Cal. 26, holding that the commissioners had power to abolish the office of wharfinger. Affirmed in State v. Kalb, 50 Wis. 183, and Douglas Co. v. Timme, 32 Neb. 275.

Appeal from Judgment.—The testimony can only be reviewed on motion for new trial, p. 475.

Affirmed in Federico v. Hancock, 1 Ariz. 512. Cited, without apparent relevancy, in Keeran v. Griffith, 34 Cal. 585, to the point that a patent was admissible in evidence, no objection being made to the absence of preliminary proof.

General Citation.—Lewis v. Silver King Min. Co. 22 Utah, 53, 54.

27 Cal. 475-483. HILL v. SMITH.

Water for Mining.—Owner of a water ditch is entitled to protection from injury thereto by mining debris. Rules of the common law as to water rights have not been materially modified in this state; the reasons remain undisturbed, the conditions to which we are called upon to apply them are changed, p. 482.

Cited in Courtwright v. Bear River Co., 30 Cal. 585, as an example of a district court taking jurisdiction of a suit to abate a nuisance; Junkans v. Bergin, 67 Cal. 269, holding that a later appropriator of water had no right by his mining operations to fill up the ditch of a prior appropriator; Lux v. Haggin, 69 Cal. 359, holding that on the public lands "as between the appropriator of land or water the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority"; Atchison v. Peterson, 20 Wall. 515, where Field, J., says: "What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first ap-

proprietor will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied"; and in same case, 1 Mont. 567, holding a prior appropriator of water not entitled to an injunction against miners fifteen miles up the stream, who did no material harm to the stream, as "an injunction would cause infinitely more damage than it would remedy"; *Fitzpatrick v. Montgomery*, 20 Mont. 188, 63 Am. St. Rep. 625, awarding damages for injury to realty by deposit of tailings in stream; *Alder Gulch Co. v. Hayes*, 6 Mont. 38, holding that when water from a ditch has been used on a claim, it must be turned back for use by lower proprietors; in the great "Debris Case" of *Woodruff v. North Bloomfield Co.*, 9 Sawy. 535, 18 Fed. Rep. 802, granting a perpetual injunction against the discharge of mining debris into a stream; *Hewitt v. Story*, 64 Fed. Rep. 515, 519, holding that water rights had been lost by abandonment; *Union Mill Co. v. Dangberg*, 81 Fed. Rep. 95, where the court regulated the relative rights of quartz mills and farmers as to water from a stream; *Benton v. Johncox*, 17 Wash. St. 284, 61 Am. St. Rep. 918, holding that the doctrine of prior appropriation does not interfere with the common-law rule as to riparian owners; *Trambley v. Luterman*, 6 N. Mex. 26, 27, holding an easement established by adverse user of water, and later locator of land takes subject to the easement; and in note on this point in 43 Am. Dec. 279, 281, 282.

27 Cal. 483-489. PAGE v. HOBBS.

Pre-emption.—In order to connect themselves with the United States under the pre-emption laws it was necessary for the defendants [in ejectment] to show that they were persons entitled under this act to the benefit of its provisions, p. 486.

Affirmed in *Carder v. Baxter*, 28 Cal. 101; *Megerle v. Ashe*, 33 Cal. 90; *Quinn v. Kenyon*, 38 Cal. 501; *Burrell v. Haw*, 40 Cal. 377; *Schieffery v. Tapia*, 68 Cal. 186, 188. Distinguished in *Conkling v. Pacific Improvement Co.*, 87 Cal. 298, holding that in a bill for injunction against the diverting of water, it was sufficient for plaintiff to allege possession of the land and payment therefor, and it was unnecessary to aver that the lands were subject to pre-emption, because plaintiff made no claim of title in himself and did not question that of defendant. Cited in *Shiveley v. Pennoyer*, 27 Oreg. 37, holding that a pre-emption claimant must show his qualifications before he can purchase from the state; and in note to 87 Am. Dec. 133.

Suscol Rancho lands were withdrawn from pre-emption by the act of congress of 1841, except as to prior purchasers from Vallejo who had taken possession, p. 487.

Affirmed in *Page v. Fowler*, 28 Cal. 609, saying: "And there can be no doubt that congress had the power to thus withdraw the lands from pre-emption and the sale under the general laws, at any time prior to Notes Cal. Rep.—87

the acquisition by a settler of a right in the lands that he could maintain against the United States, so as to secure ultimately the legal title"; also in *People v. Shearer*, 30 Cal. 650; and in *Hutton v. Frisbie*, 37 Cal. 490, 491, saying: "The right of pre-emption is a mere privilege, . . . not a right of property as against the government, and it can be withdrawn at any time before it has been perfected into an obligation which can be enforced against the government itself, and that is before a sale and payment"; and in dissenting opinion in same case, pages 502, 503; also in *Durfee v. Plaisted*, 38 Cal. 83, saying: "The patent is the record of the government that the land was subject to entry by the patentees under the act of Congress, and was entered by them in conformity to law; and is conclusive evidence of the regularity, as well as the validity, of the action of the officers in passing upon and finally confirming their claim as purchasers from Vallejo or his assigns."

Declarations of Intention to pre-empt lands that are not subject to pre-emption are inadmissible in evidence, p. 487.

Distinguished in *Tyler v. Green*, 28 Cal. 408, 87 Am. Dec. 131, where plaintiff claimed under a pre-emption right to lands that were subject to pre-emption, and it was held he could prove by witnesses the facts necessary to establish his pre-emption right.

Recovery of Crops in Ejectment.—Point referred to but not decided, p. 489.

Cited in *Rathbone v. Boyd*, 30 Kan. 490, holding that a later settler in good faith is entitled to his crops, as against an earlier claimant who finally obtained the land.

27 Cal. 489-491. **PEOPLE v. AH FING.**

Accessory.—One may have been in the house with a thief, seeing him steal, and have made no attempt to interfere, and still be entirely innocent, p. 491.

Cited in *Walrath v. State*, 8 Neb. 88, to the point that mere personal presence when an offense is committed is not enough to make one a principal; and in note to 13 Am. Rep. 177, on aiding and abetting.

27 Cal. 491-495. **HEGELER v. HENCKELL.**

Waiver of Motion for new trial results from failure to file the statement within the statutory time, p. 494.

Affirmed in *Campbell v. Jones*, 41 Cal. 518, and *Elder v. Frevert*, 18 Nev. 282.

Amendment Nunc pro Tunc of clerk's minutes, by inserting an oral order alleged to have been made, cannot be allowed after expiration of the term, p. 495.

Cited in *Estate of Schroeder*, 46 Cal. 316, holding that clerical errors in a judgment may be amended "by the record" after the close of the

term; to same effect in *Bostwick v. McEvoy*, 62 Cal. 502, and *People v. Greene*, 74 Cal. 404; 5 Am. St. Rep. 452; *Kaufman v. Shain*, 111 Cal. 20, 52 Am. St. Rep. 141, holding that a court may correct an entry in its minutes, to make it correspond with the fact, upon whatever evidence the court deems satisfactory, at any time after the entry, and the error need not appear of record; and *Scamman v. Bonslett*, 118 Cal. 97, holding that where the error in a judgment is not of record, motion to amend must be made within the time prescribed by section 473, Code Civil Procedure. Cited in *Tynan v. Weinhard*, 153 Ill. 606, 607, holding that a judgment can be entered nunc pro tunc on record evidence only, and not by parol; *Clark v. Strouse*, 11 Nev. 79, holding that a record cannot be amended unless there is something to amend by; *Benedict v. State*, 44 Ohio St. 685, where a journal entry in a criminal case was allowed to be amended at a subsequent term; and in notes on this point in 12 Am. Dec. 353, 14 Am. Dec. 518, and 4 Am. St. Rep. 832, 834.

27 Cal. 495-497. **WALLACE v. ELDREDGE.**

Judgment by Default, entered by the clerk, held erroneous as to a provision for payment in current coin, and that part thereof ordered stricken out, p. 497.

Cited in *Harding v. Cowing*, 28 Cal. 214, holding that a judgment by default was the judgment of the court, not of the clerk who entered it; also in *Glidden v. Packard*, 28 Cal. 652, holding that a notice of motion to dissolve attachment "was not such an appearance in the case as would authorize the clerk to enter judgment by default"; *Bond v. Pacheco*, 30 Cal. 535, holding that where the clerk entered judgment by default for too large an amount, owing to an error in calculation of interest, it was "an error committed in the performance of an act within his jurisdiction to perform, which could be corrected on motion made in time, or on appeal, but which would not vitiate the judgment if not corrected"; *Providence Co. v. Prader*, 32 Cal. 636, 91 Am. Dec. 600, holding that in each case it must appear that what the clerk did was within the authority conferred on him by the statute; *Sacramento v. Central Pacific Co.*, 61 Cal. 255, holding that on an offer by defendant to allow judgment to be entered for a certain sum, for state and county taxes, the clerk had no right to enter judgment in a gross sum, not specifying the separate taxes of state and county, but less than the total amount claimed in the complaint. Cited in *Files v. Robinson*, 30 Ark. 494, holding that a judgment by default entered by the clerk in vacation did not comply with the statute; *Hazard v. Cole*, 1 Idaho, 287, holding that a judgment for gold coin was not void but irregular; *Graydon v. Thomas*, 3 Oreg. 252, holding that the clerk's duties in entering judgment by default are ministerial, not judicial.

27 Cal. 498-500. **WALLACE v. ELDREDGE.**

Judgment is a contract, p. 499.

Approved in *Weaver v. San Francisco*, 146 Cal. 732, judgment entered against city payable only out of funds of particular year pursuant to direction of supreme court on appeal, is res adjudicata, and cannot be modified.

Suits on judgments are actions upon contracts, p. 499.

Affirmed in *Bean v. Loryea*, 81 Cal. 153; *Dore v. Thornburgh*, 90 Cal. 66; 25 Am. St. Rep. 101.

Consolidation of Suits, brought upon distinct causes of action, refused, p. 500.

Cited in note to 58 Am. Dec. 511.

Judgment for Coin held proper, p. 499.

Cited in note to 87 Am. Dec. 126.

Reversal of Judgment will not be ordered "by reason of any matter of fact that was not shown or offered in the court below," p. 500.

Affirmed in *Howard v. Quinn*, 2 Mont. 340.

27 Cal. 500-502. PEOPLE v. BROWN.

Verdict ought not to be disturbed if the evidence is conflicting, p. 501.

Affirmed in *Territory v. Stone*, 2 Dak. 171, and *State v. Van Winkle*, 6 Nev. 352.

27 Cal. 502-506. OWEN v. DOTY.

Forcible Entry and Unlawful Detainer must be proved by plaintiff, in the statutory action, p. 505.

Affirmed in *Winterfield v. Stauss*, 24 Wis. 406; *Torey v. Berke*, 11 S. Dak. 160, holding judgment for plaintiff unwarranted by facts stated.

27 Cal. 507-515; 87 Am. Dec. 95. PEOPLE v. KING.

Indictment for murder need not state the means of death or nature and locality of wound and ought not to state the degree of the crime. Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions pp. 510-512.

Cited in *People v. Ah Woo*, 28 Cal. 208, holding that an indictment for forgery need not contain a copy in Chinese of the instrument forged; *People v. Shaber*, 32 Cal. 38, holding an indictment for burglary sufficient; *People v. Cronin*, 34 Cal. 200, 208, 210, holding that an indictment need not aver the mode or means of death; *People v. Nichol*, 34 Cal. 217, to the point that the degree of crime should not be averred; *People v. Dick*, 37 Cal. 280, to the point that the common law tests for indictments are superseded; to same effect in *People v. Kelly*, 59 Cal. 377; *People v. Hong Ah Duck*, 61 Cal. 389, and *People v. Hyndman*, 90 Cal. 3, holding that an information need not specify the means of death; *People v. Schmidt*, 63 Cal. 28, holding that malice aforethought should be averred;

People v. Rozelle, 78 Cal. 89, holding that an information stating facts sufficient to constitute defendant an accessory at common law, charges him as a principal under the code; *People v. Russell*, 81 Cal. 618, to the point that the degree of crime need not be specified; and in *Ex parte Mansfield*, 106 Cal. 408, holding that criminal complaints for misdemeanors, in justices or police courts, need not conclude with the phrase, "contrary to the form of the statute," etc.; *State v. St. Clair*, 6 Idaho, 112, where information for murder described deceased as John Doe, whose true name was unknown, and on trial it was proved that name was John L. Decker, there was no material variance. Cited in the following cases, holding that indictments sufficiently charged murder: *People v. Walters*, 1 Idaho, 274; *People v. Bemis*, 51 Mich. 424; *State v. Millain*, 3 Nev. 465; *State v. Thompson*, 12 Nev. 148; *State v. Moore*, 104 N. C. 751; *Wilkerson v. State*, 2 Tex. App. 266; *Brannigan v. People*, 3 Utah, 494; *State v. Day*, 4 Wash. St. 108; *United States v. Clark*, 46 Fed. Rep. 638; to same effect, as to robbery, in *State v. Lawler*, 130 Mo. 376, 52 Am. St. Rep. 581; as to unlawful cohabitation in *United States v. Cannon*, 4 Utah, 127, 134; and *Webb v. York*, 79 Fed. Rep. 621, refusing to release on habeas corpus a prisoner arrested in Colorado on a request for extradition from California, because the affidavit to the charge described an offense punishable under California law, though not under the statutes of Colorado; and in notes on indictments in 3 Am. St. Rep. 281 and 43 Am. St. Rep. 192.

Bias of Juror, to disqualify him, must be a fixed and settled conviction of the guilt or innocence of the defendant, p. 512.

Affirmed in *State v. Williams*, 49 La. Ann. 1151. Cited in *State v. Walton*, 74 Mo. 282, holding that a juror is not incompetent if his opinion "will readily yield to the evidence," and if he will "determine the issue upon the evidence"; *State v. Williams*, 49 La. Ann. 1151, holding juror not disqualified under facts stated; *Territory v. Bryson*, 9 Mont. 38, holding a juror competent whose opinion was formed from reading the newspapers; and in notes on this point in 36 Am. Dec. 523, 529.

Instruction to Jury, that there is no evidence reducing a charge of murder to manslaughter, does not violate the constitutional provision that the jury are sole judges of the weight of evidence, p. 514.

Cited in *People v. Byrnes*, 30 Cal. 207, to the point that "instructions are always to be given with reference to the facts proved before the jury"; also in *Levitzky v. Canning*, 33 Cal. 305, holding in a civil case that "it was error to charge the jury that the plaintiff was entitled to recover"; *People v. Taylor*, 36 Cal. 266, holding that where the prosecution claimed the offense was murder, and the defense that it was manslaughter, the court properly charged as to both; and in *People v. Best*, 39 Cal. 691, holding that "no instruction should ever be given unless there is some evidence before the jury to which it is applicable upow

some rational theory of the case, logically deducible from such evidence." Affirmed in *Smith v. People*, 1 Colo. 144, and *State v. Garrand*, 5 Oreg. 220. Cited in *Territory v. Gay*, 2 Dak. 143, holding that the court properly charged that the verdict must be murder or manslaughter. Distinguished in *Wood v. State*, 31 Fla. 234, holding, under a different law, that a charge that the jury could not convict of certain degrees of murder and manslaughter was error. Cited in *United States v. Camp*, 2 Idaho, 218, holding that the charge should be a few plain propositions of law applicable to the facts; *State v. McGinnis*, 5 Nev. 339, holding a charge as to facts, in a case of assault with a weapon, to be error; *Territory v. Romera*, 2 N. Mex. 477, holding an instruction correct, that there was no evidence of any offense less than murder in the first degree; *Territory v. Baker*, 4 N. Mex. 131, holding an instruction as to heat of passion correct; *People v. Lee*, 2 Utah, 454, holding that the court in its charge may review the facts; *United States v. Cannon*, 4 Utah, 139, to the point that immaterial instructions need not to be given; and in notes on this point in 92 Am. Dec. 53; 7 Am. St. Rep. 600; 31 Am. St. Rep. 894; 37 Am. St. Rep. 94; 44 Am. St. Rep. 74.

In the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the court below, upon the principle that the party who alleges error must show it. But where such action of the lower court is manifestly erroneous under any and every conceivable state of facts, this court will review it, notwithstanding the evidence may not have been brought up, p. 514.

Cited in *People v. Torres*, 38 Cal. 143, holding that instructions were not "erroneous under every conceivable state of facts." Affirmed in *People v. Dick*, 32 Cal. 215; 34 Cal. 665; *People v. Brotherton*, 47 Cal. 404; *People v. Smith*, 57 Cal. 131; *People v. Gilbert*, 60 Cal. 111, 112; *State v. Mason*, 24 Mont. 342, noted under *People v. Levison*, 18 Cal. 98; notes on this point in 76 Am. Dec. 507; 95 Am. Dec. 696; 99 Am. Dec. 133, 134.

Drunkenness of defendant may be considered by the jury on the question of premeditation, to determine the degree of the offense, p. 514.

Cited in *People v. Hill*, 123 Cal. 49, noted under *People v. Belencia*, 21 Cal. 544; *People v. Harris*, 29 Cal. 683, to the point that drunkenness will not excuse crime. Affirmed in *People v. Williams*, 43 Cal. 352; *People v. Blake*, 65 Cal. 278; *People v. Vincent*, 95 Cal. 428. Cited in note on this point in 95 Am. Dec. 775.

Instructions, already given in substance, may be refused, but "it is better to give the instructions asked than to refuse, for by such refusal a pretext is afforded for an appeal which otherwise, perhaps, would not be taken," p. 515.

Affirmed in *People v. Strong*, 30 Cal. 155; *People v. Lachanais*, 32 Cal. 436. Cited in note to 99 Am. Dec. 127.

27 Cal. 515-522. GROGAN v. KNIGHT.

Public Lands.—A certificate of purchase of school lands from the state land office, before the lands have been surveyed by the United States, is not evidence of title; the survey must precede the selection, p. 519.

Affirmed in *Middleton v. Low*, 30 Cal. 604; *Smith v. Athern*, 34 Cal. 512. Cited in *Toland v. Mandell*, 38 Cal. 31, 33, 43, holding that since the act of Congress of July, 1866, locators on unsurveyed lands have the rights of pre-emptioners, on compliance by them with the statute, until their claims are determined by the proper authority. Affirmed in *Hastings v. Devlin*, 40 Cal. 363, 370; *Hastings v. Jackson*, 46 Cal. 243; *Chant v. Reynolds*, 49 Cal. 217. Distinguished in *Roberts v. Columbet*, 63 Cal. 24, holding that the locator of a school land warrant, prior to the passage of the act of 1866, may plead his right of possession under a general denial in ejectment. Affirmed in *Bullock v. Rouse*, 81 Cal. 594; *Layton v. Farrell*, 11 Nev. 455; and *United States v. Curtner*, 14 Sawy. 546; 38 Fed. Rep. 9. Cited in note on this point in 85 Am. Dec. 93.

27 Cal. 524-565. CARPENTIER v. WEBSTER.

Tenants in Common respectively have the right to enter upon and occupy the whole and every part of the common land, p. 545.

Affirmed in *Tevis v. Hicks*, 38 Cal. 239. Cited in *Mullins v. Butte etc. Co.*, 25 Mont. 536, noted under *Gunter v. Laffan*, 7 Cal. 589; *Paul v. Cagnaz*, 25 Nev. 315, discussing rights of ousted cotenant; *Spanish Fork City v. Hopper*, 7 Utah, 238, noted under *Waring v. Crow*, 11 Cal. 367; *Rodgers v. Pitt*, 129 Fed. 937, a number of owners in common of flume and irrigating ditch who divide waters flowing in ditch among them are tenants in common of water rights, and one alone may sue to enjoin diversion by subsequent appropriator of any portion of water; *Lytle Creek Co. v. Perdew*, 65 Cal. 452, saying that tenants in common of water "hold by unity of possession, though their titles be distinct. If this unity is destroyed, the tenancy no longer exists." Cited in *Mora v. Murphy*, 83 Cal. 16, holding that one tenant in common was entitled to his share of the land. Affirmed in *May v. Sturdivant*, 75 Iowa, 119; 9 Am. St. Rep. 465; and in *Miller v. Blackett*, 47 Fed. Rep. 549.

Ouster may consist in actual exclusion of one tenant in common by his cotenant, from part of the common land, or refusal of the latter to let the former into possession, though admitting his title, pp. 548-565.

Cited in *Carpentier v. Mendenhall*, 28 Cal. 485, 487, 87 Am. Dec. 135, 137, holding that an intent to oust "must be established as a fact by the finding of the jury." Affirmed in *Carpentier v. Gardiner*, 29 Cal. 162, 163; also in *Carpentier v. Mitchell*, 29 Cal. 333, holding that one ousted by his cotenant may recover damages. Cited in *Packard v. Johnson*, 57 Cal. 183, holding a finding as to ouster insufficient, and also

that plaintiff was ousted from the time when he became aware that his cotenant claimed the whole land, "or (at the very least) from the time when, as a prudent man reasonably attentive to his own interests, he ought to have known that his cotenant asserted an exclusive right to the land of which both had had the common possession"; *Bell v. Hudson*, 73 Cal. 290, 2 Am. St. Rep. 795, holding that ouster was not properly averred in a complaint; *Stevenson v. Anderson*, 87 Ala. 232, holding that there may be ouster and adverse possession of part of the common premises, without affecting the status of the cotenants as to the remainder.

27 Cal. 572-587. **PEOPLE v. POOL.**

Where several join in robbery and resisting arrest, whatever is said or done by one of them, in furtherance of the common design, is the act of all, p. 576.

Affirmed in *Stephens v. State*, 42 Ohio St. 153. Approved in *State v. King*, 24 Utah, 492, where two defendants and another were associated to rob a person and such person was killed, killing, by whichever of three it was done, was act of all; *People v. Woods*, 147 Cal. 271, 272, admitting evidence of conspiracy for burglary and irrelevant incidents connected with burglarious trip in prosecution for murder.

Officer Making Arrest of a party committing an offense, or upon fresh pursuit afterward, need not disclose his official character or the cause of the arrest, p. 576.

Cited in *State v. Green*, 66 Mo. 649, and *In re Acker*, 66 Fed. Rep. 296, holding that an officer gave sufficient notice before attempting an arrest; and in note to 61 Am. Dec. 159.

Arrest Without Warrant may be made by an officer who has reasonable cause to believe that the party arrested has committed a felony, p. 578.

Affirmed in *Croom v. State*, 85 Ga. 723; 21 Am. St. Rep. 183. Cited in *State v. Morgan*, 22 Utah, 168, 170, 171, 172, sustaining right of sheriff's posse to make arrest; citing main case also on question of distinction between murder and manslaughter; *State v. Taylor*, 70 Vt. 12, 67 Am. St. Rep. 656 holding certain evidence admissible as to intent of persons assaulting one attempting to arrest them.

"Willful, Deliberate, and premeditated" being the phrase used in the statute defining murder, it is not error to substitute "or" for "and" in charging the jury on this point, p. 586.

Cited in *Lovett v. State*, 30 Fla. 154, holding an instruction as to premeditation correct; and in *State v. Lopez*, 15 Nev. 414, holding that premeditated and deliberate are synonymous.

Killing an Officer, trying to make and arrest, is murder, p. 587.

Affirmed in *State v. Spaulding*, 34 Minn. 366; *White v. State*, 70 Miss. 258; *State v. Gay*, 18 Mont. 79.

General Citation.—*Miller v. State*, 130 Ala. 16.

27 Cal. 588-596. **DORE v. SELLERS.**

Mechanic's Lien, of employees of the contractor, arises under and flows from the original contract, p. 594.

Affirmed in *Davis v. Livingston*, 29 Cal. 290, adding: "And it follows, that no agreement subsequently made between the principal parties, unless seasonably disclosed to the workmen and materialmen, can be set up to their disadvantage"; to same effect in *Shaver v. Murdock*, 36 Cal. 298; *Aste v. Wilson*, 14 Colo. App. 328, noted under *Bowen v. Aubrey*, 22 Cal. 566; *Whittier v. Blakely*, 13 Oreg. 559, holding that the lien attaches on delivery of the material and service of notice of lien.

Mechanic's Lien does not exist in favor of a contractor's materialman or laborer, against the owner of the property, if they did not give the statutory notice of their claim until after payment was made to the contractor according to the contract, p. 595.

Affirmed in *Blythe v. Poultney*, 31 Cal. 238; *Dingley v. Greene*, 54 Cal. 335; *Wiggins v. Bridge*, 70 Cal. 439. Cited in *Frost v. Falgetter*, 52 Neb. 694, on point that contractor may waive lien, and holding subcontractor affected thereby. Distinguished in *Kellogg v. Howes*, 81 Cal. 175, holding that under sections 1183 and 1184 of the Code of Civil Procedure, as amended, if the owner fails to record the contract, it is void, and subcontractors, laborers, and materialmen may enforce their lien, without notice to the owner and without regard to his payments to the contractor.

27 Cal. 596-603. **VANDEWATER v. McRAE.**

Indorser of note secured by mortgage may be sued personally, after foreclosure of the mortgage, for any deficiency, p. 603.

Affirmed in *Allin v. Williams*, 97 Cal. 407; *Savings Bank v. Central etc. Co.*, 122 Cal. 35, discussing right to sue junior mortgagor personally after loss of security under senior mortgage; *County Bank v. Greenberg*, 127 Cal. 130, holding suit on note given as collateral security for overdraft not barred by prior suit on mortgage to secure such overdraft; *Mallory v. Kessler*, 18 Utah. 15, 72 Am. St. Rep. 766, sustaining action for deficiency on note after application of proceeds of sale under power in trust deed; *Blumberg v. Birch*, 99 Cal. 417, 37 Am. St. Rep. 69, holding that where the mortgage was foreclosed upon publication of summons to the mortgagor, a deficiency judgment against him could not be included in the foreclosure proceedings, but must be by separate action. Affirmed in *Merced Bank v.*

Casaccia, 103 Cal. 643. Cited in Carver v. Steele, 116 Cal. 119, 58 Am. St. Rep. 158, holding that an indorser of a note secured by mortgage was not discharged by failure of the mortgagor to foreclose when the premises were sold on foreclosure of a prior mortgage; and in First Nat. Bank v. Williams, 2 Idaho, 626, holding that where a note is secured by mortgage, a suit cannot be brought on the note alone, unless the mortgage is valueless.

27 Cal. 603-607. CUNNINGHAM v. HAWKINS.

Parol Evidence is admissible to show that a deed absolute on its face was intended to be a mortgage. There is but one form of action in this state, and the same rules of evidence must be applied alike to all cases, p. 606.

Affirmed in Hopper v. Jones, 29 Cal. 19. Cited, as an illustration, Peck v. Vandenberg, 30 Cal. 28, to the point that parol evidence is admissible to show that a deed is a gift. Cited in Byrne v. Hudson, 127 Cal. 256, on point that no title passes under such deed; Sears v. Dixon, 33 Cal. 332, holding that the object of admitting parol evidence is "to show the real nature of the transaction, without regard to the mode or form in which the instruments in writing were executed." Affirmed in Gay v. Hamilton, 33 Cal. 690; also in Jackson v. Lodge, 36 Cal. 48, 49, a majority of the court holding that the rule applies at law as well as in equity, and the dissenting opinion disapproving of the principal case, on page 63. Affirmed in Raynor v. Lyons, 37 Cal. 454; Taylor v. McLain, 64 Cal. 514; Turner v. McDonald, 76 Cal. 180; 9 Am. St. Rep. 191; and in Brandt v. Thompson, 91 Cal. 461, holding that the rule of the principal case and Jackson v. Lodge, 36 Cal. 48, was "restored by sections 2924 and 2925 of the Civil Code," and the "doctrine of Hughes v. Davis, 40 Cal. 117, has been abrogated"; Hughes v. Davis having overruled Jackson v. Lodge, without referring to the principal case, Rhodes J., who delivered the dissenting opinion in Jackson v. Lodge, saying in the opinion in Hughes v. Davis: "Since the decision of that case I have seen nothing which tended to shake my confidence in the conclusion which I then expressed, and I again announce that, in my opinion, an absolute deed does convey the legal title." Affirmed in McAnnulty v. Seick, 59 Iowa, 590, holding that parol evidence is admissible in law and equity to show that a bill of sale was intended as a mortgage. Cited in note on this point in 76 Am. Dec. 488.

27 Cal. 611-613; 87 Am. Dec. 102. DELAND v. HIETT.

Part Payment of a Judgment, under a dry agreement that it should operate as a satisfaction in full, does not discharge the judgment, p. 612.

Affirmed in Siddall v. Clark, 89 Cal. 323, holding that an agreement of an administratrix to accept, in payment of a judgment due the estate, a note for a less amount, was without consideration and void;

also in *Brockley v. Brockley*, 122 Pa. St. 6. Cited in notes on this point in 91 Am. Dec. 183, 244, and 1 Am. St. Rep. 398.

27 Cal. 613-630. **CREIGHTON v. MANSON.**

Street Assessment is not a tax; if it were, it could no more be levied solely on the property contiguous to the improved street, than the expense of any branch of the municipal government could be so levied. And to uphold it on the principle of eminent domain, just compensation must be made for property taken; it has been often held that the owner of the property should be deemed to be compensated by the benefits in the way of an increase of value that the property has received by the adjacent improvements, but that theory is only admitted for the purposes of this case, pp. 620-621.

Overruled in *Emery v. San Francisco Gas Co.*, 28 Cal. 348, 349, holding that a street assessment is a tax, and saying that after a more thorough investigation of the subject than was given in the principal case, the views of the court "have been somewhat modified," and the discussion of the subject now is "as if the questions were new in this state, without further reference to *Creighton v. Manson*." Cited in *Martin v. Tyler*, 4 N. Dak. 304, holding that a statute providing for the taking of land for drainage purposes, without providing for proper compensation, is unconstitutional; *Warren v. Hanly*, 31 Iowa, 42, holding that a statute providing for paving streets, at the expense of lots abutting thereon, is constitutional; *Hammett v. Philadelphia*, 65 Pa. St. 155, 3 Am. Rep. 621, 622, holding that a statute authorizing the paving of a street is unconstitutional, so far as it authorizes the expense to be paid by the owners of property abutting on the street; and in notes, on eminent domain in 25 Am. Dec. 622, and 40 Am. Dec. 267.

Owner of Property Assessed, prior to act of 1862, was not personally liable for a street assessment, but the action was in rem, to enforce the payment of the assessment by a decree for the sale of the lot, p. 623.

Distinguished in *Walsh v. Mathews*, 29 Cal. 124, saying: "It was not decided in that case that the property holder could not be made personally responsible, but only that the act under which the improvement was made did not impose a personal liability. In this case . . . the work was done and the assessment levied under the act of 1862, which in express terms makes the owner as well as the property liable."

Assessment must not exceed the value of the benefit conferred by the making of the improvement and certainly an assessment should not be laid either upon the property or the owner where, instead of a benefit to the property, the owner has received only an injury, p. 624.

Cited in dissenting opinion in *Lent v. Tillson*, 72 Cal. 441, to the point that the statute ordering the widening of Dupont street in San Fran-

cisco was unconstitutional, because the assessment was in excess of benefits; a majority of the court holding the statute constitutional. Affirmed in *Zoeller v. Kellogg*, 4 Mo. App. 165.

Statute as to street assessments must be strictly construed, p. 628.

Affirmed in *Hudford v. Omaha*, 4 Neb. 353, holding that where the grade of a street is changed without first finding and tendering the amount of damages to property owners, the proceedings are void.

Resolution of Intention of board of supervisors to grade a street need not necessarily be in the usual form of a municipal ordinance and be preceded by the words, "Be it ordained, etc." but whatever its form it amounts in substance to an ordinance, and must be passed in the mode prescribed for the passage of ordinances. It is a legislative act it must be presented to the president of the board for his approval, 629, 630.

Affirmed, as to presentation of resolution to president, in *Thompson v. Hoge*, 30 Cal. 179, 180. Distinguished in *Taylor v. Palmer*, 31 Cal. 243, holding that the act of 1862 prescribed that the resolutions as to street work should not be deemed ordinances, therefore they need not be presented to the mayor for approval, and resolutions of intention need only be passed by the board and signed by the clerk. Referred to in *Creighton v. San Francisco*, 42 Cal. 448, another phase of the principal case, decided on other points. Cited in *Napa v. Easterby*, 78 Cal. 228, as not being opposed to the view that a provision in the city charter of Napa as to the style of ordinances was "merely directory" as applied to a resolution for street work; and in *Quinchard v. Board of Trustees*, 113 Cal. 669, to the point that "whether an existing street shall be improved is a question to be addressed to the governing board of a municipality in its legislative capacity, and its determination upon that question, as well as upon the character of the improvement to be made, is a legislative act"; and in *Martindale v. Palmer*, 52 Ind. 414, holding the signature of a mayor not essential to the validity of an ordinance passed by a municipal corporation.

27 Cal. 630-638. PEOPLE v. YSLAS.

Evidence of Unchastity of a witness is inadmissible to impeach her testimony; the inquiry must be restricted to her reputation for truth and veracity, p. 633.

Cited in *Heath v. Scott*, 65 Cal. 551, holding that under sections 1847 and 2051 of the Code of Civil Procedure, "general character for truth, honesty, and integrity may be inquired into." Affirmed in *State v. Larkin*, 11 Nev. 331. Cited in notes on this point in 15 Am. Dec. 100, 17 Am. Dec. 77, and 53 Am. St. Rep. 479.

The common-law definition of an assault is substantially the same as that found in the statute, p. 633.

Cited in *People v. Lee Kong*, 95 Cal. 668, 29 Am. St. Rep. 167, holding that firing a pistol through the roof was an assault, though the party fired at was not there at the time; *State v. Sears*, 86 Mo. 174, holding that intent to do bodily harm is essential; *Thomas v. State*, 99 Ga. 43, holding that demonstrations of violence, coupled with apparent ability, so as to compel the party assaulted to retreat, constitute an assault; Cited in *Hollister v. State*, 156 Ind. 258, holding evidence not sufficient to sustain conviction for assault with intent to commit rape; notes to 39 Am. Rep. 713, and 41 Am. Rep. 493.

27 Cal. 643-648. **LEACH v. DAY.**

Injunction Against Trespass may be granted for the purpose of quieting a possession or preventing a multiplicity of actions, or where the value of the inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries, or woodland, whether the same result from the nature of the injury itself or from the insolvency of the party committing it, p. 646.

Cited in *More v. Massini*, 32 Cal. 594, granting an injunction against entry on lands to quarry asphaltum; *Nevada Co. v. Kidd*, 37 Cal. 307, refusing an injunction against diversion of water, because it did not amount to waste; *Richards v. Kirkpatrick*, 53 Cal. 434, refusing an injunction against a sale on execution, because there was an adequate remedy at law; *Richards v. Dower*, 64 Cal. 64, granting an injunction against constructing a tunnel through lands; and in *Spring Valley v. Bartlett*, 8 Sawy. 569, 16 Fed. Rep. 626, refusing an injunction against passage by a board of supervisors of an ordinance fixing water rates, because there was an adequate remedy at law.

27 Cal. 649-654. **MARRINER v. SMITH.**

Cloud on Title.—Injunction against execution sale of land as a cloud on title, refused because plaintiff's bought the land with record notice of the judgment on which the execution issued, and it does not appear that any fraud was practiced on them, and they did not make the judgment creditor a defendant in their suit for an injunction, pp. 651, 652.

Cited in *Porter v. Pico*, 55 Cal. 176, enjoining an execution sale, because it would be a cloud on title; and in *Archbishop v. Shipman*, 69 Cal. 592, holding that a sale on foreclosure would not be a cloud on the title of the owner of the land who was not a party to the judgment; and in notes, on relief in equity against a judgment, in 19 Am. Dec. 607, and 54 Am. St. Rep. 252.

Homestead.—If an abandonment of homestead, and conveyance thereof to a stranger, was "one transaction and took effect at the same moment of time," and the value of the homestead did not exceed five

thousand dollars, prior judgment against the husband was not a lien on the homestead, pp. 652, 653.

Cited in *Eby v. Foster*, 61 Cal. 286, holding that the delivery of a deed, and filing it and a declaration of homestead for recording, were simultaneous, and the lien of a prior judgment did not attach; and in notes, on judgment liens against homesteads, in 87 Am. Dec. 278; 83 Am. Dec. 351; 20 Am. Rep. 151; 34 Am. St. Rep. 501; 38 Am. St. Rep. 247.

Fraud in obtaining judgment, by taking a default in a case that had been settled, held not to be an issue under the pleadings, p. 652.

Cited in *Hogg v. Link*, 90 Ind. 351, holding that where a judgment lien was obtained by fraud, it could not be collaterally attacked by a subsequent vendee of the land, although his vendor might have done it; and in dissenting opinion in *Humboldt Co. v. Terry*, 11 Nev. 248, a majority of the court holding that a confession of judgment was rightly entered.

27 Cal. 655-685. PEOPLE v. BOARD OF SUPERVISORS.

Mandamus.—The rules of the Civil Practice Act are as strictly applicable to the pleadings in mandamus as to those in any action, p. 670. The general rules of pleading are substantially the same in mandamus as in other civil actions, p. 671.

Affirmed in *People v. Lothrop*, 3 Colo. 448, and *Chamberlain v. Warburton*, 1 Utah, 270. Cited in *Jones v. Board*, 141 Cal. 96, holding application subject to general rules regarding limitations.

Facts must be Pleaded, showing wherein an ordinance is illegal, not the assumed inference, p. 675.

Affirmed in *Hedges v. Dam*, 72 Cal. 522, and *Lyman v. Martin*, 2 Utah, 149, 150.

Distinguished in *People v. Reclamation Dist.*, 121 Cal. 526, sustaining complaint in quo warranto.

Bribery at Election held to be immaterial issue, p. 676.

Cited, and not decided, in *Belo v. Commissioners*, 76 N. C. 497; *Board v. Coler*, 113 Fed. 735, quoting *Belo v. Commissioners*, 76 N. C. 489.

Res Judicata.—A fundamental fact in an action, that must have been found by the court before a judgment could have been rendered, cannot be again litigated in another action between the same parties, p. 676.

Affirmed in *Jackson v. Lodge*, 36 Cal. 38. Cited in *Sauls v. Freeman*, 24 Fla. 223, 224, 12 Am. St. Rep. 198, holding a former judgment to be an absolute bar to further litigation; Cited in *Slater v. Skirving*, 51 Neb. 114, 66 Am. St. Rep. 448, holding prior default judgment res adjudicata.

Municipal aid to a railroad having been authorized by the legislature and the city having voted in favor of it, delivery of municipal bonds by the city to the corporation became a duty, and a subsequent compromise between the city and the railway did not affect its legality, p. 681.

Cited in *Leavenworth Co. v. Miller*, 7 Kan. 506, 12 Am. Rep. 440, holding that the legislature may authorize municipal aid for a railroad; *State v. Davis*, 11 S. Dak. 115, 118, 74 Am. St. Rep. 782, sustaining right of county to compromise judgment claim against it; *Talcott v. Pine Grove*, 1 Flipp. 136, Fed. Cas. No. 13,735, noted under *Pattison v. Board*, 13 Cal. 175; *Harcourt v. Good*, 39 Tex. 472, holding that a tax in aid of a railroad could be collected.

27 Cal. 685-688. LEVY v. GETLESON.

Statement on Appeal.—After a nonsuit in the lower court, the merits of that judgment can be investigated only on motion for new trial or on appeal from the judgment; and a statement, not conforming to the statutory requirements in this regard, is properly stricken out by the lower court, p. 688.

Distinguished in *Calderwood v. Pyser*, 31 Cal. 337, holding that where a referee's report contains an erroneous conclusion of law, the lower court may correct it before entering judgment; dissenting opinion in *Quivey v. Gambert*, 32 Cal. 326, as an example of the practice of striking out a statement; *Nicoll v. Littlefield*, 60 Cal. 240, holding that as an appeal from a nonsuit contained no statement, it must be dismissed. Affirmed in *Williams v. Rice*, 13 Nev. 237. Cited, *Sanford v. Duluth Co.*, 2 N. Dak. 10, holding that on an appeal from the judgment errors of law at the trial can be reviewed.

Taxation of Costs, made before final judgment, must be reviewed by a statement on appeal from the judgment; an order refusing to retax costs is not appealable, p. 688.

Affirmed in *Lansky v. Davis*, 33 Cal. 678, holding that though the taxation is made after entry of judgment, the law considers it as having been made before. Distinguished in *Dooly v. Norton*, 41 Cal. 441, 443, holding that an order refusing to retax costs, made at the next term after the entry of judgment, was appealable. Affirmed in *Rader v. Nottingham*, 2 Mont. 158.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES A. TUTTLE,

REPORTER.

VOLUME 28

WITH

NOTES ON CAL. REPORTS

/

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FOURTH DISTRICT..... E. D. SAWYER.
FIFTH DISTRICT..... JAMES M. CAVIS.
SIXTH DISTRICT..... J. H. McKUNE.
SEVENTH DISTRICT..... J. B. SOUTHARD.
EIGHTH DISTRICT..... WILLIAM R. TURNER.
NINTH DISTRICT..... E. GARTER.
TENTH DISTRICT..... I. S. BELCHER.
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FOURTEENTH DISTRICT..... T. B. McFARLAND.
FIFTEENTH DISTRICT..... S. H. DWINELLE.
SIXTEENTH DISTRICT..... HARVEY LEE.

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APRIL TERM 1865.

[12]

REPORTS OF CASES

DETERMINED BY

THE SUPREME COURT

APRIL TERM, 1865.

**WILLIAM PRADER v. CHARLES H. GRIMM AND
GEORGE COOPER.**

ACTION ON INJUNCTION BOND.—The plaintiff in an action on an injunction bond is not entitled to a judgment for damages for expenses incurred for attorneys' fees and in procuring testimony, unless he proves that he has actually paid the attorney and the expenses of procuring testimony.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

E. Cook, for Appellants.

P. L. Edwards, and *Robert C. Clark*, for Respondent.

Opinion of the Court.

By the Court, SANDERSON, C. J.

This is an action upon an injunction bond, and was tried under the law of appeals as it stood prior to the passage of an Act entitled "An Act to regulate appeals in this State." (Statutes 1861, p. 589.) The trial was by the Court, and the judgment was for the plaintiff. The only point which it is necessary for us to notice is to the effect that the finding does not sustain the judgment.

The finding is in the following words.

"From the evidence in this case, the Court finds all the issues in favor of the plaintiff except as to the amount of damages claimed; and in regard to damages, the Court finds that plaintiff was compelled to employ counsel to dissolve the temporary injunction, and did employ counsel, and that a reasonable counsel fee was three hundred and twenty-five dollars. The Court further finds that the plaintiff, in procuring and taking testimony to dissolve the injunction, incurred the further expense of forty-seven dollars and twenty-five cents, making the whole damage sustained by the plaintiff up to the time of giving the second bond, the sum of three hundred and seventy-two dollars and thirty-five cents. As a conclusion of law, the Court holds that the plaintiff is entitled to judgment against defendants for the sum of three hundred and seventy-two dollars and twenty-five cents, and costs."

It will be observed that the foregoing does not find that either of the sums of money therein stated have been actually paid by the plaintiff, or that he has given his note or any other security therefor.

Wilson v. McEvoy, 25 Cal. 169, was an action in all respects like the present. The only breach of the bond assigned in that case was, that by reason of the injunction the plaintiff had been compelled to retain and employ attorneys and counsellors at law, and to pay them the sum of one thousand dollars to prevent said injunction from being made perpetual, and to procure its dissolution. As in the present case, the

Statement of Facts.

Court found all the issues in favor of the plaintiff, except as to the damages, as to which it found that there was no evidence of any money having been paid by the plaintiff, or of his having given any valuable or other consideration to any person for or on account of the services in question; and thereupon and for the reason that the plaintiff had failed to establish any actual loss, and at most only a liability, the Court rendered a judgment in favor of the defendants, holding that under those circumstances no recovery could be had. On appeal to this Court we affirmed the judgment. We are entirely satisfied with the rule in that case, and upon its authority as well as upon principle the judgment in this case must be reversed and a new trial directed.

Ordered accordingly.

Mr. Justice SHAFER expressed no opinion.

JERRY FORD v. R. C. CHAMBERS.

ACTUAL AND CONTINUED CHANGE OF POSSESSION OF GOODS SOLD.—If a merchant, having a stock of goods in his store, and engaged in a retail trade, with clerks in his employ, makes a sale in good faith of his entire stock in trade to a creditor in payment of the indebtedness, and for a fair price, and the creditor immediately goes into the store, takes entire control of the business, and proceeds to take an inventory, and also to retail the goods to customers with the assistance of the clerks of the vendor, this constitutes an actual and continued change of possession, and the sale is valid as against the creditors of the vendor, although there has been no formal discharge of the clerks of the vendor and rehiring of them by the vendee, and the vendor continues to occupy a room in the upper part of the store where he had previously slept.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court below found the following facts:

"1. That on the first day of November, 1859, William Ford was doing business as a merchant at Quincy, and had been so doing business for more than a year before that time. That the stock in such business consisted of goods, wares, and

Statement of Facts.

merchandise usually kept in a store in the country. That he had several clerks in his employ in his business.

" 2. That at that time he was indebted to Jerry Ford, the plaintiff in this suit, and his brother, about the sum of ten thousand dollars.

" 3. That on the 28th of October, 1859, Arrington & Co. obtained a judgment against said William Ford for \$5,063.09, in this Court, for goods before that date sold to said William Ford.

" 4. That on the first day of November, 1859, an execution was issued upon the said judgment and immediately forwarded to R. C. Chambers, the defendant in this action, and then Sheriff of Plumas County.

" 5. That on the first day of November, 1859, the said Jerry Ford arrived at Quincy from San Francisco, and said William Ford agreed to sell to the said Jerry Ford his entire stock of goods, and the amount thereof to be credited upon the debt which William Ford then owed Jerry Ford.

" 6. That Jerry Ford and William Ford's clerks, then in the store, proceeded to take an inventory of the stock of goods in the said store, and so continued from day to day until the morning of the 5th of November, 1859, and the amount of such inventory was charged in the books of William Ford to Jerry Ford.

" 7. That the evidence of the indebtedness from William Ford to Jerry Ford was an entry of such debt in the said books of William Ford, and the amount of the said inventory was entered in the same books as so much paid upon said debt.

" 8. Within two hours after the inventory was made, and the entry of the amount thereof was made in the books as aforesaid, the defendant as Sheriff, with the aforesaid execution, entered the said store and levied upon the entire stock therein and proceeded to take an inventory thereof, and did make an inventory of the same and took them into his custody as such Sheriff, and in the month of December following sold the same under said execution.

Statement of Facts.

"9. That a portion of the goods levied upon were in a warehouse about one hundred and twenty-five feet from the principal storehouse.

"10. That during the time of the taking of the inventory by the said Jerry Ford and clerks the goods remained in the said store the same as before, and a portion of them were sold by Jerry Ford and the clerks during that time and up to the time of the levy of the defendant.

"11. During this time, and for some days previous to that time, William Ford was sick in the upper part of said store, which part had been and then was occupied by the said William Ford and the said clerks as sleeping apartments, the entrance to which was by a stairway outside and apart from said storehouse, through a woodshed.

"12. That during the time of the taking of said inventory, and up to the time of the said levy, the said Jerry Ford was there present in the store, giving directions as to the goods, and was selling goods to customers as they called for that purpose.

"13. On the 5th of November, 1859, the said William Ford gave the said Jerry Ford a lease of the said store, dated the 2d day of November, 1859, and it was so dated to correspond with the time of the taking of the inventory under the contract of sale from William Ford to Jerry Ford.

"14. The clerks in the store at the time of taking the inventory and of the levy were the same clerks in the employ of William Ford on and before the 1st day of November, 1859, and it does not appear that there was any specific hiring or employing of said clerks by Jerry Ford before the levy.

"15. William Ford had a small sign over the door of the said store, upon which was the name 'Ford,' and said sign continued over said door without any alteration up to the time of the said levy.

"16. That after said levy by the said defendant, he (the defendant) rented from Jerry Ford the said warehouse to store the said goods on which he had so levied and taken under the said execution.

Argument For Appellant.

"17. That at the time of the said levy, the said Jerry Ford gave the defendant notice that he was the owner of the goods, and forbid him from taking the same under said execution.

"18. The inventory of that portion of the goods in the warehouse was completed, and the amount thereof entered in the books of William Ford before the defendant levied upon such portion; and that such portion of goods in said warehouse thus seized were worth at the time of the levy at Quincy \$2,440; and the whole store of goods so taken and sold by the said Sheriff were, at wholesale price, at said Quincy, of the value of \$6,000 at the time of said levy."

The Court also found as conclusions of law:

"That there was no immediate delivery nor actual or continued change of possession of the said goods from the said William Ford to the said Jerry Ford, and that the said sale as to the creditors of the said William Ford was fraudulent and void, and that the defendant is entitled to judgment."

Defendant recovered judgment in the Court below, and plaintiff appealed from an order denying a new trial and from the judgment.

This case was before the Supreme Court at the October term, 1861, and is reported in the 19 Cal. 144.

B. D. Wheeler for Appellant.

The sale of the stock of merchandise from William Ford to Jerry Ford, was a legal and valid sale, and vested the title in the plaintiff:

1st. Because there is neither proof nor pretence of actual fraud.

2d. The delivery was immediate, and the change of possession actual and continued. (*Stevens v. Irwin*, 15 Cal. 503; *Lay v. Neville*, 25 Cal. 545; *Godchaux v. Mulford*, 26 Cal. 316.)

3d. Plaintiff had no knowledge of Arrington & Company's claim, nor of the issuance of the execution. But even if

Argument for Respondent.

plaintiff knew, at the time he purchased from William Ford, that there was an execution in the officer's hands against the property of his vendor, it did not render the transaction fraudulent. (*Wheaton v. Neville*, 19 Cal. 41.)

The Statute of Frauds, like all other statutes, must be reasonably construed; and we are not aware that any especial sanctity attaches to that statute, or that it is obligatory on the Courts of the land to give to it a more strict or literal construction than belongs in common to the various legislative enactments standing upon our statute books. It was virtually held at one time by the Supreme Court of this State, that the "immediate delivery" required by the statute, meant an almost *instantaneous* delivery; but subsequently it was determined that the character of the property sold, its situation, and all the attendant circumstances should be taken into consideration in determining whether the delivery had been made within a reasonable time or not. And again, it was held that the "continued change" of possession required by statute, in reality meant an unbroken and *perpetual* change of possession; but this Court subsequently held that the terms "actual and continued" were used merely in contradistinction to the terms *formal* and *temporary*; and that even though the chattel sold should at some future time revert, temporarily, to the hands of the vendor, yet it would not, while thus in his hands, be subject to seizure for his debts, provided the vendee, pursuant to his purchase, had possessed it long enough to satisfy a reasonable mind of the *bona fides* of the transaction. (16 Cal. 503.)

J. P. Hoge, and H. H. Haight, for Respondent.

This Court is so familiar with the authorities upon this subject that we propose to dismiss them with a very brief review.

And one remark is to be made here, that the late cases modify the earlier ones to this extent only, that the employment of the vendor by the vendee after a lapse of a longer or

Opinion of the Court.

shorter time is not a fact of such a controlling character as of itself to make the sale void against creditors. This, we understand, is the only respect in which the earlier cases in this State are modified, and this modification has no bearing upon the case at bar.

The case of *Stevens v. Irwin*, 15 Cal. 503, in which the modification above referred to was first made, was a case in which the vendee had been in possession more than a year, and the vendor then went into his employ. This was very properly held not fatal; but in that very case Judge Baldwin lays it down that the change of possession must be open and unequivocal, carrying with it the usual marks of change of ownership, so as to give evidence to the world of the claims of the new owner.

The delivery and change of possession need not have consumed more than twenty minutes. The amount of credit to be given was to be arrived at by computation after taking an inventory, and was not an essential part of the delivery or change of possession. If the credit were not entered for six months, or not at all, it would not affect the delivery and change of possession if that were in compliance with the statute.

Instead, however, of making an immediate delivery and actual change of possession, there was, after the lapse of four days, no change whatever, much less that actual change which Courts have over and over again declared to signify open, public, unequivocal, and notorious. (*Struper v. Echert*, 2 Wharton, 303; *Jarvis v. Davis*, 14 B. Monroe, 529; *McBride v. McClelland*, 6 Watts & Sergt. 95.)

By the Court, SAWYER, J.

The main question in this case is, as to whether there was an immediate delivery of the stock of goods to plaintiff, Jerry Ford, before the levy of defendant, within the meaning of the fifteenth section of the Statute of Frauds, so as to render the sale valid, as against creditors. We are satisfied that there

Opinion of the Court.

was, and that the conclusion of law drawn by the Judge below from the facts found is, in this respect, erroneous. We have carefully examined the evidence, and think it fully sustains the facts found by the Court, and that in some respects the facts might have been properly stated still more strongly in favor of the plaintiff.

It is clear to our minds, from the findings, and also from the evidence, that, from the time of the arrival of Jerry Ford at Quincy, he took the entire management and control of the goods. William was not about the store, and gave no direction, except when the inventory was footed up and taken to his room up stairs, he directed the amount to be charged to Jerry on his books. The Court find the bargain to have been made on the arrival of Jerry. Jerry from that time went on with the inventory in connection with the clerks, assumed the direction of matters in the store, and sold goods to customers — the memoranda of sales being kept during the taking of the inventory on loose papers. The inventory was leisurely taken, occupying from the first till the morning of the fifth of November, and was fully completed, and the amount charged over to Jerry Ford, on the books of William, some two hours before the levy by the Sheriff. The goods were taken, so far as they went, in satisfaction of a debt of long standing found to be due Jerry Ford for goods sold to William — said sum appearing as a credit in favor of Jerry, on the books of William Ford. A lease of the store was also executed and delivered on the morning of the fifth, before the arrival of the Sheriff, as shown by the uncontradicted testimony of the witnesses, dated as of the second — the day that Jerry took charge. True, there had been no formal discharge and rehiring of the clerks, but they manifestly acted under the orders of Jerry, and William never came into the store, or interfered in any way after the arrival of Jerry, till he was called down at the instance of the Sheriff at the time he came to make the levy. Unquestionably, as between William and Jerry Ford, the title had passed, and had the goods been destroyed by fire at the moment of the levy, the loss would have fallen on the vendee; and we think

Opinion of the Court.

the conclusion to be drawn from the facts found, and from the testimony, equally clear, that the actual possession had passed to Jerry Ford, and that the goods were under his actual personal control as early as the second of November, and from that time till the levy. The sale had been made, the control of the store had passed to Jerry on the second of November, and it only remained to complete the inventory and ascertain the amount to be charged over, and this was fully completed and the entries made upon the books of William Ford before the defendant commenced his levy. We are fully satisfied that the judgment is erroneous. The only doubt we entertain is, as to what judgment should be entered. The facts are very fully found, and regarding the final conclusion in the finding, as a conclusion of law drawn from the facts found—the light in which the Judge below considered it—we think it erroneous, and the conclusion should have been, that there was an actual delivery, and continued change of possession sufficient to satisfy the Statute of Frauds, and that the sale was valid as against the creditors of William Ford. And we do not see how any other result could be arrived at, on the testimony, if a new trial were had. This case was tried once before by a jury, and the verdict was in favor of the plaintiff. But our predecessors reversed the judgment for error in one of the instructions. The instruction was, doubtless, erroneous, and the judgment properly reversed for that reason, yet we think it not very likely that the verdict was really affected by the error. The Justice who delivered the opinion, while he expressly disclaimed any intention to decide the matter, remarked that “upon reviewing the testimony in the case, we are strongly inclined to the opinion, that there was no such actual delivery of the goods proved as made the contract between William Ford and Jerry Ford complete as against the former’s creditors.” It is highly probable that this suggestion influenced the learned Judge who tried the case below, in deducing his conclusion from the facts found. But whatever may have been the evidence adduced on the first trial, we are satisfied that upon the evidence now presented by the

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record, and upon the specific facts found, there was such an actual change of possession as to render the sale valid as against the other creditors of William Ford.

Upon the whole we think the plaintiff should have had judgment upon the facts found, and clearly so upon the evidence.

Ordered, that the judgment be reversed, and the District Court be directed to enter judgment in favor of the plaintiff for the sum of six thousand dollars, and interest from November 5th, 1859, at the rate of ten per cent per annum and costs of suit, and that appellant recover his costs on appeal.

Mr. Justice CERRY being disqualified did not participate in the decision of this case.

THE PEOPLE *ex rel.* CALEB DORSEY v. EDWARD SMYTH, COUNTY AUDITOR OF TUOLUMNE COUNTY.

SALARIES OF DISTRICT ATTORNEYS.—The salaries of District Attorneys are not audited and allowed by the Boards of Supervisors of counties, but by the County Auditors. Boards of Supervisors have no power over or duties to perform touching the salaries of District Attorneys.

JUDGMENT IN MANDAMUS.—One having the title to the office of District Attorney, but not in possession, is not bound by a judgment in mandamus against a Board of Supervisors to which he was not a party, requiring the Board to audit and allow the salary of another in possession of the office without title.

OFFICER BOUND TO KNOW THE LAW AS TO WHO IS HIS SUCCESSOR.—When the question as to who is the legal successor of an officer is in litigation upon a point of law, the officer is bound to know who his successor is, and if the legal successor qualifies and demands the office, and the incumbent refuses to deliver it up upon the termination of the litigation he becomes a trespasser *ab initio*.

SALARY OF AN OFFICE IS INCIDENT TO THE TITLE.—One having the legal right to an office, but not in possession of the same, is entitled to the salary for the term for which he was elected; and the payment of the salary to one in possession of the office without title will not prevent the one having the title from recovering the salary.

RECOVERY OF OFFICE OR ITS INCIDENTS.—One claiming by action an office or the incidents to the office, can only recover upon proof of title.

JUSTIFICATION OF SURETIES ON OFFICIAL BOND.—An official bond is not vitiated because the sureties swear that "they are worth the amount for which they become liable over and above all their ~~past~~ debts and liabilities." Instead of saying "over and above all their debts," etc.

Statement of Facts.

APPLICATION to the Supreme Court for writ of mandate to compel the defendant, County Auditor of Tuolumne County, to audit and allow the salary of the relator as District Attorney of said county.

The affidavit of the sureties on the official bond of the relator states that they "are each and severally worth the amount for which they have become sureties in the above bond over and above all their just debts and liabilities."

At the September election, in 1863, the relator, Caleb Dorsey, and one Hugh G. Platt were opposing candidates for the office of District Attorney of Tuolumne County. At that election two hundred and eleven votes were cast for the candidates for that office by soldiers in the military service of the United States. Of these votes, Platt received two hundred and ten, and Dorsey one. With these votes in, Platt was elected, otherwise Dorsey. They were included in the count, and Platt declared elected. Thereupon Dorsey brought suit to contest the election upon the ground that the votes in question were illegal, which was finally determined in his favor by the County Court on the 7th of December, 1863, and by this Court on appeal at the October term, 1864. Prior to the first Monday in March, 1864, at which time the term of office to which he had been elected commenced, the relator duly qualified, and on that day formally demanded from C. C. Brown, the then incumbent, possession of the office and the books and papers pertaining thereto. On account of the pending controversy between the relator and Platt, Brown refused to comply with the demand, and continued to hold the office and exercise its functions until after the final determination thereof, at which time he surrendered the office to the relator. For the time during which he thus held over, Brown received from the county the salary belonging to the office, amounting to the sum of seven hundred dollars, which was paid to him in obedience to a mandamus issued by the District Court upon his relation against the Board of Supervisors, to which proceeding neither the relator nor the respondent were parties; both, however, were cognizant of the proceeding and the

Argument for Defendant.

judgment thereon. Upon coming into the possession of his office, the relator made claim for the back salary before the respondent, and demanded from him a warrant therefor, which was refused. Hence the present proceeding.

Caleb Dorsey, in pro. per., for Relator.

It is a well settled principle of law that the compensation of an office, whether it be a salary or fees, does not depend upon its mere occupation and exercise, but upon the title to the office. The party who has the title to the office is the one entitled to the salary. The salary is an incident to the title. The Supreme Court of New York has laid down the doctrine as follows: "The compensation of a public officer is an incident to the title to the office, not to its mere occupation or exercise. The principle which avails to sustain the acts of officers *de facto* in respect to third persons, will not avail to sustain the claim of such an officer to salary or fees." (*People v. Tieman*, 8 Abbott's Rep. 359.)

The salary commences with the term. The certificate of election is only evidence of the title derived from the election. (*Magee v. Supervisors*, 10 Cal. 376; *Wammach v. Holloway*, 2 Ala. 31; *Peter v. Stale*, 1 McCord, 233.)

In this case the judgment of the County Court and the judgment of the Supreme Court affirming that of the County Court, were the evidences of title to said office of petitioner. Said judgments show that petitioner was entitled to the office from the first Monday in March, 1864, and if the principle laid down in the foregoing decisions be correct, he is entitled to the salary from that date.

H. P. Barber, for Defendant.

The plaintiff performed none of the duties of the office, and cannot recover the back salary, at least from the county. The statute (Wood's Dig. p. 1,147, Art. 478,) provides that the District Attorney of Tuolumne "shall receive for his services annually" the sum of one thousand two hundred dollars. (*Payne v. San Francisco*, 3 Cal. 122.)

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The plaintiff refers to the New York case of *People v. Tie-man*, 30 Barb. 123. The Court will see, on examination, that that case was decided expressly on the ground that under the New York statute no power to hold over was vested in the incumbent.

Although the County Auditor may be the party required to draw the warrant, it is the duty of the Supervisors to "examine, settle, and allow all accounts legally chargeable against the county." (Wood's Dig. Art. 3,319.)

It is particularly requisite that the Supervisors should inspect the account of the District Attorney, for if he fail to attend the term of any District Court or Court of Sessions, the Court is authorized to appoint a substitute, to be paid from the County Treasury. (Wood's Dig. Art. 118.)

Petitioner, not having filed the requisite bond, could not legally perform the duties of his office, and therefore could claim no compensation. (W. D., 77, Art. 208.)

If a party were allowed to interpolate the word "just," the statute might easily be avoided. He might confess a fraudulent judgment covering his entire property; this evidently would not be a "just" debt—yet, as between himself and the party to whom the same was confessed, it would be perfectly valid, on the ground that he could not interpose his own fraudulent act as an answer to the judgment, being *particeps criminis*.

By the Court, SANDERSON, C. J.

The question involved in this case is whether Brown, the old incumbent, or the relator is entitled to the salary for the time during which the former held over. This question is wholly unaffected by the mandamus against the Board of Supervisors. The relator was not a party to that proceeding, nor had the Board any power over or duty to perform touching the salary of his office. The salary of District Attorneys is not audited and allowed by the Board of Supervisors but by the County Auditor. (Wood's Digest, p. 664, Sec. 2, and

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p. 694, Sec. 9.) Admitting that he could have intervened in that proceeding we know of no rule by which he was compelled to do so, and such being the case his rights in the premises could not be prejudiced by his omitting to do what no rule of law required.

Every one is presumed to know the law, and therefore Mr. Brown was bound to know under the circumstances who was his successor, and to yield the office upon his qualification and demand. He was bound to act at his peril, and if he held over, and thereafter it should appear that the party so qualifying and demanding the office had at the time a title thereto he could claim nothing on the score of services rendered, for upon the determination of that question he became a usurper *ab initio*. The salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise. (*The People ex rel. Morton v. Tieman*, 8 Abbott's Practice Reports, 359.) In the case cited the Court said: "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. (2 Kent's Com., 295.) But it does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office, without legal authority, as if he were an officer *de jure*. When an individual claims by action the office or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defence, but cannot, as against the public, be converted into a weapon of attack to secure the fruits of the usurpation and the incidents to the office."

Points decided.

The technical objection interposed to the relator's official bond is, in our judgment, untenable.

Having the title to the office, the relator is entitled to the salary from the commencement of the term for which he was elected, and he cannot be deprived of it by the usurpation of Brown, or the wrongful payment of the same to the latter by the direction of a Court in a proceeding to which he was not a party.

Peremptory mandamus allowed.

JACOB P. LEESE v. WILLIAM S. CLARK.

JUDGMENT IN EJECTMENT WHERE DEFENDANTS SEVER IN THEIR ANSWERS.—

If, in an action against several defendants, sued jointly to recover the possession of a tract of land, the defendants sever in their answers, but do not demand separate trials, and the jury finds specially that the defendants are severally in possession of separate parcels of the land sued for, and if, on appeal to the Supreme Court, that Court directs judgment to be entered in the Court below "for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint," a joint judgment rendered in the Court below upon filing the remittitur there against all or a part of the defendants is erroneous.

NOTE.—In such case, notwithstanding the entry of the joint judgment, the plaintiff may apply for and have a several judgment against the defendants.

NOTE.—In such case, also, the entry of a several judgment against part of the defendants is not a discontinuance of the action nor an abandonment of the same by the plaintiff as to the others, nor does it preclude him from afterwards moving for and having a several judgment against a defendant not included in the first several judgment.

FORM OF JUDGMENT A QUESTION OF LAW.—The question, whether a judgment entered in the Court below, is entered in accordance with the mandate of the appellate Court, is one of law, and not of fact.

ENTRY OF JUDGMENT.—The entry of a judgment by the Clerk is a ministerial act.

EFFECT OF RECITALS IN A JUDGMENT.—The recitals in a several judgment against one of a number of defendants, that in a former judgment in the same action the name of this defendant was stricken out on plaintiff's motion, is *prima facie* evidence only of the fact, and may be contradicted by the recitals in said former judgment.

NOTE.—The recital in a judgment that a party defendant against whom it is entered appeared in the action is *prima facie* evidence only of the fact.

CLERK'S RECITALS IN JUDGMENT.—It is not necessary for a Clerk in entering up a judgment to insert therein recitals of his exposition of the preceding facts.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Statement of Facts.

This case was before the Supreme Court at the July term, 1861, when the judgment was reversed and the case remanded for a new trial, and again at the July term, 1862, when the judgment was reversed, and the Court below directed to enter judgment for the plaintiff upon the special findings for the premises in controversy pursuant to the prayer of the complaint. (See 18 Cal. 535, and 20 Cal. 387, where the general facts pertaining to the action are fully reported.)

The following is the judgment of the Supreme Court rendered at the July term, 1862:

“And now, at this day, this cause being called, and having been heretofore argued and submitted, and taken under advisement by the Court, and all and singular the law and premises being by the Court here seen, heard, understood, and fully considered, the opinion of the Court herein is delivered by Field, C. J., Cope, J., concurring to the effect that the judgment of the Court below be reversed, with directions to enter judgment for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint.

“Whereupon it is now considered, ordered, adjudged, and decreed by the Court here, that the judgment of the District Court of the Fourth Judicial District, in and for the County of San Francisco, in the above entitled cause be and the same is hereby reversed with costs, and said Court is directed to enter judgment for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint.”

Upon the filing of the remittitur, and on the 29th day of October, 1862, the following judgment was entered in the District Court:

“Whereas, on the 21st day of February, A. D. 1862, a judgment was entered in the above entitled cause in favor of the above named defendants, against plaintiff, upon a special verdict of a jury duly impanelled to try said cause, from which

Statement of Facts.

judgment the said plaintiff, on the 5th day of March, A. D. 1862, perfected an appeal to the Supreme Court of the State of California. And, whereas, the said appellant having filed in said District Court the remittitur of said Supreme Court, wherein it is 'ordered, adjudged, and decreed that the judgment of the District Court of the Fourth Judicial District, in and for the City and County of San Francisco, in the above entitled cause, be and the same is hereby reversed with costs; and said Court is directed to enter judgment for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint.' Now upon application and motion of counsel for plaintiff for judgment in conformity with the mandate of said Supreme Court, it is ordered, adjudged, and decreed that the judgment heretofore entered herein on the 21st day of February, A. D. 1862, in favor of defendants against the plaintiff, stand for naught, and that the said plaintiff, Jacob P. Leese, do have and recover of and from William S. Clark, Daniel Gibb, James Spear, Charles M. Hitchcock, Charles Minturn, W. Hood, and John Pfeiffer, executor of Ed. F. Saelzer, deceased, defendants, possession of the premises mentioned and described in the complaint on file herein, as follows, to wit: "

Then follows a description of the land as contained in the complaint.

On the 9th day of December, 1862, the following judgment was entered in the same cause :

" The plaintiff, by his counsel, having heretofore moved the Court to modify the judgment in this cause, and the Court having taken the same under advisement, now at this day, the respective parties appearing by counsel respectively, and the defendants not objecting thereto, said motion is granted; and it is ordered, that the judgment heretofore entered in this cause, in favor of plaintiff and against the defendants, be and the same is so modified as to read as follows, to wit:

" Whereas, on the 21st day of February, A. D. 1862, a judgment was entered in the above entitled cause, in favor of the above named defendants against the above named plain-

Statement of Facts.

tiff, upon the special verdict of a jury, duly impanelled to try said cause, from which judgment the said plaintiff on the 5th day of March, A. D. 1862, perfected an appeal to the Supreme Court of the State of California; and, whereas, the said appellants having filed in said District Court the remittitur of said Supreme Court, wherein it is ordered, adjudged, and decreed, that the judgment of the District Court of the Fourth Judicial District in and for the City and County of San Francisco, in the above entitled cause, be and the same is hereby reversed with costs; and said Court is directed to enter judgment for the plaintiff, upon the special findings, for the premises in controversy, pursuant to the prayer of the complaint.

"Now, therefore, upon application and motion of counsel for plaintiff for judgment in conformity with the mandate of said Supreme Court, it is ordered, adjudged, and decreed, that the judgment heretofore entered herein on the 21st day of February, A. D. 1862, in favor of defendant, against the plaintiff, stand for naught, and that the said plaintiff, Jacob P. Leese, do have and recover of and from the defendant, James Spear, all that part or parcel of," etc. Here follows a description of the portion of the land described in the complaint, found by the special verdict to be in the possession of Spear. After the description, like several judgments were entered against three of the remaining defendants, for the separate parts of the land of which they were in possession. The recitals in the judgment were not repeated. Defendant Clark was not included in this judgment.

May 2d, 1864, on motion of plaintiff, made on written notice, filed April 4th, 1864, the following judgment was entered in the District Court against defendant Clark:

"Whereas, on the 21st day of February, A. D. 1862, a judgment was entered in the above entitled cause in favor of the above named defendants against plaintiff, upon a special verdict of a jury duly impanelled in said cause, from which judgment the said plaintiff on the 5th day of March, A. D. 1862, perfected an appeal to the Supreme Court of the State of California; and, whereas, the said appellant having filed in

Argument for Appellant.

said District Court the remittitur of said Supreme Court, wherein it is ordered, adjudged, and decreed, that the judgment of the District Court of the Fourth Judicial District, in and for the City and County of San Francisco, in the above entitled cause, be and the same hereby is reversed with costs; and said Court is directed to enter judgment for the plaintiff, upon the special findings, for the premises in controversy, pursuant to the prayer of the complaint.

"And judgment having been heretofore entered in pursuance of the direction of the Supreme Court as to all of said defendants appertaining, including the said defendant Clark, which said judgment was afterwards, on motion of the plaintiff, amended by striking out the name of the said defendant, Clark, and judgment was thereupon entered against his co-defendants, leaving the said defendant, Clark; now, upon application of counsel for the plaintiff, and after hearing counsel for the said defendant Clark, and due deliberation having been thereupon had, on motion of Brooks & Whitney, attorneys for the plaintiff, it is ordered, adjudged, and decreed, that the said judgment heretofore entered herein on the 21st day of February, A. D. 1862, in favor of said defendant, and against the plaintiff, stand for naught, and that the said plaintiff, Jacob P. Leese, do have and recover of and from the defendant, William S. Clark, all that," etc.

Here follows a description of the part of the land in Clark's possession.

The other facts are stated in the opinion of the Court.

Clarke & Carpentier, for Appellant.

The voluntary abandonment of the judgment, entered October 29th, 1862, which included Clark with the other defendants, and covered all the land in dispute, by the amended judgment of December, 1862, which industriously excludes him from it, without any necessity, propriety, or good reason, and without permission or leave of the Court, or any express or implied reservation of a right to proceed against Clark subsequently, operated a discontinuance as to him.

Argument for Appellant.

The trial before the jury in February, 1862, was a joint one against all the defendants, and a joint judgment was entered in their favor, from which the plaintiff appealed. The Supreme Court reversing that judgment, dictated the judgment to be entered in favor of the plaintiff, leaving no discretion in the District Court.

The judgment so to be entered was ordered to follow the prayer of the complaint and the special findings of the jury. It was a simple clerical act, to prepare the judgment thus ordered. It was prepared and entered, and the office of the mandate accomplished. The trial was a joint one, and the judgment is required to be entered by the clerk, "in conformity to the verdict." (Practice Act, § 197.)

If the verdict had been for the plaintiff, "according to the prayer of the complaint," but one judgment could have been entered thereon.

The one hundred and forty-fifth section of the Practice Act provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." And section one hundred and forty-six is as follows:

"In an action against several defendants the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." By these two sections all cases, whether of joint or several liability, are placed upon the same platform.

The point has been directly decided in New York, under exactly similar provisions of the code of procedure:

In *Bacon v. Comstock*, 11 Howard's Practice Rep. 200, Mr. Justice Harris in deciding the point remarks: "The common law rule is that the judgment must dispose of the rights of all the parties. There could be no two final judgments in the same action."

Argument for Respondent.

Brooks & Whitney, for Respondent.

The judgment of October 29th, 1862, was wiped out of the record by the judgment which was entered in December, 1862. If the judgment of December, 1862, disposed of the entire controversy, that was an end of the action. If it did not, then the action was not at an end.

If the Court could not enter up several judgments in an action of ejectment, that would be the end of the matter. But this the appellant does not pretend. He admits that the Court had this power. The very point was presented in the case of *Lick v. Stockdale*, 18 Cal. 220. That was an action of ejectment. The plaintiff brought his suit to trial as to some of the defendants, had a finding in his favor, and entered up final judgment against them, and executed his judgment, ejected those defendants, and was put in possession of the land which was severally occupied by them. The suit was for four fifty-vara lots, and these defendants occupied only one of them. Some two years after, he went on with his suit against the other defendants, and had judgment. The defendant Stockdale appealed, and one of the grounds of appeal assigned by him was that there was a final judgment already entered in the cause; but the Supreme Court held this point not well taken.

Section one hundred and forty-six of the Practice Act allows the Court to render judgment against one or more of the defendants, leaving the action to proceed against the other, *when- ever a several judgment is proper*. It will not be pretended that a several judgment was not proper in this case. It was not only *proper* but *necessary*, because the defendants had no community of title or possession. They were not joint tenants, tenants in common, or co-parceners, but derived their claims of title from divers sources, and occupied in severalty each his particular portion; and, by a stipulation made part of the judgment record, it was precisely ascertained what particular lot or parcel each defendant held, so that a several judgment was not only proper but necessary. The judgment was precisely the same in this case as in *Lick v. Stockdale*.

Opinion of the Court.

Nor does it make any difference that the trial was a joint one. Trials in ejectment are almost always joint. It does not follow that the judgment must be. Whether the judgment shall be joint or several does not depend upon the fact whether the trial is joint or several, but whether the defense is joint or several.

By the Court, SHAFER, J.

Ejectment for the recovery of certain lots in the City of San Francisco. There were forty-one defendants in all, who answered severally. The jury rendered a general verdict for the defendants, and answered also to certain special issues. Plaintiff moved for judgment on the special findings. The motion was denied and judgment was entered for all of the defendants. On appeal to the Supreme Court the judgment was reversed, and the Court below was directed "to enter judgment for the plaintiff upon the special findings, pursuant to the prayer of the complaint." Amongst other things, the special findings disclosed the parts or portions of the premises sued for of which the defendants were respectively possessed. The remittitur having been sent down and filed, the plaintiff's counsel, on the 29th of October, 1862, "moved for judgment, in conformity with the mandate of the Supreme Court," and thereupon a joint judgment was entered against eight of the forty-one defendants, Clark being one of the eight. Thereafter, and as we must assume, before the expiration of the term, and upon like "application and motion of counsel for plaintiff for judgment in conformity with the mandate of the Supreme Court," a second judgment was entered (containing several judgments in effect) against four only of the eight defendants named in the first judgment—Clark being one of the four omitted. It appears from the recitals in this second judgment, that it was entered upon a motion of the plaintiff to "modify" the first judgment; but all we know with regard to the nature of the modifications sought for is found in the particular recital above quoted.

Opinion of the Court.

The plaintiff, thereafter, moved for a several judgment against Clark. The motion was made upon the remittitur and papers on file, and came on to be heard April 4th, 1864. The motion was opposed by Clark on grounds set forth in the record. The files were used at the hearing and affidavits were introduced by both parties. The files and affidavits are left out of the transcript by stipulation. The Court decided in favor of the motion, and a several judgment was entered accordingly against Clark, May 2d, 1864.

The judgment recites, among other things, the appeal to the Supreme Court, the remittitur and the joint judgment against the eight defendants in the first instance, and states that it was entered "in pursuance of the directions of the Supreme Court;" and then follows the further statement that the first judgment "was afterwards amended, on motion of the plaintiff, by striking out the name of Clark; and that judgment was thereupon rendered against his co-defendants, leaving [out] the said defendant Clark. Now, upon application of counsel for the plaintiff, it is ordered, adjudged and decreed," etc. The appeal is taken from this judgment against Clark and from the order by which the judgment was awarded.

The proposition of the appellant comes to this: That the record establishes a voluntary discontinuance or abandonment of the action as to Clark. The argument, generally stated, is, that the first judgment was substantially in conformity to the mandate; that the plaintiff moved to modify or amend the judgment by striking out the name of Clark and three others; and, furthermore, that he procured the judgment against the remaining four to be turned or resolved into several judgments against each of them, thereby, as is contended, manifesting an intention to abandon all further proceedings in the action as to Clark. The counsel of the respondent, however, does not assent to but controverts the facts upon which the reasoning proceeds.

First — The judgment first entered upon the remittitur, was not, in our opinion, in conformity to the mandate of the Supreme Court. In the first place, the judgment was entered

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against eight of the defendants only. In the second place, it was entered against the eight jointly. The answers were several — the findings were several — and, in the absence of any stipulation of parties, the joint judgment was erroneous and any party prejudiced by the error could have appealed. (*Winans v. Christy*, 4 Cal. 70; *McGarvey v. Little*, 15 Cal. 31.) And the Supreme Court took that view of the law when it directed judgment to be entered upon the special findings. It does not appear that that form of judgment was departed from on stipulation, nor by reason of any interposition of the plaintiff. He did nothing, so far as the record shows, except move for judgment "in conformity with the mandate;" and the judgment that he got was very far from conforming to the mandate. Thereafter, according to the record, the plaintiff moved to "modify the judgment" by making a fresh "application and motion for judgment in conformity with the mandate of the Supreme Court." In view of this specification it is manifest the plaintiff was dissatisfied with the judgment as it stood on the ground that it met the mandate neither in form nor in substance. We gather from the specification that it was the fixed purpose of the appellant to stand upon the mandate as the test of his right and of the form in which the judicial vindication of it should be pronounced upon the record. But the judgment entered ministerially upon this motion was a wider departure from the requirements of the mandate than the one which it was the purpose of the motion to supplant. The new judgment was several to be sure, but it was against four defendants only. And for this eccentricity the plaintiff is in no manner responsible upon the record. There are then no acts of discontinuance or abandonment by the plaintiff, but a persistent seeking on his part for the relief adjudged by the Supreme Court instead.

There is an apparent conflict between the recitals of the several judgment against Clark — the third in the series — and the recitals contained in the first and second judgments respectively. By the recitals of the first judgment it "was entered upon the plaintiff's motion for judgment in conformity to the

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mandate," and the recitals of the second judgment are to the same effect. Each of these judgments may be said to state the facts of its own history, and the third judgment undertakes to recapitulate them. It recites that the first judgment "was entered in pursuance of the direction of the Supreme Court." Whether it was so entered or not is a question of law and not a point of fact. We have the judgment and the mandate both before us, and hold that the first judgment is not in pursuance of the mandate, except it be in a very limited sense. We consider that the Clerk in entering up the third judgment fell into a mistake of law in this respect. The third judgment recites also that the first judgment "was, on motion of the plaintiff, amended by striking out the name of the said defendant Clark, and judgment was thereupon entered against his co-defendants, leaving out the said defendant Clark."

These judgments are all *in pari materia*, and counsel have so treated them by bringing them all into the record, and by arguing upon each of them as illustrated by the others. The judgments were entered by the Clerk as a ministerial officer (*McMillan v. Richards*, 12 Cal. 468); and if entered by judicial direction, it comes to the same thing. The recital in a judgment that a party defendant against whom the judgment is entered appeared in the action is *prima facie* evidence only of the fact; and we consider the Clerk's recital in the third judgment, that the first was amended by "striking out Clark's name on the plaintiff's motion," to be so far within the rule that it may at least be confronted with the recital in the second judgment which gives a very different version of the character and object of the plaintiff's motion. Again: at the time the third judgment was applied for and ordered, the Court had nothing before it bearing upon the question in hand, of which we have any knowledge, except the second judgment and its recitals; and they constitute the basis, as we must presume, on which the several judgment against Clark was ordered. The recitals of the third judgment were not ordered by the Court — nor was it necessary to insert them. They were put in by the Clerk, and are nothing more than his exposition of

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the motion antedating the several judgment and fully set forth therein. The result is, that there are in our judgment no facts in the record which *per se* work a discontinuance of the action as to Clark, and none showing that the action was abandoned as to him by the plaintiff. The plaintiff had a several verdict against Clark. The Supreme Court had adjudged the plaintiff was entitled to a separate judgment, and the plaintiff, after two unsuccessful applications, secured the entry of such judgment for the first time, on the 2d of May, 1864. We cannot adjudge that the plaintiff had lost his right to have judgment entered on the grounds stated except upon the clearest demonstration, and the whole force of the record is the other way.

Second—There is another view of the matter which may be very briefly stated. If there is any state of facts under which the entry of the third judgment can be vindicated, we must presume that that state of facts existed at the time the entry was ordered, and that the order was made on the ground of them. The files and affidavits used at the hearing are not inserted in the transcript. For anything we can know to the contrary, there may have been a stipulation among the files, or one may have been brought forward by affidavit, fully accounting for all the phenomena put as the basis of the argument submitted for the appellant—and conserving also the plaintiff's right to a several judgment against Clark—and by direct expression.

The order and judgment are affirmed.

BENJ. H. RAMSDELL v. JANE E. FULLER AND RAYMOND SUMMERS.

SEPARATE ESTATE OF WIFE.—Property purchased during coverture with funds which constitute a part of the separate estate of the wife, will also be her separate estate.

CLOUD UPON THE TITLE OF A MARRIED WOMAN'S PROPERTY.—A mortgage executed by the grantee of the husband upon property purchased with funds

Argument for Appellant.

belonging to the separate estate of the wife, and deeded to the wife during coverture, is a cloud upon the wife's title which a Court of equity will remove.

PROPERTY PURCHASED DURING COVERTURE.—The presumption is that property conveyed to the wife for a money consideration is common property; but this presumption may be rebutted by showing that it was purchased with money belonging to her separate estate.

PURCHASE FROM HUSBAND OF PROPERTY DEEDED TO WIFE.—Parties purchasing of the husband real estate deeded to the wife for a money consideration during coverture, do so at their peril. The record of the deed to the wife is notice to all the world that the land *may* be the separate property of the wife, and is sufficient to put purchasers upon inquiry.

MORTGAGE ON SEPARATE ESTATE OF WIFE.—If land is purchased with funds belonging to the separate estate of the wife, and the deed, expressing a money consideration, is executed to the wife during coverture, and recorded, and the husband afterwards sells the land, the wife not joining in the deed, and his grantee executes a mortgage on the same to one who has no notice other than the record of the deed to the wife that it was purchased with the separate funds of the wife, the mortgage will be set aside by a Court of equity, although the deed on its face did not state that the consideration paid was the separate estate of the wife. The fact that the title stands in the name of the wife is sufficient to put parties dealing with land upon inquiry.

APPEAL from the District Court Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Walter Vandyke, for Appellant.

Section nine of the Act defining the rights of husband and wife, provides that "the husband shall have the entire management and control of the common property, *with the like absolute power of disposition as of his own separate estate.*"

Under this provision of our statute it is not questioned, as I understand, that the husband, Silas Fuller, had a perfect right to convey the premises to Lawrence at the date of his deed, provided it were common property.

The statute says: "All property acquired after the marriage, *by either husband or wife, except,*" etc., "*shall be common property.*" There is no exception in regard to such property as may be so acquired by the separate funds of either. The *legal title* to such property is in the community, although in *equity* it may be the separate property of one or the other. Suppose the property be purchased in the name

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of the husband, or both, but with the wife's separate funds, although, as in the present case, nothing to show that fact on the face of the deed, it will hardly be claimed that he could not convey the legal title of the same to an innocent purchaser for value, unencumbered of the wife's claim to such property. If so, then the husband in the present case could convey the legal title, for the statute and our decisions say that it makes no difference in whose name it stands so that it be acquired by purchase.

The wife surely can stand in no better position in respect to her separate property than other people. The most that can be claimed is that her rights in regard to property are the same as the husband's.

In this extreme view of the case in favor of the wife, how does the law stand? If an estate be purchased in the name of one person and the consideration money belong to or be paid by another, a trust results therefrom, and the former thereby becomes a trustee for the latter. (1 Saunders on Uses and Trusts, 352, and cases cited in note *a*.)

So if a partner buys land in his own name with the partnership funds. In all such cases, although the legal title is in the grantee named in the deed, yet in equity the estate belongs to the party whose funds purchased it. The legal title then being in the community in this case, notwithstanding in equity the estate belonged to the wife, the husband possessed the right to dispose of the same. (See the Statutes and cases cited from our State Reports.)

The estate being, however, as between them, subject to the trust or equitable interest in favor of the wife, all persons who should purchase from the husband with notice of such trust or interest, would hold the estate subject to said trust the same as the husband held it. On the other hand, the law is equally clear and without exception that one who should purchase of the husband for a valuable consideration without notice, would hold the estate discharged of the trust or equitable claim of the wife. (1 Saunders on Uses and Trusts, 351, star page; Dart. on Vendors and Purchasers, 390, star page;

Argument for Respondent.

1 Story's Eq. Juris. 396, § 410; 1 Greenleaf's Cruise, 371, § 88; Willard's Eq. Juris. 248, 249; *Somes v. Brewer*, 2 Pick. 184.)

A. & H. C. Campbell, for Respondent.

We contend: That while a deed to a married woman for a valuable consideration expressed is *prima facie* evidence of common property, (12 Cal. 224, *Smith v. Smith*; 16 Cal. 557, *Mott v. Smith*; 12 Cal. 254, *Mayer v. Kinzer*;) that it is only *prima facie* so, and like any other presumption, may be rebutted by evidence fully and clearly proving that the consideration paid was the separate property of the wife. The burden of proof rests on the wife.

The law allows a wife separate property. She has the deed. It *may* be her *own*, it *may* be common property. A purchaser from the husband is presumed to know the law. He is bound to know the husband's alleged title; and in this case it is of record through deed to the wife. The question of ownership is an open one, and he is put on his guard and bound to inquire. If he neglect to inquire, he takes the risk and must abide the result. He may collude with a knavish husband to cheat the wife, or he may shut his eyes and purchase in a blind stupidity, and call it good faith. In neither case will the law aid him to deprive the wife of that which the same law confirms to her. *Vigilantibus non*., etc.

Mr. Justice Story, (1 Story's Eq. Ju., Sec. 403,) says: "It is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property."

And in section 400: "Whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons) is in equity held to be good notice to bind him."

Here plaintiff had notice of this deed by the record. It gives time, (during the marital relation,) circumstances, (the payment of the consideration by some one,) and persons, a married woman and her husband. He should have inquired.

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In confirmation of these views we refer to the following cases, some of which are cited with approval in *Smith v. Smith*, 1 Texas, 354; *Pitch v. Willard*, 7 Texas, 13; *Ward v. Wheeler*, 7 Texas, 6; *Love v. Robertson*, 8 Texas, 242.

By the Court, SAWYER, J.

On the 13th of November, 1856, the premises described in the complaint, for a consideration expressed in the deed of \$3,000, were conveyed by one George W. Brown to the defendant, Jane E. Fuller, who was then the wife of Silas Fuller. The purchase money was paid out of funds belonging to the separate estate of Mrs. Fuller. On the third day of November, 1859, Silas Fuller, at that time the husband of defendant, Jane E. Fuller (but who was very soon afterward separated from her by a decree of divorce), executed a conveyance of said premises to L. L. Lawrence. Said Lawrence, on the 11th of August, 1860, conveyed to defendant Summers. These deeds were regularly acknowledged and recorded. Both Lawrence and Summers took their respective conveyances with actual knowledge of the fact that the consideration of the conveyance from Brown to defendant, Jane E. Fuller, was paid out of the separate estate of Mrs. Fuller. On the 15th of June, 1861, defendant, Summers, executed the mortgage in suit to one Alexander G. Ramsdell, to secure the note set out in the complaint, which note and mortgage were afterward assigned to plaintiff. There is nothing, other than the record of the deed from Brown to Jane E. Fuller, to show that plaintiff, or his assignor, the mortgagee in said mortgage, had notice at the time of the execution and assignment respectively of said mortgage, that Mrs. Fuller claimed the land, or that the purchase money was paid to Brown out of her separate estate. Subsequent to the execution of the mortgage, the defendant, Jane E. Fuller, in an action instituted for that purpose against defendant, Summers, recovered the premises in question. Plaintiff brought this action to foreclose the said mortgage, making Mrs. Fuller a party defendant.

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The defendant, Jane E. Fuller, in her answer, set up her title as aforesaid, alleging plaintiff's mortgage to be a cloud upon it, and asking, as affirmative relief, that the said mortgage be declared null and void as against her, and that the same be set aside, and be removed as a cloud on her title to said premises. The facts having been found upon the trial as herein stated, a judgment was entered in accordance with the prayer of the answer of defendant, Jane E. Fuller; and from that portion of the judgment this appeal is taken.

Conceding Mrs. Fuller to have a valid title as against the plaintiff's mortgage, there can be no doubt that the mortgage is a cloud upon it, which will be removed, within the principle of the case of *Pixley v. Huggins*, 15 Cal. 130, and numerous other cases. Property purchased during coverture with funds which constitute a part of the separate estate of the wife, will also be her separate estate. Such a transaction would only be changing the *form* of the property, which is already held as separate estate, without in any degree affecting its character as separate property.

In *Houston v. Curl*, 8 Texas, 242, the Court say: "It is the settled doctrine and law that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. *This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife—in which case it remains the separate property of the party whose money was employed in the acquisition.*" (See, also, *Meyer v. Kinzer*, 12 Cal. 252.)

The power to change the form of the investment, without impairing the right of the wife, is absolutely essential to the full beneficial enjoyment of her separate estate.

A presumption arises from a conveyance to a married woman upon a money consideration that the property conveyed is common property. But this is only a presumption of law arising from the fact, that a purchase has been made during coverture, and the real character of the transaction may be shown. It is much easier for the party purchasing

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land to show affirmatively, that the funds used are separate property of the party purchasing, than for others interested to show negatively that they were not. The evidence is peculiarly within the knowledge and control of such party. For these and other reasons, when the fact is required to be proved, the law throws the burden of identifying the funds as a part of the separate estate upon the party claiming the benefit of such estate.

In this case it was shown to the satisfaction of the Court, that the premises in question were purchased with funds belonging to the separate estate of the wife. They became, therefore, in fact, her separate property. The conveyance was upon its face to the wife. The apparent record title was in her, and not in her husband, Silas Fuller. The deed is sufficient in law to convey a title to the wife, but whether it did, in fact, convey an estate in common, or a separate estate, manifestly depended upon a fact *dehors* the deed. Ostensibly the intent was to vest the title in the grantee named, Jane E. Fuller. It did not appear on the face of the deed that the grantee was a married woman—or that, being a married woman, the consideration was paid out of her separate estate. The deed, then, so far as shown on its face, might have conveyed a title absolute to a *feme sole*; a separate estate to a *feme covert*; or an estate in common to husband and wife. Upon the best view for plaintiff, the deed upon its face was equivocal. But it afforded to all persons seeking to acquire title under it a clue to the title, which they were bound to pursue, or suffer the consequences of their laches. The grantee is a woman. The presumption of law is that she is sole, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she is married or single, all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband in his own name, of the land so conveyed to the wife, will be presumed to pass the title; but

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in fact it may not, for the reason that the land may still be the separate property of the wife, which he has no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain, at their peril, whether he did in fact have the power to convey.

The record title in this case was notice to all the world, that the land in dispute might be the separate property of Mrs. Fuller, and every party dealing with it, did so at his peril. The plaintiff was by the record put upon inquiry as to the true condition of the title. The grantee upon the record was capable of taking the land, and was a different person from the one from whom the plaintiff derives his title. If the plaintiff did not avail himself of the means afforded by the record to ascertain the true state of the title, it is his own fault, and he cannot claim to be an innocent purchaser. He stands in no better position than he would had he taken his mortgage from Fuller himself. We think the judgment fully supported by the pleadings and the facts found.

It is therefore affirmed.

THE PEOPLE *ex rel.* WM. C. STRATTON v. GEORGE OULTON, CONTROLLER OF STATE.

SALARY OF AN OFFICE.—The salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise.

RIGHT OF OFFICER TO HOLD OVER.—The State Librarian holds over his office, after the expiration of his term, and until the election and qualification of his successor, by title, notwithstanding the law creating the office contains no provision authorizing him to do so.

SAME.—The above rule applies to civil functionaries whose duties consist in the safe keeping and current management of public property committed to their care and custody.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This proceeding was commenced in the Supreme Court. The writ of mandate was applied for on affidavit and notice. The following are copies of the same:

Statement of Facts.

STATE OF CALIFORNIA, }
County of Sacramento. } ss.

William C. Stratton, being duly sworn, deposes and says:

That during the twelfth session of the Legislature of this State, an Act was passed, "prescribing rules for the government of the State Library." Said Act was approved by the Governor on the eighth day of March, A. D. 1861.

The first section of said Act provides that "the State Library shall be under the direction and control of a Board of Trustees, to consist of five members, as herein provided. The Governor and the Chief Justice of the Supreme Court shall be ex officio members of the Board. J. R. McConnell, J. W. Winans, and S. Heydenfeldt, are hereby appointed members of the Board."

The fifth section provides that "the Board of Trustees shall have power to appoint a Librarian."

The seventh section provides, "that the Librarian appointed by the Trustees shall hold his office for the term of four years, and before entering upon the duties of his office he shall make and execute his bond to the State of California in the penal sum of three thousand dollars, for the faithful discharge of the duties of his office. Said bond shall be approved by the Governor, and shall be by him deposited in the office of the Secretary of State."

The sixth section provides, that "the Librarian shall receive for his salary the sum of two thousand five hundred dollars per annum. He may at any time be removed by consent of all the members of the Board of Trustees."

The seventeenth section provides, "this Act shall take effect from and after its passage."

That the Board of Trustees mentioned in the first section of the Act, held a meeting in the State Library rooms, on the 16th day of March, A. D. 1861, and at the meeting there held, this deponent was appointed Librarian by the said Board of Trustees for the term of four years, and this deponent executed his bond, and took the oath of office as required by law, and on the 17th day of March, A. D. 1861, he entered upon

Statement of Facts.

the duties of the office of Librarian, and has continued to discharge the duties of said office continuously to the present time.

This deponent further sheweth, that on the 21st day of March, A. D. 1864, the Legislature passed an Act (which was approved on the day and year aforesaid) entitled: "An Act to amend an Act entitled an Act prescribing rules for the government of the State Library, approved March eighth, eighteen hundred and sixty-one," which amends the first section of the Act of March 8th, A. D. 1861, and provides, that "the State Library shall be under the direction and control of a Board of Trustees, to consist of five members, as herein provided. The Governor and the Chief Justice of the Supreme Court shall be ex officio members of the Board; J. F. Morse, J. W. Winans, and H. W. Harkness, are hereby appointed members of the Board."

That on or before the 30th day of December, A. D. 1864, the Governor appointed B. B. Redding a Trustee of the State Library to fill a vacancy occasioned by the resignation of J. F. Morse.

That on the 8th day of March, A. D. 1865, the Board of Trustees held a meeting for the purpose of electing or appointing a Librarian. There were present at said meeting, B. B. Redding, J. W. Winans, H. W. Harkness, and F. F. Low, the Governor of the State. The Board proceeded to vote for a Librarian; H. W. Harkness and J. W. Winans voted for this deponent, B. B. Redding and F. F. Low voted for J. L. Perkins.

That F. F. Low has exercised the office of Governor continuously for one year last past, and was on the said 8th day of March, and is still exercising the office of Governor, and that by section twelve of Article Five of the Constitution of this State, he is prohibited from holding the office of Trustee of the State Library while exercising the office of Governor, and by thus being incompetent to hold the office of Trustee of the State Library, his action as such and vote for Librarian was void, and this deponent having received a majority of the

Statement of Facts.

votes of the legal Trustees of the Library, was, as he is advised and believes, duly appointed Librarian for the term of four years from the 17th day of March, A. D. 1865.

That this deponent executed his bond as required by law, which was presented to the Governor for his approval on the 16th day of March, A. D. 1865, and the Governor received and retained the same without objecting to its sufficiency, until the 30th day of March, A. D. 1865, when this deponent received a notice from the Governor. Said notice was dated March 28th, 1865, and informed this deponent that the Governor returned said bond without his approval, and in the following words declined to do so: "As you have not been re-elected by the Board of Trustees, I cannot recognize you as Librarian, and therefore cannot approve your bond."

That this deponent took the oath of office and entered upon and has discharged the duties of Librarian from the said 17th day of March, A. D. 1865, to the present time.

That no other person has claimed the office of Librarian, and this deponent is justly entitled by virtue of his appointment as aforesaid, and the performance of the duties of the office, to the salary allowed the Librarian by law.

That the sum now due this deponent as Librarian, is one hundred dollars and eighty cents, for salary from the 17th day of March, A. D. 1865, to the 31st day of March, A. D. 1865.

That the Legislature of the State passed an Act which was approved by the Governor on the 4th day of April, A. D. 1864, entitled "An Act making appropriations for the support of the civil government of this State for the sixteenth and seventeenth fiscal years, commencing on the first day of July, A. D. eighteen hundred and sixty-four, and ending on the thirtieth day of June, A. D. eighteen hundred and sixty-six."

Section first of said Act appropriates the sum of five thousand dollars out of any money in the Treasury not otherwise appropriated for the salary of the State Librarian, from the 1st day of July, A. D. 1864, to the 30th day of June, A. D. 1866.

That the salaries of officers of State are by law due and

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payable on the last day of each month, and it is the duty of the Controller to draw his warrant for the same on the last day of each month. (Laws, 1863, p. 235.)

And this deponent further says, that on the last day of March, A. D. 1865, he demanded of George Oulton, Controller of State, that he, said Controller, should draw his warrant on the Treasurer of State in favor of this deponent, for the sum of one hundred dollars and eighty cents, the amount due this deponent for his salary as Librarian from the 17th to the last day of March, A. D. 1865.

And this deponent further says, that on said last day of March, when the said demand was made upon the said Controller, there was a large amount of money in the State Treasury not otherwise appropriated by law, out of which the statute authorizes the appropriation in question to be made, and subject to be applied to the payment of the warrant demanded of the Controller by this deponent; but the said Controller, in violation of the clear legal rights of this deponent, as this deponent is advised and believes, and of his, the said Controller's plain duty in the premises, unjustly refused and still refuses to draw said warrant for said sum or any part thereof.

And this deponent says further, that he is advised and believes that for the wrongful refusal of the said Controller to draw the said warrant, there is no plain, speedy, and adequate remedy in the ordinary course of law.

Therefore, plaintiff prays that the above named George Oulton, Controller, the defendant in this action, may appear in this Court, and answer this complaint, and show why a peremptory writ of mandamus shall not issue, requiring him to draw his warrant on the Treasurer of State in favor of the plaintiff for the sum of one hundred dollars and eighty cents, for this plaintiff's salary as Librarian, from March 17th to March 31st, A. D. 1865, and that the Court will award a writ of mandate requiring and commanding said Oulton, Controller aforesaid, to issue said warrant.

WILLIAM C. STRATTON.

Argument for Relator.

To the Honorable George Oulton, Controller of the State of California:

SIR:— You will please take notice that on Tuesday, the 11th day of April, A. D. 1865, or as soon thereafter as counsel can be heard, I shall apply to the Supreme Court of the State of California to issue a peremptory mandamus commanding you, that, as Controller of the State of California, you do forthwith draw your warrant on the Treasurer of the said State, in favor of William C. Stratton, for the sum of one hundred dollars and eighty cents, due from the State of California to said Stratton, for his salary as State Librarian, from the 17th to the 31st days of March, A. D. 1865.

The said application will be founded upon the affidavit of William C. Stratton, a copy of which affidavit is herewith served.

WILLIAM C. STRATTON.

The defendant demurred to the complaint. The case was submitted on complaint and demurrer.

Wm. C. Stratton, in pro. per., for the Relator.

It is admitted that in most cases an information in the nature of a *quo warranto* is the proper proceeding to try the title to an office; but in case of an application for a writ of mandamus by an officer to compel the Controller to draw his warrant, if the refusal be on the grounds that the person claiming the salary is not an officer, "the title to the office is directly in issue and is the only material fact in the case." (*People v. Tieman*, 30 Barb. 196.)

The plaintiff here desires to institute no direct proceedings for the purpose of testing the right of Governor Low to hold the office of Trustee of the State Library. But deeming himself the duly qualified State Librarian, he invokes the power of the Court for the purpose of compelling the Controller to draw the warrant for his salary.

If Stratton was not elected Librarian on the 8th of March, 1865, although his former term expired on the sixteenth of the

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same month, he must continue to hold the office until the Trustees appoint a Librarian to take charge of the office. (*McCall v. Byram Manufacturing Co.*, 6 Conn. 428; *Spencer v. Champion*, 9 Conn. 536; *Bethany v. Sperry*, 10 Conn. 200.)

He is not a usurper, as his original possession was by authority of a legal appointment. The possession of the office of Librarian is possession of the books and property of the library, for which he is responsible. He cannot resign, nor can he lawfully abandon the office, but must continue to hold possession until he can deliver it up to some person legally appointed Librarian by the Trustees.

The Act provides that the Librarian appointed by the Trustees shall hold his office for the term of four years. The Act does not provide that the Librarian shall hold his office until his successor is appointed; but if the Trustees, who can act at any time, and who have the direction and control of the library, refuse to appoint a successor, and by such refusal compel the incumbent to continue in charge of the office, it is a reasonable construction that he is not a usurper, but is legally holding over as Librarian, and is entitled to the salary allowed the Librarian by law.

The theory of the Constitution and statute law is that officers must hold over until their successors are qualified to relieve them; and it certainly could not have been the intention that so important an institution as the State Library should remain without any person to take charge of it.

The Act provides that the Librarian may at any time be removed by consent of all the members of the Board; and Stratton, after being once duly appointed, must be considered the legal incumbent by consent of the appointing power, so long as the Trustees neither appoint another person nor remove him, as provided by law.

J. G. McCullough, Attorney-General, for Defendant.

By the Court, SHAFER, J.

Stratton, the applicant in this proceeding, prays the Court that a peremptory writ of mandamus may be awarded, requiring Oulton, the State Controller, to issue his warrant on the Treasurer for the sum of one hundred dollars and eighty cents, due for the applicant's salary as State Librarian, from the 17th to the 31st days of March, 1865.

Stratton was duly appointed State Librarian in March, 1861, and his term of office, assuming that he could under no circumstances hold it more than four years by virtue of that appointment, expired on the 16th of March, 1865.

At a meeting of the Board of Trustees, held on the 8th of March, 1865, for the purpose of electing a Librarian, three of the five Trustees named in the Act of 1864 and the successor of another Trustee named therein, were present. Two of the four, Winans and Harkness, voted for Stratton, and the other two, Governor Low and Redding, voted for Perkins.

Since the 16th of March, Stratton has had the custody of the library, and has performed all the duties connected with the office of State Librarian.

The applicant claims that he is Librarian *de jure*. He could do no less, for the salary annexed to a public office is incident to the title to the office and not to its occupation and exercise. (*People ex rel. Dorsey v. Smyth*, County Auditor, 28 Cal. 21.) In aid of his alleged right to the office of Librarian, the applicant insists, first, that he was elected to the office at the meeting of the Trustees on the 8th of March—inasmuch as the vote of the Governor against him was a nullity, the Governor having, as is claimed, no power to cast a vote in view of the twelfth section of the Fifth Article of the Constitution; and if not so elected, then the applicant further insists, that he holds the office by title until his successor shall be duly elected and qualified. Both of these propositions are controverted by the respondent; and, for the purposes of this decision, the first of the two may be considered as fallacious. This not only narrows the ground covered by the applicant in argument, but

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does away with the objection stated by the respondent, that the validity of the vote cast by the Governor cannot be gone into in this proceeding. As thus disburdened, the case presents but a single question: Does the applicant hold over under his appointment in 1861 in the absence of a statute provision authorizing him to do so?

In the case of *Foul v. Prowse*, Mayor of Truro, 1 Strange, 625, it appeared that the Mayor was to be chosen out of the Aldermen, who were themselves to be elected annually. The Aldermen present at and participating in the election of the plaintiff had been in office several years, and none of them had been re-elected within a year. On a bill of exceptions, the Court was of the opinion that the election of the plaintiff was void for want of an annual election of the Aldermen. But upon error in the Exchequer Chamber, and two solemn arguments, the judgment was reversed; and it was held "that the words 'to be annually elected' were only directory, and that an annual election of Aldermen was not necessary to make an election of Mayor in their presence good; and King, C. J., *de C. B.*, who delivered the opinion of the Court, compared it to the case of a Constable and other annual officers who are good officers after the year is out and until another is elected and sworn. The reversal was affirmed in Parliament."

In *The Queen v. The Corporation of Dunham*, 10 Mod. 146, it was considered that "a Town Clerk, to be elected annually, would continue Town Clerk until the election of his successor."

In the *Anonymous Case*, 12 Mod. 256, it is said "a Constable is not discharged until his successor is appointed and sworn in; because the parish cannot be without an officer."

It was held in *McCall v. Byram Manufacturing Company*, 6 Conn. 427, Mr. Chief Justice Hosmer delivering the opinion, "that the Secretary of a corporation appointed in January, 1823, for the ensuing year, and continuing to act as such after the year had expired, was, by virtue of the legal construction of his appointment, Secretary *de jure*." That "it was a well settled principle that an annual officer continues until superseded by the appointment of another in his place. The time

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when such an appointment is to be made is considered as directory and not imperative." It was admitted that "a statute or by-law, or even an appointment, might be so restrictive, by the expression or implication of a negative, as to terminate an annual office at the end of the year. But the election to an office for a year has never been considered of this description. Such are the appointments to town offices; but the persons appointed continue indefinitely until the incumbent's place is supplied."

In *Spencer v. Champion*, 9 Conn. 536, it appeared that the charter of a manufacturing company, under which the plaintiff claimed by levy of execution, provided that the affairs of the corporation should be managed by a Board of Directors who should hold their offices for one year and should be annually elected. The question was whether Directors, elected under the charter, could hold over *de jure*; and it was held that "an annual officer, there being no restrictive provision in his appointment, holds his office until the appointment of another in his place."

In *Bethany v. Sperry*, 10 Conn. 200, the whole subject was learnedly reviewed on principle and authority, and the doctrine of the above cases was reaffirmed. In *People v. Runkle*, 9 John. 148, the Court acquiesced in the English decisions cited, as correct expositions of the rule of the common law; and that conclusion received the sanction of Chancellor Kent in *Slee v. Bloom*, 5 J. Ch. 377. And in his Commentaries (Vol. 2, p. 295), the learned author, giving his conclusions as a jurist, considers "the sounder and better doctrine to be, that where the members of a corporation are to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards." And it was held in *Wier v. Bush*, 4 Litt. 434, that the words would be regarded as directory, unless the implication was displaced by "negative expressions."

The Attorney-General cites *The People ex rel. Morton v. Tiesman*, 30 Barb. 193, as being opposed to these decisions. But the point now in question did not arise in that case; for it

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appeared that the Act under which the relator was appointed City Inspector had been repealed, and therefore it was unnecessary to inquire whether the relator would have held over or not if the Act had not been repealed. The opinion, in so far as it bears upon the question, is *obiter dictum*, and cannot be considered as reversing the rule in New York as established by *The People v. Runkle* and *Slee v. Bloom*. It is suggested in the opinion in 30 Barbour that the instances in which officers have been held to hold over by right until the appointment and induction of their successors, have been limited to officers and agents of private corporations or to subordinate agents and officers of municipal corporations. But inasmuch as Morton was a subordinate officer of a municipal corporation, and inasmuch as the Court, or, rather, the Judge who wrote the opinion, held, nevertheless, that he would not have held over on any known principle of common law in the event the Act creating the office of Inspector had been on foot, it follows that the cases, both at home and abroad, establishing the contrary to be the rule, were not considered as correct expositions of the common law. But those decisions nowhere limit the operation of the rule to the subordinate or inferior officers of municipal corporations; and it is conceived that a distinction that should make the operation of the rule to depend upon official grade could be referred to no intelligible principle. The case cited from the 12th Mod. illustrates the ground of the rule. (A Constable holds over, not for the reason that he is a subordinate officer, but "because a parish cannot be without an officer.") By this it is not meant that a parish when it loses its Constable ceases to be a parish, for that is not true, as matter of law (5 Com. Dig. 180); but that a parish without a Constable would fail in one of the ends to which it is appointed. The ground of the rule then is public necessity; and if the public welfare would be endangered if subordinate officers in a municipal corporation could not hold over until their successors were appointed and qualified, *a fortiori*, would it be endangered if the chief officers were to be

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considered as out of office by limitation, before others were appointed to whom they could safely resign their trusts?

Officers of public corporations are themselves as public as the corporations to which they belong. Such corporations and all official positions in them, are created either directly or indirectly by the Government, and for public political purposes only. To say that a man is an officer of a public corporation is to say that he is a public officer in the largest sense. He may be limited in the exercise of his powers to a particular locality, but his position and powers are, in the matter of essential quality, as public as those of an officer of the highest station. And, therefore, should it be considered that the distinction stated in *People v. Tieman*, for the first time, was well taken, it may well be insisted that Stratton, as Librarian, is a "subordinate officer," or rather a mere ministerial agent of a public corporation of largest magnitude, charged, as such, with the custody and care of corporate property. Such, then, being the Librarian's character and relations, he holds over under the limitations put upon the common law rule in the case cited for the respondent; and, in addition to that, it is perfectly manifest that the office of State Librarian is within the principle upon which the rule of the common law proceeds.

If Stratton is not now in custody of the library by right, to whom does its custody rightfully belong? If he is not "bound to be constant in attendance upon the library during the hours it shall be directed to be kept open" (Stat. 1861, p. 46, Sec. 9), upon whom does that obligation rest? Who, if not he, is bound to act "as Secretary of the Board of Trustees and to keep a correct record of its proceedings?" Who, if not he, "is responsible for the safe-keeping of the books?" Section fourteen requires "that the library shall be kept open every day of the year, Sundays excepted, during such hours as the Trustees may direct." Who is at once authorized and bound to fulfil this command if Stratton is not? If he is a naked usurper, as is contended, then he does not rightfully control the approaches to the library—and if he enters it as

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Librarian it is only by usurpation of that character. If he holds the key lawfully, it is merely as depositary, having no powers and no duties with respect to it, except to keep it safely in his own possession until called upon by the Trustees or his successor to surrender it. On this view of the law we have not only a library without a Librarian, but a library suspended as to all the uses for which it was established; and not only are citizens barred of lawful access to it during the alleged interregnum, but the Governor also, and every officer of the Executive Department, and the Justices of the Supreme Court. All of which, in effect, comes to this: that the State has lost the right to use its own books *die in diem*, while the present condition of things shall continue to subsist.

The rule of the common law, as settled by the cases cited, conserves the public good by conserving the methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences, might result in a suspension of business in every department of the public service. We do not decide, nor would we be understood as holding, that the rule of the common law would extend to members of the Legislature, or to judicial officers, or to the Executive. They may be without the mischiefs which the rule was intended to forestall. But as to the State Librarian, and other civil functionaries like him, the sum of whose duties consists in the safe keeping and current management of public property committed to their custody, they, in our judgment, are broadly within the rule and its reason. If Aldermen, whose duties are legislative in the main, are within it, a mere custodian and manager of a public library must be.

It is urged in the learned argument filed by the Attorney-General that, inasmuch as the Act of 1863, "concerning offices" (Stats. of 1863, p. 386,) provides that certain officers, some of whom hold by constitutional and others by statute tenure, shall hold until their successors are elected and qualified; and inasmuch as the Act creating the office of State

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Librarian contains no such provision, the common law rule is constructively negated as to him.

The Acts are not *in pari materia*. The subject matter of the Act of 1863 is confined to the offices and officers therein named, and the subject matter of the Act of 1861 is made up of other and distinct offices and officers. If the office of Librarian and its tenure, had been included in the Act of 1863 as a portion of its subject matter, and a holding over in the matter of that office had been omitted, the maxim *expressum facit cessare tacitum* might have applied. But as between two detached and independent statutes without a common subject matter in any exact sense, the maxim has no application. The question, then, comes to this: Did the Legislature in passing the Act of 1861 negative the rule of the common law by omitting to restate it? Certainly not in the judgment of the tribunals by which the cases previously cited were determined, otherwise the very point decided could not have arisen. But the question was directly presented in *Bethany v. Sperry*, 10 Conn. 206, already cited, and it was held that the fact that it was expressly provided that the society clerks should hold over, while the Act was silent in that particular as to the other society officers did not necessarily argue that a holding over by them was intended to be forbidden. (Smith's Com. 655.) There the legislation as to the clerk and the other society officers was not only in the same Act but in one and the same section.

We consider the constitutional provision that the Governor, Lieutenant-Governor, Secretary of State, Attorney-General and Surveyor-General, shall hold their offices until their successors are respectively elected and qualified, as a most impressive recognition of the policy upon which the rule of the common law proceeds; and the Legislature has given the largest countenance to it, by the Act of 1863, and by other Acts relating to civil officers.

Reference is made, on behalf of respondent, to *Miller v. The Board of Supervisors of Sacramento County*, 25 Cal. 93, and *People*

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ex rel. Dorsey v. Smyth, 28 Cal. 21. Neither of those decisions, as we conceive, bears upon any point raised in this proceeding. The writ moved for is awarded.

Mr. Chief Justice SANDERSON expressed no opinion.

WILLIAM W. WAKEMAN, WARREN D. GOOKEN,
CHARLES DIMON, AND JOHN B. DICKENSON v.
WILLIAM T. COLEMAN, EDWARD M. ROBINSON,
AND HENRY CARLETON, JR.

TRANSCRIPT ON APPEAL FROM ORDER DENYING A NEW TRIAL.—On appeal from an order denying a new trial, the appellant is only required to furnish the appellate Court with copies of the notice of appeal, order appealed from, and of the papers used on the hearing of the motion for new trial in the Court below.

UNDERTAKING ON APPEAL.—The appellant must show that the required undertaking on appeal has been given. The fact may be shown, either by introducing a copy of the undertaking into the transcript, or by stating in the transcript that an undertaking in due form was filed within the time prescribed.

MOTION TO DISMISS AN APPEAL.—On motion to dismiss an appeal on the ground that an undertaking on appeal is not shown by the transcript to have been filed, the appellant may suggest a diminution of the record, and obtain an order directing the Clerk of the Court below to certify a copy of the undertaking to the appellate Court.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The transcript in this case contained a copy of the pleadings, findings of fact of the Court below, and its conclusions of law, the notice of motion for new trial, statement, order denying a new trial, and notice of appeal. Defendants recovered judgment in the Court below, and plaintiffs appealed.

Shafter & Gould, for Appellants.

G. F. & W. H. Sharp, for Respondents.

By the Court, SAWYER, J.

Respondents move to dismiss the appeal on the following

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grounds: Firstly—The transcript does not contain a copy of the judgment. The appeal is not from the judgment, but from the order denying a new trial. On appeal from an order, it is only required that the “appellant shall furnish the Court with a copy of the notice of appeal, * * * order appealed from, and a copy of the papers used on the hearing in the Court below.” (Practice Act, Sec. 346.) These papers are contained in the transcript. Secondly—It does not appear in the transcript that any undertaking has ever been filed. “As no appeal is effectual for any purpose without an undertaking, the appellant must show affirmatively that the required undertaking has been given.” (*Bryan v. Berry*, 8 Cal. 134; *Franklin v. Reiner*, ib. 340.) The fact may be shown either by introducing a copy of the undertaking into the transcript, or by stating in the transcript that an undertaking in due form was filed within the time prescribed. (Ib.)

The appellant suggested a diminution of the record in this respect, and by way of counter motion asked an order directing the Clerk of the District Court to certify a copy of the undertaking on file to this Court, and since the submission of the motion to dismiss, the appellant has transmitted to this Court a certified copy of an undertaking on appeal in due form.

We think the appellant should be permitted to supply the defect in the record.

Ordered, that the certified copy of the undertaking on appeal transmitted to this Court be filed by the Clerk, and that the motion to dismiss be denied, and that respondents recover the costs of their motion.

C. L. CONNER v. WILLIAM JONES AND GEORGE
SHERIFF.

LEASE—LANDLORD AND TENANT.—A lease of a lot of land at a certain rent reserved provided that at the expiration of the term the lessees should have the right to remove from the premises all buildings and improvements by

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them put on the land after the date of the lease, unless the lessor should pay for the same, and that the value of the same should be ascertained by two persons, one appointed by the plaintiff, and one by the defendant, and in case of a disagreement, a third by the two, and that the lessor should not take possession except on payment of the value of the improvements, and that he should give the lessees thirty days notice of his intention to take possession of the premises. *Held*, that the leasehold became determined by the lessor's thirty days' notice to quit, and his offer to perform on his part and his tender of the full value of the improvements. *Held*, further, that an appointment by the lessor of one appraiser and notice of the same to the lessees, and their failure for thirty days thereafter to appoint another, gave the lessor the right to appoint two appraisers, although the lease did not provide within what time the lessees should appoint an appraiser, nor that the lessor might appoint both. *Held*, further, that a demand for rent due up to a day before the expiration of the thirty days named in the notice did not keep on foot the relation of landlord and tenant after the expiration of said thirty days.

DENIAL OF TENANCY BY TENANT.—If a tenant denies the relation of landlord and tenant, and refuses to pay rent, he cannot afterwards revive that relation by offering to pay rent.

APPEAL from the County Court, Sacramento County.

The facts are stated in the opinion of the Court.

Henry H. Hartley, for Appellants.

P. L. Edwards, for Respondent.

By the Court, CURREY, J.

The parties entered into an agreement on the 22d of October, 1860, by which the plaintiff leased to the defendants certain premises at a certain rent reserved, for the term of one year from the date thereof, with the privilege to the defendants of a renewal of the lease for one year longer on the same conditions, with the right to remove from the premises at the expiration of the term of the leasehold all the buildings and improvements before then erected thereon, unless the plaintiff should pay for the same—and it was further provided by the agreement that the plaintiff should not enter and take possession of the premises at the expiration of the second year, except on payment to the defendants of the value of all the improvements they might put or cause to be put on the premises after the date of the lease. It was stipulated that the

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value of such improvements should be determined by two persons, one of whom should be nominated by the plaintiff and the other by the defendant, and in case of the disagreement of the persons so named, they were to select a third. The agreement of two of the three persons so selected, it was provided, should be binding on the parties. It was further agreed that the plaintiff should give to the defendants at least thirty days notice of his intention to take possession of the premises at the expiration of the second year, and on failure to do so, the defendants were at liberty to renew the lease until the foregoing conditions should be fully complied with by the plaintiff.

Sometime in the year 1863, after the 20th of May, but at what particular time the record does not show, the plaintiff commenced an action in a Justice's Court, under the Act concerning forcible entries and unlawful detainers, for the purpose of obtaining possession of the demised premises. The complaint contains allegations of the performance of the conditions entitling him to the possession of the premises and of a refusal of the defendants to surrender the possession of the same, according to the agreement on their part so to do. The defendants controverted the material averments of the complaint. The cause was tried before the Justice and a jury, and judgment was rendered for the plaintiff. The defendants appealed to the County Court, and judgment was again rendered for the plaintiff. The defendants then moved for a new trial, which was denied, and from the judgment and order an appeal was taken to this Court.

From the record it appears that on the 10th of April, 1863, the plaintiff gave to the defendants a notice in writing informing them that the lease had expired, according to its terms, and demanding that they surrender to him possession of the premises within thirty days thereafter. That he declined purchasing or paying for any improvements put on the premises prior to the date of the lease, and requiring them to remove the same within thirty days. That he had selected and appointed a certain person as referee to ascertain and value the improve

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ments put on the premises by them since the date of the lease, and requesting them to select and appoint a referee for the like purpose, to act in conjunction with the one appointed by him. That he was ready and offered to pay for the improvements whatever amount the referees might determine to be just, and also to comply in all respects on his part with the terms and conditions of the agreement.

It appeared in evidence, also, that defendant Jones stated to plaintiff in February or March, 1863, upon the plaintiff's demanding of him the rent then due, that the lease terminated on the 22d of October, 1862; that he did not hold under the lease, and would not pay any more rent. On the 6th of April, 1863, the plaintiff addressed a letter to the defendants requesting them to pay to Joseph Hull the amount of rent due up to the 22d of that month. This letter was delivered by Hull to the defendant Sheriff, who took it away with him without saying whether he would pay it or not. On the 22d of April the defendants tendered to the plaintiff the amount then due, which the plaintiff refused to receive, and on the 18th or 19th of May following the defendants again tendered to plaintiff the rent due and also a month's rent in advance, which the plaintiff refused to accept. The sum of money first tendered was paid into Court for the plaintiff when the defendants' answer was filed, and there remained at the time of the trial, subject to the order of the plaintiff.

The defendants failing and refusing to appoint a referee to ascertain and appraise the value of the improvements made on the premises after the date of the lease, two persons selected by the plaintiff for the purpose appraised and reported the value of such improvements at a certain sum, which one of the appraisers testified was their full value. The plaintiff testified he was willing to pay the amount fixed by these appraisers, and had tendered the same to the defendants, though at the time of the tender he thought, and still was of opinion, it was more than the improvements were worth.

The second section of the Act referred to provides that any Justice of the Peace shall have authority to inquire as therein-

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after directed, as well against those who make unlawful or forcible entry into lands, tenements or other possessions, and detain the same as against those who, having lawful and peaceful entry into lands, tenements or other possessions, unlawfully detain the same; and that if it be found, upon such inquiry, that an unlawful or forcible entry hath been made, and that the said lands, tenements or other possessions, after a lawful entry, are held unlawfully, then such Justice shall cause the party complaining to have restitution thereof. The thirteenth section of the same Act provides, among other things, that when any person or persons shall hold over any lands, tenements or other possessions after the termination of the time for which they are leased to him or them, if the lessor shall make demand in writing of the tenant or tenants to deliver to him the possession of the demised premises, and if the tenant or tenants shall refuse or neglect for the space of three days after the demand to quit the possession, then upon complaint to any Justice of the Peace of the proper county the Justice shall proceed to hear, try and determine the same in the same manner as in other cases provided for in the Act, but shall impose no fine.

In this case the leasehold became determined by the lessor's thirty days notice to quit, and his offer and tender of performance on his part of the terms and conditions contained in the agreement, on his part to be performed and fulfilled, and his tender of the full value of the improvements for which he had contracted to pay the defendants. The agreement between the parties prescribes the mode by which the value of the improvements for which the plaintiff contracted to pay should be ascertained. But it is argued, on behalf of the defendants, that it is not provided within what time this should be done, nor that the failure of either of the parties to nominate a referee or appraiser for ascertaining such value should give the other the right to go on and select both appraisers. It may be admitted that the contract between the parties does not so provide in terms, but it does not, therefore, follow that either of the parties could defeat the object

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of their stipulation for all time, nor that the contumacious refusal by one of the parties to appoint an appraiser would keep the lease on foot forever. The object of the parties was, in the first place, to secure to the lessees thirty days within which to surrender the premises to the lessor, and, in the second place, to ascertain the amount which the lessor should pay the lessees for the improvements which they had placed on the premises after the date of the lease. That the plaintiff offered and tendered to the defendants the full value of such improvements is in evidence, and does not, in fact, seem to be disputed. What more could the plaintiff have done? He could not compel the defendants to select an appraiser on their part to determine with one chosen by plaintiff the value of these improvements, nor could a Court of equity have compelled them to do so, had suit been brought for the purpose, nor could the plaintiff have had a mandamus for such purpose. The plaintiff did all that he could or was bound to do in the premises, and his offer to make payment and his readiness so to do at the time of the trial was all that could justly be required of him. The defendants cannot be permitted to say that the relation of landlord and tenant was still subsisting between the parties at the time the action was brought. They had denied the relation previously and refused for a time to pay the rent due. They cannot for one purpose say they are tenants, and for another say they are not. They were tenants until the lease was determined by the notice of thirty days to surrender, and the demand for rent up to the 22d of April could not operate to keep on foot the relation of landlord and tenants after the expiration of the thirty days specified in the notice, because the thirty days expired after the term for which rent was demanded. We deem it unnecessary to pursue the subject further. We think substantial justice was done to the parties by the Court below and that the judgment should be affirmed.

Judgment affirmed.

BERNARD STOUT AND JOSEPH S. SHUSTER v. OLIVER C. COFFIN.

VARIANCE BETWEEN COMPLAINT AND PROOF.—The rule that the *allegata* and *probata* must correspond is not abrogated by the Civil Practice Act. The plaintiff must prove his contract as alleged in his complaint, or he is not entitled to recover.

ALLEGATA AND PROBATA TO CORRESPOND.—If the complaint charges that the defendant received goods as a common carrier and warehouseman, to be stored by him, and by the next boat to be by him shipped and carried and conveyed to the place of destination, and to be by him there safely delivered to the plaintiffs, proof that defendant received the goods in his warehouse as bailee, and shipped them according to plaintiffs' directions, does not entitle plaintiffs to recover.

SAME.—In such case plaintiffs cannot recover without proof that the defendant contracted to convey the goods.

APPEAL from the District Court, City and County of San Francisco.

Plaintiffs recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellant.

Crockett & Whiting, for Respondents.

By the Court, RHODES, J.

The plaintiffs sue to recover the value of goods which they allege they delivered to the defendant, to be shipped to the County of Fresno, and which the defendant received as a "common carrier, warehouseman and forwarding merchant," to be safely and securely taken, stored and kept by him, "and by the boat next departing from the said Town of Martinez to be safely and securely taken and conveyed, or caused to be conveyed by the said defendant, for the said plaintiffs from the said Town of Martinez to the County of Fresno, in the State aforesaid, and then and there, at the said County of Fresno, to be safely and securely delivered by the defendant, his servant or agents, to the said plaintiffs, for a certain reward, to be paid by the said plaintiffs to the said defendant therefor."

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The breach alleged, is that the defendant neglected and refused to store and safely keep the goods, and neglected and refused to convey, or cause to be conveyed, the goods from Martinez to Fresno County, or there to be delivered to the plaintiffs, but wrongfully and negligently permitted them to be taken and carried away by persons to the plaintiffs unknown, and neglects and refuses to deliver them to the plaintiffs.

The defendant denies that he was a warehouseman or forwarding merchant, or that he was a common carrier, except by his ferryboat between Martinez and Benicia, and denies all the allegations of the complaint respecting the contract and his receipt of the goods, and denies that he permitted them to be taken or carried away, because he says he never had the charge or custody of the goods.

The defendant requested the Court to give the following instruction to the jury: "Before the jury can rightfully render a verdict in favor of the plaintiffs against the defendant, it must be found and determined from the evidence that defendant contracted with plaintiffs to carry, or cause to be carried, the goods mentioned in the complaint, from Martinez in Contra Costa County, to the County of Fresno." The Court refused the instruction, and the defendant excepted, and now assigns the refusal as error.

The words "carry or cause to be carried" employed in the instruction, are of similar import to the words "conveyed or caused to be conveyed" as used in the complaint. The respondents object to the instruction, on the ground that it assumes that it was incumbent on them to prove, that the defendant undertook to transport the goods from Martinez to Fresno, and say that the gist of the action is that the defendant received the goods as a bailee for shipment to a specified place, instead of which he allowed them to be taken away and lost. One of the material issues of fact raised by the pleadings, is whether the plaintiffs and defendant entered into the contract mentioned in the complaint; and a material and substantial portion of the contract was, that the goods were to be "taken and conveyed or caused to be conveyed by the said defendant"

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from Martinez to Fresno County. There can be no doubt that the complaint states a contract to convey, and this is the more apparent when the allegations in that respect are read in connection with the allegation that the goods were "to be safely and securely delivered by the defendant, his servant or agents, to the plaintiffs" at Fresno, and that the defendant was a common carrier. The gist of the action is that the defendant lost the goods he received under contract not only to ship them, but also to carry or convey them to their destination. The instruction is but an expression of the familiar rule of evidence that the plaintiffs must prove the contract as alleged in their complaint, otherwise they are not entitled to recover in the action. (1 Phil. Ev., C. H. and E. Notes, 864, Note 240.) Proof that the defendant was to convey the goods, is as essential to maintain the action as proof that he received or was to deliver the goods — in fact, without such proof the contract alleged would be a materially different one from that proven. The rule that the *probata* must correspond with the *allegata* is not abrogated by the Practice Act. The case affords a good illustration of the propriety and necessity of the rule that the proof must correspond with the substantial allegations of the pleadings. The evidence tends to prove that the goods were shipped according to the plaintiffs' directions on a steamer, and were lost while in charge of the persons who were conveying them, and if the evidence had, in the opinion of the jury, amounted to proof of those facts, no recovery could be had against the defendant for the loss of the goods, without proof that he contracted to convey them.

The consequences of a variance between the averments in a pleading and the proof are the same under our system of practice as at common law, except that they may be, to a great extent, obviated by amendments to the pleadings, which are allowed with great liberality. The allegations made in setting out the contract, that the defendant undertook to convey, or caused to be conveyed, the goods to their destination, are not of the class that are usually denominated impertinent, and which may be struck out as surplusage, and of which proof

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is not required, but they form the very substance of the contract, and must be proved. (1 Phil. Ev., C. H. and E. Notes, 845, and Note 240.)

Judgment reversed and cause remanded for a new trial.

Mr. Justice CURREY, having been of counsel, did not sit in this case.

SANDERSON, C. J., concurring specially.

Excessive damages was one of the grounds upon which a new trial was claimed in this case. The true measure of the damages was the value of the goods and lawful interest thereon. The value of the goods, according to the allegations of the complaint and the evidence (in which there is no conflict) was three hundred and fifty-five dollars. Lawful interest upon that sum, from the time at which the goods were lost up to the date of the trial is ninety-two dollars and forty-five cents (if I have made no error in the computation,) making the true amount which the plaintiffs were entitled to recover, if at all, four hundred and forty-seven dollars and forty-five cents. Yet the jury found a verdict for five hundred and fifty dollars, which was too much by one hundred and two dollars and fifty-five cents. For this reason I concur in the judgment reversing and remanding the case for a new trial.

Mr. Justice SAWYER expressed no opinion.

THE PEOPLE *ex rel.* CARPENTIER v. GEORGE R.
LOUCKS, COUNTY CLERK OF CONTRA COSTA COUNTY.

EFFECT OF MOTION FOR NEW TRIAL ON JUDGMENT.—The pendency of a motion for new trial does not stay proceedings upon the judgment. The party in whose favor the judgment is rendered is entitled immediately to the proper process for its enforcement unless proceedings are stayed by the Court.

MANDAMUS ON CLERK OF COURT.—The Clerk of a Court may be compelled by writ of mandate to issue process for the enforcement of a judgment, notwithstanding his liability on his official bond for damages for a refusal to do so.

Statement of Facts.

WHEN MANDAMUS WILL LIE.—The rule that mandamus will not lie where the relator has another remedy is not universally true where the writ is sought against ministerial officers.

AN action for the recovery of a tract of land in Contra Costa County, and for damages for its detention, in which the relator was plaintiff and Thurston *et al.* were defendants, was tried in the District Court of the Fifteenth Judicial District, Contra Costa County, at the July term, 1864. A jury was waived, and the cause was submitted and taken under advisement by the Court. On the 24th of February, 1865, at a regular term of said Court, the attorneys for both parties being present, the Court announced its decision, and directed judgment to be entered against defendants, and an entry of the same was made by the Clerk in the minutes of the Court. The Court at the same time announced that the findings of fact would be filed thereafter. On the 11th day of March, 1865, the Judge signed his findings of fact and conclusions of law, and the same were delivered to the Clerk, but were not marked as filed by him until the 13th of March. On the 11th of March the plaintiff's attorney served on the attorney for defendants a written notice of the filing of the findings and decision. On the 13th of March the Clerk entered up a judgment in favor of plaintiff for restitution of the premises and for damages and costs. On the 22d of March, notice of intention to move for new trial was served on plaintiff's attorney and filed, and within five days thereafter a statement was made and filed. Afterwards, the plaintiff demanded of the Clerk that he issue a writ of *habere facias possessionem*, and an execution for the enforcement of the judgment, but the Clerk refused to issue the same because notice of motion for a new trial had been given. The plaintiff thereupon applied to the Supreme Court for a peremptory writ of mandate to compel the Clerk to issue the proper writ for the enforcement of the judgment.

H. W. Carpentier, in *pro per.*, for Relator.

Thomas A. Brown, for Respondent.

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By the Court, SANDERSON, C. J.

It is unnecessary to determine whether the respondent's motion for a new trial was in time or not. If in time it did not *per se* operate as a stay of proceedings, and the relator was entitled to final process upon his judgment, notwithstanding. The notion which has prevailed hitherto, that a motion, or notice of motion, for a new trial of itself stays all proceedings upon the judgment until such motion has been determined, is without foundation. The Practice Act contains no such provision. On the contrary, the reverse is at least implied. The one hundred and eightieth and one hundred and ninety-seventh sections provide when judgments shall be entered; and the two hundred and ninth provides that "the party in whose favor judgment is given, may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement." Upon this provision the Act contains no limitation whatever, and it must necessarily follow that the party in whose favor the judgment is entered is entitled to his execution immediately, as therein provided, and he cannot be deprived of his right or delayed in its exercise by any mere act of the opposite party.

Doubtless this question might be regulated by a rule of Court, but in the absence of such a rule a party desiring a stay of proceedings pending his motion for a new trial must obtain an order to that effect from the Court, as in the case of a stay of the entry of judgment, as provided in Section 197. Upon such application the Court can grant the order unconditionally, or upon terms according to the circumstances of the case. If a stay would be likely to jeopardize the judgment an execution and levy might be allowed, and further proceedings thereafter stayed, or security for the payment of the judgment might be required, and the like. We think this question has been wisely left by the Practice Act to the sound discretion of the Court. The rule contended for on the part of the respondent might lead to a gross abuse of the right to move for a new trial. Were such a rule to prevail a motion

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for a new trial could be made subservient to the dishonest purposes of the moving party, and all the benefits and fruits of the judgment might thereby become lost to the other side.

The case of *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 106, does not establish the doctrine that a motion for a new trial *per se* stays execution upon the judgment until after it has been determined. No such question was involved in that case, as we recently had occasion to declare in the case of the *Copper Hill Mining Company v. Spencer*, 25 Cal. 16.

Nor has *Cowell v. Buckelew*, 14 Cal. 640, any application to the present case. That case was decided under the Constitution as it stood prior to the amendments of 1863, and the mandamus was denied upon the ground that the Court then possessed only appellate jurisdiction, and could issue, with the exception of writs of habeas corpus, only such writs and process as was necessary or proper for the exercise of that jurisdiction. Under the present Constitution this Court has original jurisdiction in cases of mandamus, as was held by us in *Tyler v. Houghton*, 25 Cal. 26.

Nor is there any doubt as to mandamus being the proper remedy. The judgment awards to the relator the possession of land which can be obtained only through the writ which he seeks. The duty of issuing the writ is especially enjoined upon the respondent, and it is manifest that a suit upon his official bond for damages resulting from a non-performance of that duty would be wholly inadequate. (*Fremont v. Crippen*, 10 Cal. 215.) In *McCullough v. The Mayor of Brooklyn*, 23 Wend. 461, it was said that although, as a general rule, a mandamus will not lie where the relator has another remedy, it is not universally true where the writ is sought against ministerial officers, notwithstanding they may be liable in an action on the case for a neglect of duty, they may be compelled by mandamus to exercise their functions according to law.

Peremptory mandamus allowed, with costs.

Mr. Justice SHAFTER expressed no opinion.

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WILLIAM A. BIDLEMAN v. BENJAMIN S. BROOKS.

ASSESSMENT OF LAND FOR TAXES.—If the Assessor, in assessing a city lot owned and occupied by the owner as a single lot, arbitrarily divides the same, and assesses one part to the owner and another part to unknown owners, the assessment to the unknown owners is illegal, and a tax deed under a sale of the same for non-payment of the tax is void.

TAX DEED AS EVIDENCE OF TITLE.—The *prima facie* evidence of title furnished by the recitals of a tax deed is overthrown by showing that the assessment was illegal.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Henry B. Janes, for Appellant.

Brooks & Whitney, for Respondent.

By the Court, **SAWYER, J.**

This is an action to recover certain lands in San Francisco. The cause having been tried without a jury, the Court found for defendant, and rendered judgment accordingly. A new trial on the ground that the evidence is insufficient to justify the findings, was applied for by plaintiff, and denied. Plaintiff appeals from the order denying a new trial, and from the judgment.

The plaintiff's title depends solely upon tax deeds executed upon a sale for taxes for the fiscal year ending June 30, 1862. The plaintiff introduced in evidence his tax deeds, proved a demand upon defendant for possession before the commencement of the suit, and rested.

It appeared from the evidence introduced by defendant, and further evidence in rebuttal on the part of plaintiff, that defendant, Brooks, was at the time of the assessment, and he had been since the summer of 1859, the owner in fee of the whole of fifty vara lot No. 835, and that his conveyance was on record; that the premises in question are parts of said fifty

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vara lot; that before and at the time of the assessment in question, there was a house and various outbuildings on said lot, actually occupied by his tenants; that the whole fifty vara lot was inclosed by one fence, and not divided; that it was used as one lot, the tenant of defendant with his family living in the house, and thus occupying the premises as one lot down to the time of the sale; that the lot was not assessed as an entire lot, but the larger part was assessed to defendant, Brooks, as owner, and the premises in controversy arbitrarily cut off by the Assessor, and separately assessed to unknown owners.

The principal question is whether the property was lawfully assessed. We do not think it was. The Assessor is nowhere authorized to arbitrarily divide up lots into strips to suit his caprice, and assess such several portions separately. If he may divide up a lot of well known boundaries into strips twenty feet wide, he may divide it into strips of one foot in width, or even smaller dimensions, and assess each separately, and thus render it not only greatly inconvenient and oppressive to the owner, but almost impossible for him to ascertain whether his taxes have all been paid or not. The law undoubtedly contemplates that each lot of well known dimensions and boundaries shall be assessed as one lot. In this instance, there was a lot of the ordinary dimensions—the smallest of the lots as originally officially surveyed and platted in that part of the city—which had not been subdivided by the owner. It was inclosed by a single fence, separating it distinctly from all other lands, and had a dwelling house and outbuildings upon it, the whole openly and notoriously occupied as a single lot or messuage by the defendant's tenant and his family. Yet it was arbitrarily sliced up into at least three parts, and each separately assessed as a distinct lot, the larger portion—more than half—being assessed to the real owner, the defendant, and the other two parcels to unknown owners. Such an assessment of a tract of land constituting one well known lot, and actually occupied as such—if it would not

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necessarily have such an effect — would be very likely to mislead the owner and result — as in this instance — in a sale of his property. The owner calls to pay his taxes. A list of all the taxes against him is furnished. Upon looking it over he finds a lot in a certain locality taxed to him, and, without scrutinizing the boundaries very closely, he naturally concludes that the whole lot is assessed to him — as it should be — pays his taxes and rests in security, till several years afterwards he finds that a small strip has been, in fact, assessed to unknown owners, and without his knowledge, or fault, sold. Such would be the inevitable result if such a system of assessment were tolerated. The object of levying taxes is to secure revenue for the purposes of the Government, and not, by deceptive assessments to entrap the unwary into the loss of their lands. In cases where it is difficult to ascertain whether a tract of land has been divided into smaller lots or not, it might not be proper to scrutinize the acts of the Assessor too rigidly, if it can be seen that no injury could result; but the assessment of a single lot notoriously occupied as this was, the greater part to the owner, and smaller portions to unknown owners, is a gross violation of both the letter and the spirit of the law, and if upheld would lead to great abuses and injustice. It is, to our minds, highly probable that the assessment in question did in fact mislead the defendant, and that the sale of the property was the result of this misapprehension. At all events, he was liable to be thus misled to his injury. The assessment being illegal, the *prima facie* case made by the tax deeds, conceding them to be sufficient in form, is overthrown. For these reasons we do not think that we should be justified in setting aside the findings on the grounds of insufficiency of the evidence to sustain them.

This view renders it unnecessary to discuss the various other points made by the respondent, and we think there is nothing requiring notice in the other points made by the appellant.

Judgment affirmed.

Statement of Facts.

WILLIAM McGARRAHAN v. J. W. C. MAXWELL et al.

WHAT AN APPEAL FROM A JUDGMENT INCLUDES.—If, on the rendition of a final judgment the Court also grants a perpetual injunction, and an appeal is taken from the whole judgment, the injunction is included in the appeal.

INJUNCTION ON FINAL HEARING.—An injunction granted upon the rendition of final judgment is a part of the judgment.

DIMINUTION OF RECORD.—If a part of the judgment appealed from is omitted in the record, the Supreme Court, on being apprised of the omission, will, if it is material, require it to be supplied, even if the discovery is not made until an application for rehearing after a decision has been rendered.

EFFECT OF REVERSAL OF JUDGMENT ON INJUNCTION.—A reversal of a judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate Court.

EFFECT OF AN APPEAL ON A JUDGMENT.—An appeal from a judgment of a United States Court, affirming a survey of a Mexican grant of land, destroys the value and effect of the judgment as evidence during the pendency of the appeal.

SURVEY OF MEXICAN GRANT OF LAND.—The Act of Congress, approved June 2, 1862, entitled "an Act for the survey of grants or claims of lands," does not make a survey, which has been approved by the Surveyor-General, of a Spanish or Mexican grant of land, *prima facie* evidence of title.

ACT OF 1862 CONCERNING SURVEY OF MEXICAN GRANTS.—The Act of Congress, approved June 2, 1862, entitled "an Act for the survey of grants or claims of lands," did not repeal by implication the Act of 1860, nor did it make any change in the law regulating the survey of land in California derived from the Spanish or Mexican Governments, except in requiring the survey to be made on the application of the claimant, on his paying the expense of survey.

SURVEY OF MEXICAN GRANT AS EVIDENCE.—A survey of a confirmed Mexican or Spanish grant of land, which has been approved by the Surveyor-General, without the publication of the notice required by the Act of 1860, is of no effect as evidence.

CONSTRUCTION OF A LAW.—The meaning of an Act is to be ascertained, not from the debates which took place on its passage, but from the language of the Act.

APPEAL from the District Court, Third Judicial District, Monterey County.

This action was brought to recover possession of the tract of land, lying partly in Fresno and partly in Monterey county, and in which are located the New Idria quicksilver mines. The plaintiff claimed title under a grant of the Mexican Government made in 1844 to Vicente Gomez, and to prove the issues on his part, offered in evidence the petition of Gomez for the confirmation of his grant to the United States Board

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of Land Commissioners, organized under the Act of Congress of March 3, 1851; a decree of confirmation of the grant by the United States District Court for the Southern District of California; a survey of the land confirmed, made by the United States Surveyor-General of California, and approved September 11, 1862; and mesne conveyances from Gomez to him.

To the introduction of the decree and the survey in evidence, the defendants, by their attorney, objected, because an appeal had been taken from the decree to the Supreme Court of the United States, and that such appeal suspended the force and effect of the decree so as to render it inadmissible in evidence; and that the survey was invalid, inasmuch as no publication thereof had been made agreeably to the Act of Congress of June 14, 1860, and that the same had not been confirmed by the Court. The Court below overruled the objections and admitted the evidence, to which ruling defendants excepted. Evidence was afterwards offered by defendants, tending to show that an appeal from the decree had been granted to the Supreme Court of the United States.

Plaintiff recovered judgment in the Court below, and defendants appealed both from an order denying a new trial and from the judgment.

The other facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellant.

After an appeal taken, the Court below loses all power over the case, and the whole jurisdiction vests in the appellate Court. (*Bryan v. Berry*, 8 Cal. 134.)

"Where a suit is pending in the Supreme Court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue even between the parties." (*Woodbury v. Bowman et al.*, 13 Cal. 635. See also *Saunders v. Whitesides*, 10 Cal. 89; *Penhallow v. Doane*, 3 Dall. 54, 87, 118; *Marshall v. Lester*, N. Car. Law Rep., 100.)

But here, as to the effect of the appeal, is another thing of great importance to be considered:

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The Surveyor-General can only make a survey *after final confirmation* by the Commissioners, or District Court, or the Supreme Court of the United States. (Brightly's Digest, p. 113, Sec. 46.) Now, after decree by the Land Commission, and pending an appeal to the District Court, no survey could be made, because the decree was not final; and likewise pending an appeal to the Supreme Court there could be no survey. The Act says, after final confirmation "by the said Commissioners, or by the District Court, or Supreme Court."

The Act of March 3d, 1853, (10 Statutes at Large, 245,) is to same effect. (See Ib. 91; Brightly's Digest, Note 113.) This very clear effect follows the appeal, that no survey could be made, and there being no other evidence of boundaries except the map and survey of the Surveyor-General, the action for that reason must fail, and the judgment be reversed.

We then confidently submit that there was an appeal from the decree of confirmation pending, and that two results followed from it, viz:

1st. The decree below was suspended for all purposes, and was not evidence upon the questions at issue, even between the parties. (*Woodbury v. Bowman*, 13 Cal. 365; *Saunders v. Whitesides*, 10 Cal. 89, 90.)

2d. That the appeal operated as a bar to further proceedings on the decree, and the party could not proceed to execute it, or in other words, could not have a survey, which was the only thing to be done in execution of the decree. (*United States v. Pacheco*, 20 Howard, 263.)

If these views are correct, the respondent failed to present any evidence of title, and the judgment below must be reversed.

As to the survey — the grant, in this case, confirmed by the decree, was one requiring a survey. There were no definite boundaries. It was not a case of a certain amount within larger exterior boundaries, like that in *Mahoney v. Van Winkle*, 21 Cal. 552. No evidence was offered but a survey. It was like the grant spoken of in *Stanford v. Tracy*, 18 How. U. S. R. 412-13: "A public survey was required to attach the

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concession to any land." As stated in *Johnson v. Van Dyke*, 20 Cal. 228: "The survey was essential to give precision to the title and attach it to any particular law."

The survey offered in evidence was a map and plat by the Surveyor-General of the United States, under the Act of Congress of June 2d, 1862. (See 12 U. S. Stat. at Large, 410.) On making this survey the Surveyor-General made no publication, and took none of the proceedings required of him in the Act of Congress of June 14th, 1860. (See 12 Stat. at Large, 33.)

It was contended by the respondent's counsel that the last named Act was repealed by the Act of June 2d, 1862, and that under this Act surveys were now alone to be made; that the Courts ceased to have any further jurisdiction over surveys, and that the Commissioner of the General Land Office alone could supervise the survey; that the survey under the Act of 1862 was "*prima facie* evidence of the true location of the land claimed or granted," as against the United States, but was conclusive against the defendants in this action.

Going back to the Fossatt case, (21 How. 448,) and before the Acts of 1860 and 1862, relative to surveys, we find the inquiry propounded as to what is involved before the Land Commission, or Court, in reference to land cases. "What are the questions involved in the inquiry into the validity of a claim to land?" After reasoning about the genuineness, power of the office, etc., the Court say: "But in addition to these questions upon the validity of the title, there may be questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim." The Court then proceeds to show by direct authority and decisions the power of the Courts over the surveys, citing the Arredondo case, and various others where they directly controlled the survey in the Courts under similar Acts to this one, on the subject of California claims. The cases cited and the statutes referred to were in reference to Florida, and land claims there.

Under this Act of 1851 the Surveyor-General is held to be

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directly in the power of the Court, and must fulfill its decrees as to these surveys; and that the same system has existed under the Acts of 1824, 1828, and 1851.

The Fossatt case went twice to the Supreme Court of the United States. It is reported first in 20 How. Rep. 413, and next in 21 Id. 447. It was first reversed and remanded for further proceedings simply on the question of boundaries, the title being held good.

The decree, according to the opinion of the Supreme Court which was entered by Judge Hoffman, left one of the lines to be completed by a survey. From this the United States again appealed, and it was held that the appeal was premature and improvident, and it was dismissed, and the District Court ordered to proceed to ascertain the external lines and to enter a final decree.

Here, then, we may safely draw several corollaries, viz:

1st. The Surveyor-General had not the power of absolutely determining the boundaries and location of grants.

2d. That the District Court might reject the survey and location of the Surveyor-General, and absolutely control the location, and direct what the survey should be.

3d. Where the Court did not direct the location or control the survey, the Commissioner of the General Land Office might refuse the patent on it, and that he might supervise and control the Surveyor-General in these matters.

What, then, did the act of the Surveyor-General amount to? What was its effect? Did it amount to anything at all until it was "established" in one of two ways:

1st. By the Court; or,

2d. Adopted by the Commissioner of the General Land Office, and the patent granted?

Until then, was it not "only a preliminary proceeding amounting in effect to no more than a mere report of the action of the Surveyor?" Did it bind anybody?

But, last of all, comes the Act of 1862, June 2d, and with it, as claimed by respondent's counsel, a most radical change. They claim that it took away that part of the jurisdiction of

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the Courts which was exercised over surveys under the Act of 1851, and entirely repealed the Act of 1860. The Surveyor-General who, under the Act of 1860, could only in the first instance make "a preliminary proceeding, amounting in effect to no more than a mere report," as is said in *Mahoney v. Van Winkle*, suddenly became absolute and filled with a most dangerous power.

If the Commissioner of the General Land Office still has supervision, it must be to a very limited extent; such as pronouncing in the face of the proceedings, or, as said in *Castro v. Hendricks*, "to see that the survey is in accordance with the decree." How few such cases would occur? Most errors can be shown only by matters *dehors* the survey and plat. But the Commissioner's power to revise the action and survey of the Surveyor-General arose from Acts of Congress, and the Court's power of revision arose from Acts of Congress.

How then does the Act of 1862 take away by implication the power of the Court to revise the survey, but leave the power of the Commissioner remain to revise the survey?

The Act of June, 1862, only contemplates the action of the Surveyor-General on application by the claimant, and on his paying or securing the expense. Unless that application is made, or that payment is made or secured, the Surveyor-General cannot act.

"The exercise of the right of measurement and segregation was not only a duty to the grantee—it was necessary to enable the Government to ascertain the extent of property it had acquired by the cession of the country, to separate the public lands from those that are private." (*Estrada v. Murphy*, 19 Cal. 270. See also the *Fossatt Case*, and *Castro v. Hendricks*.) From this it becomes clear, as well as from the repugnance of a Court to declare a repeal by implication, that the Act of 1860 is not repealed, but is in full force and effect. The Act of 1860, as well as the Act of June, 1862, are both in force.

John W. Dwinelle, Hoge & Wilson, and Edmond L. Gould,
also for Appellant.

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The reversal of the judgment will carry with it the reversal of this judgment of injunction. Injunctions are of two kinds: one, temporary or provisional, granted pending the litigation, and ancillary to it, until the decision of the main issue; the other, final, incorporated into the judgment, and forming a part of the relief demanded in the complaint. A provisional or temporary injunction expires with the entry of judgment; a final injunction is based upon the other parts of the judgment, that is to say, upon the facts judicially determined by the judgment. In this case the final judgment of injunction rests wholly upon the *res judicata* that the lands in controversy belong to the plaintiff. But the granting of a new trial overturns this *res judicata*, and reverses the judgment with all its incidents, and as a part of that judgment the injunction incorporated in it falls to the ground.

Patterson, Wallace & Stow, and Sharp & Lloyd, and T. J. Bergen, for Respondent.

The decree of confirmation and the survey are conclusive, and appellants are not in condition to question them in this action. It is submitted, the uniform decisions of this Court place this proposition beyond cavil or dispute. (*Clark v. Lockwood*, 21 Cal. 222; *Estrada v. Murphy*, 19 Cal. 273; *Waterman v. Smith*, 13 Cal. 419.)

If there was an appeal, it did not suspend the operation and effect of the decree. The claimant to maintain his rights is compelled, involuntarily, to sue the United States.

The law regulating the proceeding is the will of the United States, and the officers administering the law are the officers of the United States. The right of an humble claimant is the subject matter of the controversy against his great adversary, the sovereignty. He has no protection, no shield, except that of the Constitution and the treaties, the supreme law of the land. The Government engages in the contest as any other litigant. The United States has wisely and justly foreborne to make any distinction; the United States must contend according to the

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existing laws and rules of the Courts, or not at all. If aggrieved by the decree of the lower Court, and an appeal is sought so as to operate as a supersedeas, to obtain it the United States must conform to the law.

Here it is not claimed that there was any citation or bond on appeal, although expressly required by the Act of March 3d, 1857, and the general laws of 1803 and 1789. There is no law dispensing with the citation.

At the time of the alleged granting of the appeal, (25th August, 1862,) there was no law dispensing with the necessity of a bond on the part of the United States. The only law on the subject was passed 23d February, 1863, long after the alleged appeal. It will be found in supplement to Brightly's Digest, 1,182. This dispenses with the bond on the part of the Government, but still provides that the Government shall be liable for and shall pay any costs that may be awarded against it. The necessity for the enactment of this law clearly demonstrates that before its passage the United States were bound to give the bond on appeal. (*Adams et al. v. Law*, 6 How. 148; *Wallen v. Williams*, 7 Cranch, 278; *Carr v. Hoxie*, 13 Peters, 462.)

An appeal in equity does not operate as a supersedeas unless the appeal be taken and a good and sufficient bond be given within ten days after the *pronouncement of the decree*. (*Stafford v. The Union Bank, La.*, 16 How. 135.) Appeal of itself is no supersedeas. (*Carr v. Hoxie*, 13 Pet. 460; *U. S. v. Curry*, 6 How. 113; *Riggs v. Murry*, 3 Johns. Ch. 160, and cases cited; *Pell v. Ball*, 1 Richardson, 366; *Robertson v. Robertson*, 7 Edw. Ch. 360; 2 Bac. Abr., Error, (H) 479; *Enthwhistle v. Shepherd*, 2 T. R. 78; *Rose v. Bennett*, H. Blackstone, 432; *Miller v. Cousins*, 4 Bos. & P. 307.)

Suppose the appeal had been perfectly regular, and taken within ten days from the *pronouncement of the decree*; then it would not operate as a supersedeas. (*Gregory v. McPherson*, 13 Cal. 574.)

The grant gave the claimant the right of possession, and required it. (*Thornton v. Mahoney*, 24 Cal. 569, and cases

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there cited, and also cases hereinbefore referred to.) The decree did not take away that right, nor is there anything in the Act of March 3d, 1851, or in any of the Acts of Congress, taking it away or in any way interfering with that right.

The survey is valid and conclusive in this action, and cannot be questioned by appellants. The survey having been regularly made by the duly authorized officers of the law, agreeably to the Act of June, 1862, (12 U. S. Stat. at Large, 410,) the question arises whether in this action it is conclusive? The Act last mentioned is clear in its terms, and the operation and effect thereof must be determined thereby. In the construction of statutes, it is well settled that resort cannot properly be had to nor can the construction thereof be influenced by the discussion thereon in the passage thereof in the legislative body. Resort cannot be had to the debates in Congress thereon. This is familiar and well settled law. (*Forrest v. Forrest*, 10 Barb. S. C. R. 48; *Aldridge v. Williams*, 3 How. 24; *Barbat v. Allen*, 10 Eng. Law and Eq. 601.)

Discarding, therefore, all aid from the uncertain light of legislative discussion, it is submitted that according to the plain language and manifest import of the Act, upon proper construction thereof, the survey thereunder is valid and conclusive. The words, "nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States," do not operate as a limitation to exclude surveys made thereunder from the effect thereof. All lands in the United States derived from any foreign country or Government, or claimed or granted under any laws of the United States, must, where survey thereof is at all necessary, be surveyed by the officers who are by law required to survey lands claimed or granted under any laws of the United States. They are the proper officers to make admeasurement thereof whenever requisite. Private land claims are surveyed under the law requiring the executive officers to survey lands claimed or granted under any laws of the United States, though in particular classes of cases special provision in relation thereto is made in addition to the general law. "Nothing in the law

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requiring the executive officers to survey land claimed or granted, under any laws of the United States, shall be construed * * * to give any greater effect to the surveys made by them, than to make such surveys *prima facie* evidence of the true location of the land claimed or granted." The surveys made by them clearly embrace surveys under the Act. The surveys made by them shall be *prima facie* evidence of the true location—what of? Not land claimed or granted exclusively under any law of the United States, but land claimed or granted without restriction or qualification from whatever source derived. The connection, too, in which the words occur make this plain. They are in opposition to what had been declared in the preceding part of the Act to qualify the extent and operation of the same, and are introduced by the opposite word "but." Nor does the Act or any law require publication of notice of survey made thereunder. The law requiring such publication will be found in section one of the Act of June 14th, 1860, (12 U. S. Stat. at Large, 3.) This Act is repealed by the Act of 1862.

By the Court, RHODES, J.

The complaint in this case, in addition to a cause of action in ejectment, states facts entitling the plaintiff to a provisional injunction pending the action, and a perpetual injunction to restrain the defendants from the commission of waste on the premises in controversy. The judgment in ejectment was rendered August 10, 1863, and on the same day a decree of injunction, perpetually restraining the defendants from committing waste was signed and filed in the Clerk's office, and on the following day it was entered in the judgment book. It does not appear that a provisional injunction was ordered. In the notice of appeal, it is stated that the defendant's appeal "from the judgment therein made and entered in said District Court, on or about the 10th day of August, A. D. 1863, in favor of said plaintiff against said defendants, and from the whole thereof, and from the order of the Court refusing a

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new trial," etc. The record filed in this Court did not contain a copy of the decree of injunction. Upon the former hearing of the appeal, the judgment of the Court below was reversed and the cause remanded, and subsequently a rehearing was granted, upon the petitions of both parties, the plaintiff seeking an affirmance of the judgment of the Court below for the recovery of the possession of the premises; and the defendants desiring that a diminution of the record should be adjudged, and that the decree of injunction be ordered to be certified to this Court, in order that it might be reversed, together with the judgment for the recovery of the possession of the premises.

The first question is, what constitutes the *whole* of the judgment in the cause, from which the appeal is taken. A judgment, as defined in the Practice Act (Sec. 144), is a "final determination of the rights of the parties in the action or proceeding." No particular form for the judgment is prescribed in the Act, but it will be rendered by the Court in such mode that it will conform to the cause of action stated, and the proof adduced on the trial. The Court will grant the relief to which either party appears, from his allegations and proofs, to be entitled, and the relief adjudged by the Court, if it finally determines the rights of the parties respecting the matters alleged by them in their pleadings, constitutes the judgment. And it is immaterial whether the Court grants relief to each of the parties, or to one party only, or whether the relief is in its character legal or equitable, or both, for the decision of the Court, if it amounts to a final determination of the rights of the parties, touching the matters in controversy, is a judgment. The term "decree," although not found in the section of the Practice Act referred to, is frequently used by the Legislature and the Courts of the State, and is employed to distinguish a sentence or judgment of the Court in a suit in equity, or in respect to the equitable branch of an action or proceeding at law, from a judgment in an action or the branch of the action determined upon legal, as contradistinguished from equitable principles—the term being em-

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ployed not as a designation of something different from a judgment, but rather a judgment of a particular character. In the same manner, we use the terms "*feri facias*," "order of sale," and "writ of restitution," not as indicating writs differing from an execution, but as descriptive of certain kinds of writs, all of which are included in the generic term "execution"—the writ issued for the enforcement of a judgment. Nor is it of any consequence whether the judgment consists of only one or of more than one entry. In ejectment, the plaintiff may be entitled to judgment for a part of the premises, and the defendant, who has stated an equitable defense, may be entitled to a judgment granting equitable relief for another part of the premises, but both determinations, taken together, constitute a judgment. A cause of action to restrain the commission of waste may, under our system of practice, be united with a cause of action in ejectment for the recovery of the possession of the premises threatened to be injured, and the two causes of action, together with the facts pleaded by the defendant, constitute the matters in controversy between the parties, and the final determination of the rights of the parties respecting those matters, whatever form it may assume, is the judgment. The judgment in ejectment and the "decree" of injunction, in this case, constitute one judgment, and the defendants having appealed from the whole judgment, the "decree" is necessarily included in the appeal.

The decree was not brought up to this Court in the record filed by the defendants, and on which the appeal was first heard, and it is now insisted by the plaintiff, that as the defendants were bound to take notice of the entry of the decree, and did, in fact, know that it was entered, they are not entitled to have it brought up for review at this stage of the case because they have not used due diligence in suggesting a diminution of the record, and procuring a certiorari to have the decree returned to this Court. If the the question related to an order intermediate the judgment, a bill of exceptions or a statement, or any matter that the appellant might, at his election, have presented to the appellate Court, in con-

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nection with his appeal from the judgment, the propriety of permitting the omitted matter to be incorporated into the record, after the appeal had once been passed on by the Court, would be very questionable; but in respect to the judgment or order appealed from, the question as to permitting an amendment incorporating it into the record if omitted therefrom in whole or in part, cannot be solved upon consideration of diligence.

The judgment, or the part of it appealed from, must of necessity be brought before the appellate Court, either in *hæc verba*, or by a statement of its substance, for it is the very foundation of the whole proceeding in the appellate Court, and its presence is as requisite to enable the Court to act in the cause, as is the complaint or answer when a Court of original jurisdiction passes upon a general demurrer to the whole pleading. Not only would it be the right of either party to have the omitted judgment or part of the judgment brought before the appellate Court, but the Court, on being apprised of the omission, may and would require it to be supplied, if it was deemed material and necessary to a proper decision of the appeal. In the absence from the record of the judgment appealed from, the matters in controversy between the parties on appeal are not before the appellate Court.

The question is not worthy, we think, of the laborious consideration bestowed upon it by counsel. The cause of action to restrain the commission of waste consists of the allegations that the plaintiff has title to the premises, that the defendants are in possession without title and threaten to commit the alleged waste, and are unable to respond in damages for the injury. The plaintiff's right to the equitable relief is dependent upon his title to the premises. The Court, having found that the title to the premises was in the plaintiff, and that the defendants were wrongfully in possession; and having found, as we may presume, the other facts which were necessary to entitle the plaintiff to the equitable relief prayed for, the Court was thereupon authorized to grant the injunction. The basis of the equitable relief was the title of the plaintiff to the lands

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in controversy, and if the Court had not adjudged that the title to the premises was in the plaintiff, the injunction could not have been ordered; and it inevitably follows, that if the cause is appealed and the decision of the Court below respecting the title is reversed, the injunction, like all other proceedings dependent upon that decision, must fall with it.

Counsel have again argued the two principal questions in the case—first, as to whether an appeal was taken by the United States to the Supreme Court of the United States, from the decree of confirmation rendered by the United States District Court for the Southern District of California, in the case of *The United States v. Gomez*; and second—as to the value and effect as evidence, of the survey of the rancho Panoche Grande, made by the United States Surveyor-General. The plaintiff's evidence relating to these questions consisted of the petition of Vicente Gomez, the alleged grantee of the Mexican Government, to the Board of Land Commissioners, for a confirmation of his claim to the rancho; a formal decree of the United States District Court for the Southern District of California, confirming the claim of Gomez to the rancho, signed on the 5th day of February, 1858, and ordered to be entered *nunc pro tunc*, as of the 5th day of June, 1857, the date at which the decree was pronounced; also a certified copy of the official survey and map of the rancho, approved the 11th day of September, 1862, by E. F. Beale, United States Surveyor-General for California, together with the application of the plaintiff to the Surveyor-General for a survey, and the instructions of the Surveyor-General to his deputy concerning the survey. The plaintiff deraigned title from Gomez, and the defendants stipulated that they were in possession. The defendants introduced in evidence an application by the United States District Attorney, to set aside the decree of confirmation; the order of the Court made thereupon March 21st, 1861, setting aside the proceedings in said cause, and ordering the cause on the calendar for trial *de novo*; and the order of said Court, made August 25th, 1862, allowing an appeal to the Supreme Court of the United States, from the

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decree of confirmation; also an order of said Court, made December 4th, 1862, setting aside the last mentioned order; also an order made August 4th, 1862, vacating the order directing the cause to be placed on the calendar for trial *de novo*.

First—Was an appeal taken to the Supreme Court of the United States from the decree of confirmation of the United States District Court? The plaintiff holds that there was no appeal taken, for the reason that more than five years had elapsed from the time when the decree was entered before the appeal was allowed, and that no citation was issued and served on the appellee. In our former opinion, the decision of the Supreme Court of the United States, rendered at the December term, 1863, in the case of *The United States v. Vicente P. Gomez*, was relied on as a complete and conclusive solution of this question. The Court in that case held that the final decree of the District Court was entered on the 5th of February, 1858—the date of the signing of the decree that was ordered to be entered *nunc pro tunc*—and not on the 5th of June, 1857, the date of the entry in the Clerk's minutes of the order that a decree be entered up in conformity to the opinion of the Court—and consequently that the five years had not run before the allowance of the appeal. And the Court further held that a citation was not necessary, and in delivering the opinion they said: "Appeal, it is true, purports to be from the decision and decree of the Court confirming the claim, but it was taken from that decree not only after it had been vacated, but after the decree directing it to be vacated had itself been stricken out and the original decree restored. Admitting that the order restoring the original decree was one of any validity, then indeed no citation was necessary, because the appeal was taken in open Court and might well be regarded as taken at the same term the decree was entered. The Court also held citation in the case to be unnecessary, for other reasons based on facts that do not appear in the record in this Court."

But the plaintiff's counsel say that the record of the cause

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in the Supreme Court of the United States was not in evidence in this cause, in the Court below; that the decision was not rendered until after the trial of the cause, and that therefore it is improper to assume that the cause in the Supreme Court on appeal was the same cause that was determined by the United States District Court, portions of the record of which were introduced in evidence in this cause; and that the decision of the Supreme Court is devoid of all effect in this cause, except in so far as it may be regarded as authority upon questions of law involved in this cause; and counsel have cited many cases to show that the decision of the Supreme Court cannot be maintained as sound authority, either in respect to the event from which the time for taking the appeal begins to run, or the necessity of a citation.

It is not pretended by the defendants' counsel that the record in the Supreme Court of the United States was in evidence in this cause, and it is not denied by the plaintiff's counsel that that Court rendered the decision cited by the defendants' counsel in a cause entitled the "United States, appellants, vs. Vicente P. Gomez, appellee," which was an appeal from the decree of the District Court of the United States for the Southern District of California, confirming the claim of Gomez, the petitioner, to the Rancho Panoche Grande. The identity of the names of the parties, of the land claimed by the petitioner, of the decree of confirmation of the District Court, and of the orders made by the Court in the cause, sufficiently show the identity of the action with that, the record of which was introduced in evidence in this cause.

Although the record in the Supreme Court of the United States was not offered in evidence and is not before us, yet the record in this Court contains the facts on which the decision on the points under consideration was based — at least if not the same facts, those that in all material respects are identical in substance — and we would be well justified in giving the same construction to those facts and matters of record, and drawing the same inferences and conclusions therefrom, as was done by the Supreme Court of the United States. The position of the

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plaintiff's counsel that the decision is not evidence in this case, is unquestionably true, but it has its value as an authority, emanating from the highest Court in the country, upon the precise points in question, founded on facts identical in substance, if not in every particular, with those before us.

But counsel attack the decision as not being in harmony with many earlier decisions of the same Court, and those of other Courts entitled to great consideration and weight. It is scarcely necessary to examine the cases cited, to ascertain whether they harmonize with the decision or are opposed to it, for confessedly that Court has authority to inquire into and determine all matters pertaining to its own jurisdictions of causes before it on appeal from inferior Courts of the United States, and when the question is, did that Court acquire jurisdiction of a certain cause upon a given state of facts, we are justified in following the decision, when the same question is presented to this Court, on the same state of facts.

The effect of the appeal was to suspend all proceedings in the Court below, and preclude the doing of any act for the purpose of carrying the decree into effect, it remaining inoperative for any purpose until the appeal was disposed of. The operation and effect of an appeal from the decree of the United States District Court, approving the survey of a confirmed grant, was considered by us in *Thornton v. Mahoney*, 24 Cal. 569, and we held that "the appeal having been perfected, all further proceedings upon the survey and the decree approving it became suspended," and that "while the appeal remained pending it was a bar to further proceedings in the Court below." The appeal in this case, as in that, operated as a supersedeas, neither an order to that effect nor an appeal bond being required. (See, also, *United States v. Pacheco*, 20 How. 263; *Woodbury v. Bowman*, 13 Cal. 634; *Saunders v. Whitesides*, 10 Cal. 89; *Helm v. Boone*, 6 J. J. Marsh, 353.)

Second — The survey of the rancho is claimed by the plaintiff to have been rightfully made under the Act of Congress of June 2d, 1862. (12 U. S. Statutes at Large, 410.) The Judge of the Court below held that the survey was made under that

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Act; and while he considered it unnecessary to decide the point made by the plaintiff that the Act of 1862 divested the Courts of the United States of the jurisdiction to approve the surveys of private land claims conferred upon them by the Act of June 14th, 1860, (12 U. S. Statutes at Large, 33,) he held that the Act of 1862 constituted a survey of a private land claim, made and approved by the Surveyor-General, under that Act, *prima facie* evidence of the true location of the land confirmed, and that "the title of the confirmer adheres to that location and becomes perfect until the survey is set aside by proper authority and ejectment can be maintained on it in the State Courts."

We think the learned Judge was in error in his construction of the Act of 1862. The first part of the section—the Act consisting of one section—is as follows: "*Be it enacted,*" etc., "that all claims or grants of land in any of the States or Territories of the United States, derived from any foreign country or government, shall be surveyed under the direction of the proper officers of the Government of the United States upon the application of the parties claiming or owning the same, and at their expense, which shall be paid or secured to the satisfaction of the Secretary of the Interior, before the work shall be performed." And that is the only part of the Act that has relation to a claim to land, or a grant of land, derived from the Spanish or Mexican Governments. The remainder of the Act relates to "land claimed or granted under any laws of the United States," and its purpose seems to be to define and limit the operation of the laws regulating the survey of such lands. It is declared that "nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States, shall be construed either to authorize such officers to pass upon the validity of the title granted by or under such laws, or to give any greater effect to the surveys made by them, than to make such surveys *prima facie* evidence of the true location of the land claimed or granted." The law, of which construction is given by the Act, is the law providing for surveys of lands, the title to

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which is derived under the laws of the United States; and the survey, the effect of which is declared, is obviously the survey of lands claimed or granted under the same laws. The limitation of the authority of the officers making the survey, and of the value and effect of the survey when made, bears upon the same class of lands. It would not be reasonable, unless the construction was imperative, to say that Congress intended to prohibit the executive officers from passing upon questions of title to lands in California, claimed by virtue of a right or title derived from the Spanish or Mexican Government, when the laws then in force expressly conferred jurisdiction of those questions upon the Courts of the United States; nor would it be reasonable to say that Congress intended by the Act to declare that the surveys of "private land claims in the State of California" shall not amount to more than *prima facie* evidence of the true location of the land claimed, when under the Act of 1860, providing for the survey of those claims after their confirmation, the survey approved by the Surveyor-General is of no value as evidence, until certain proceedings are had, in the mode prescribed by that Act, and after those proceedings are had, and the survey stands or becomes confirmed in the manner provided in the Act, it is *conclusive* evidence of the true location of the lands granted. The last clause of the Act of 1862, providing that such grant shall not "be deemed incomplete for the want of a survey or patent, when the land granted may be ascertained without a survey or patent," can have no reference to a Spanish grant in California, for its completeness or incompleteness cannot possibly depend upon the fact that a survey or patent has or has not been made or issued by the United States.

The Act of 1862 did not repeal by implication the Act of 1860, and it made a change in the law regulating the survey of land in California claimed under title derived from the Spanish or Mexican Governments, only in this respect: the survey of the claim or grant was directed to be made upon the application of the claimant, and on his paying or securing the payment of the expense of the survey. Under the thir-

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teenth section of the Act of 1851, to ascertain and settle private land claims in the State of California, it was the duty of the Surveyor-General to survey all private claims upon their being finally confirmed, and no application by the claimant was required, and by other Acts it was provided that the expenses of the surveys should be paid by the United States.

It cannot be said that the Act of 1860 repealed any part of the laws pertaining to the survey of private land claims in California, except in the respects just mentioned; for the Act provides neither in what manner, nor by what officers, the survey shall be made, or approved, or confirmed, nor what disposition shall be made of it when either or all of these proceedings are had; and as resort must be had to the laws then in force to ascertain the mode of procedure, and the authorities that are charged with the performance of duties in that respect, those laws must remain in force except in so far as they are inconsistent with the Act of 1860. Entertaining these views of the construction of the Act, we are warranted in holding, until a different construction is given by the Federal Courts, that the survey of the rancho, in pursuance of, and to carry into effect the decree of confirmation, was required to be made in accordance with the laws in force at the passage of that Act, except that the claimant was required—as was done by the plaintiff in this case—to make his application for, and pay or secure the payment of the expenses of, the survey; and we are of the opinion that the Surveyor-General, not having given notice by publication, that the survey and plat had been made and approved by him, as required by the Act of 1860, the survey and plat was entitled to no effect as evidence in this case. In arriving at this conclusion it is conceded, for the purposes of the argument, that the decree of confirmation of the United States District Court was in full force, and that no appeal therefrom had been taken; for if the appeal had been taken, no proceedings to carry the decree into effect, by means of a survey, or in any other manner, could lawfully have been had.

We have not felt warranted in resorting to the reports or

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debates in Congress, upon the passage of the Act of 1862, to ascertain its true meaning and construction, and we adopt the language of Mr. Chief Justice Taney, in *Aldridge v. Williams*, 3 How. 24, as clearly expressing the law in this respect. He says: "In expounding this law, judgment of the Court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the time in which it was passed." (*Leese v. Clark*, 20 Cal. 425; *Forrest v. Forrest*, 10 Barb. 46.) The language of the Act is sufficiently plain and unambiguous to indicate the intention of Congress, and upon reading it by the aid of the ordinary rules for the construction of sentences, it is apparent that the Act speaks of two different classes of lands and makes different provisions respecting each class, as we have indicated.

The plaintiff's counsel contend that under the provisions of the Act of 1862, directing that "all claims or grants of land, etc., derived from any foreign country or government shall be surveyed, etc., upon the application of the parties claiming or owning the same," they were entitled to have the rancho surveyed; that such survey, when made by the duly authorized officers of the law, constituted an identification of the land granted, and the survey *ex necessitate rei*, upon general principles, became conclusive, unless otherwise expressly provided by law. It is unnecessary to express any opinion as to the conclusiveness or effect of a survey of a claim or grant of land in California, that has not been confirmed, and the Act itself is silent in that respect. The provision is that the *claim or grant of land* may be surveyed. In the Act of Congress of 1851, to ascertain and settle private land claims in the State

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of California, the word *claim* is used as comprehending every species of right, title or interest, legal or equitable, in or to lands derived from the Spanish or Mexican Government. The words *claim* and *grant* are not entirely synonymous, but a *claim* will include a *grant*, and also a right or interest that did not pass by grant, but is based upon some equity possessed by the claimant, entitling him to have his right perfected by the Government, by a conveyance of the legal title. A mere naked assertion of right or title does not constitute a *claim* within the meaning of the Acts to ascertain and settle private land claims, or of the Act of 1862; and we do not understand that the plaintiff relies upon anything else than his title, as constituting his claim to the land. The grant to Gomez, referred to in his petition for the confirmation of his claim, is the only claim derived from a foreign Government that appears in this case, even admitting that the recitals in the proceedings for confirmation are evidence in this cause of the existence of the grant — the grant itself not being in evidence. The only claim or grant of land that the plaintiff was authorized to have surveyed, under the Act of 1862, conceding that that Act is comprehensive enough to require a survey prior to the final confirmation of a claim that is in process of confirmation, and is required by law to be surveyed after confirmation, was the grant to Gomez, described in his petition to the Board of Commissioners for the confirmation of his claim. The decree of confirmation, conceding it to have been final, could no more form a constituent part of his *claim* derived from the Mexican Government, than would a patent issued by the executive officers of the United States. The plaintiff applied to the Surveyor-General for the survey of the rancho according to the decree of confirmation entered by the United States District Court, and the Surveyor-General instructed his deputy to survey the rancho according to that decree, and he approved the survey, as made in accordance with the decree. In the petition the land is described as a "certain tract of land called Panoche Grande, of the extent of four square leagues, (now lying and being in the County of San Joaquin,) bounded as

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follows: On the south by the lands of Francisco Aryas, on the north by the lands of Julian Urzua and the low hills, and to the east by the barren hills, as explained by the maps hereto annexed." And in the decree the land is described as "the tract of land situate in the County of Fresno, State of California, known by the name of Panoche Grande, bounded northerly by the lands of one Julian Ursua, southerly by the hills, easterly by the Valley of the Tulare, and westerly by the lands of Don Francisco Aryas, containing four square leagues of land and no more; * * * and for a more particular description of which said land, reference is hereby made to the maps and surveys in the transcript in this case." It is apparent that the two descriptions are essentially different. The survey was not applied for, nor made, nor approved as the survey of the plaintiff's claim or grant of land, but as the survey of land as finally confirmed by the decree of confirmation; and hence it was not admissible in evidence as an official survey of the plaintiff's claim or grant of land.

Judgment reversed and the cause remanded for a new trial.

SAWYER, J., concurring.

I concur in the judgment.

Mr. Justice SHAFER expressed no opinion.

DAVID CALDERWOOD v. MARCUS A. BRALY AND
E. J. WEEKS.

REMOVAL OF CAUSE TO FEDERAL COURT.—All the defendants in an action in a State Court must be aliens or citizens of another State, to authorise the removal of the cause to a Federal Court for trial.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

About the first of November, 1862, the defendants, Braly and Weeks, commenced an action in the District Court, Fourth

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Judicial District, against plaintiff Calderwood, John K. Moore, and Patrick O'Brien, to recover possession of a tract of land in San Francisco. All the defendants were summoned. Plaintiff Calderwood, within the time required to answer, filed a petition in the case, setting forth that he was a *bona fide* resident of California, but was an alien; that plaintiffs were citizens of the United States and residents of this State; that defendant Moore was not in possession of the land, and had sold his interest therein to petitioner; that defendant O'Brien was on the premises merely as Calderwood's servant, and asked that the cause be transferred for trial to the Circuit Court of the United States for the Northern District of California. Petitioner also tendered the undertaking required by law. The Court refused to transfer the cause, and in due time the default of the defendants was entered and judgment rendered against them. Upon this judgment execution was issued, and Braly and Weeks were placed in possession of the property. No appeal was taken from the judgment or order, but the present action was commenced by Calderwood to set aside the judgment and to be restored to the possession of the property. The complaint set up the above facts. The defendants demurred to the complaint, the demurrer was sustained, and final judgment rendered for defendants. Plaintiff appealed.

David Calderwood, in *pro per.*, for Appellant.

Crockett & Whiting, for Respondents.

By the Court, CURREY, J.

By the law of this State an action of ejectment must be brought against the occupant—the terre tenant—of the demanded premises at the time the action may be commenced. (*Garner v. Marshall*, 9 Cal. 268.) When the action, the history of which is contained in the complaint in this case, was commenced, one of the defendants, to wit: Patrick O'Brien, was in the possession of the premises, as well as Calderwood,

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and was properly made a defendant. There is no pretense that O'Brien was an alien or a citizen of another State, and it must be presumed he was a citizen of this State in the absence of evidence to the contrary. Though Calderwood may have been an alien, that fact, while it presumptively appeared that his co-defendant, O'Brien, was a citizen of this State, did not invest him with the right to a removal of the cause to the Circuit Court of the United States for trial. It is well settled as a general rule that all the defendants in an action brought against them in a State Court must be aliens or citizens of another State to authorize the removal of the cause to the Federal Court for trial. The exceptions to this general rule are stated in the various decisions of the Federal Courts, and need not be repeated here. We are satisfied that O'Brien was not a defendant of any character falling within the exceptions to the general rule. (*Stroubridge et al. v. Curtis et al.*, 3 Cranch. 267; *Ward v. Arredondo et al.*, 1 Paine's R. 410; *Chappedelaine v. Dechenaux*, 4 Cranch. 306; *Brown et al. v. Strode*, 5 Cranch. 303; *Wormley v. Wormley*, 8 Wheat. 421; *Conolly v. Taylor*, 2 Peters, 556.)

Judgment affirmed.

Mr. Justice SHAFER expressed no opinion.

D. D. CARDER v. C. M. BAXTER, WALTER B. MIN-
TURN, AND WILLIAM BEGGS.

EVIDENCE IN EJECTMENT.—If the plaintiff in ejectment introduces in evidence to prove his title, a patent issued by the State for the demanded premises as swamp and overflowed land, the defendant is not entitled to prove that the land is dry and fit for cultivation without first showing that he is in possession under some right or title derived from the State or the United States.

ABANDONMENT OF MOTION FOR NEW TRIAL.—If the statement on motion for a new trial sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion by the moving party is not an abandonment of the same.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

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The cause was tried by the Court without a jury, June 23d, 1864, and on the same day the Court filed its findings and decision. June 29th, 1864, plaintiff's attorney served on defendants' attorney notice of motion for a new trial and a statement. Afterwards, plaintiff's attorney gave defendants' attorney notice that on the 13th day of August, 1865, at one o'clock P. M., he would apply to the Judge at his chambers, in Petaluma, to settle the statement on motion for a new trial, and would also bring on for hearing the motion for a new trial. On said 13th day of August the parties appeared by their attorneys before the Judge, and the statement was duly settled. Immediately thereafter the motion for new trial came on to be heard, and plaintiff's counsel refused to argue the motion. The Judge then denied a new trial.

The other facts are stated in the opinion of the Court.

Temple & Thomas, for Appellant.

William D. Bliss, for Respondents.

By the Court, SHAFER, J.

Ejectment for about three acres of land situate in the City of Petaluma. The answers contain a general denial and set up the Statute of Limitations. The trial was by the Court—finding and judgment for the defendants. The plaintiff moved for a new trial—the motion was denied and the appeal is from the order of denial and from the judgment.

The plaintiff, to prove his title to the premises in controversy, gave in evidence a patent thereof issued by the State to N. L. Thompson, dated September 6th, 1860, granting the lands as swamp and overflowed. The evidence which the defendants were permitted to introduce to the effect that the larger part of the lands were dry and fit for cultivation, was improperly admitted, inasmuch as the defendants neither brought nor offered to bring themselves into relations either with the State or the United States.

The point is so well settled as to require no discussion.

Statement of Facts.

(*Doll v. Meador*, 16 Cal. 295; *Terry v. Megerle*, 24 Cal. 610; *People v. Stratton*, 25 Cal. 242; *Page v. Hobbs et al.*, 27 Cal. 483.)

But it is insisted for the respondents that the plaintiff abandoned his motion for a new trial by refusing to argue it in the Court below. This point is not well taken. The statement sets forth specifically the grounds of the motion — the motion was duly made and submitted — and this includes everything essential to a prosecution of the proceeding.

The objection urged by the respondents, that the lands covered by the patent are within the incorporated City of Petaluma, is of no avail; for the reason that the fact is not apparent on the face of the patent, nor are the respondents in a position to bring it forward by averment.

As to the defense of the Statute of Limitations, there was no evidence in the case tending to sustain it.

Judgment reversed and new trial ordered.

THOMAS DENNIS, SHERIFF OF THE COUNTY OF SANTA
BARBARA v. ALBERT PACKARD AND L. T. BURTON.

JUDGMENT AGAINST SURETIES ON AN INDEMNIFYING BOND.—If a Sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the Sheriff cannot afterwards have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he gave the sureties written notice of the action brought against him.

THE plaintiff, who was Sheriff of Santa Barbara County, by virtue of an attachment issued in the suit of *Abadie & Brothers v. Zuinga*, levied upon a quantity of corn and beans as the property of Zuinga. After the levy, one Curiacl claimed the property, and a Sheriff's jury was called, who found that the property belonged to the claimant. The plaintiff's Abadie & Brothers with the defendants here as sureties, then gave the Sheriff an indemnifying bond. Afterwards Curiacl brought an action against the Sheriff for the levy, and recovered judgment.

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The Sheriff gave no written notice to the sureties of the pendency of the action, but after the judgment had been recovered by Curia moved for judgment against the sureties on the indemnity bond, under the six hundred and forty-fifth section of the Civil Practice Act. The motion, by consent, was referred to a referee to investigate the facts and report a judgment. The referee reported a judgment in favor of plaintiff. Defendants moved the Court to set aside the judgment reported by the referee and substitute a judgment for the defendants for costs. The Court granted the motion, and plaintiff appealed.

S. F. & J. Reynolds, for Appellant.

Eugene Lies, for Respondents.

By the Court, SANDERSON, C. J.

The evidence upon which the motion was made is contained in the transcript, and agreed to by counsel. The plaintiff, upon the evidence introduced in support of the motion, was not entitled to a judgment against the sureties. Section six hundred and forty-five provides a summary remedy, of which a Sheriff cannot avail himself without showing a strict compliance with the terms of that section. It does not appear from the case made that the Sheriff ever gave the sureties the written notice of the action brought against him by Curia, for which that section calls. Such being the case, he cannot avail himself of this remedy, but is left to his action upon the indemnity bond.

Judgment affirmed.

A. M. STEVENSON v. JOSEPH SMITH AND E. S. CUSHING.

PLEADING SPECIAL DAMAGES.—When damages are special and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the complaint or they cannot be recovered.

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SPECIAL DAMAGES FOR DETENTION OF A MARE.—If the plaintiff, in an action to recover possession of a mare and damages for her detention, claims damages because the animal has lost flesh in consequence of having been kept upon short pasturage, and because she was detained during the breeding season, these facts must be specially averred as a ground of damages.

REVIEW OF ORDER DENYING COSTS.—An error of the Court in refusing to allow a party costs cannot be reviewed on an appeal from an order denying a new trial.

APPEAL from the District Court, Second Judicial District, Tehama County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

W. S. Long, for Respondents.

By the Court, SAWYER, J.

This is an action to recover a mare and colt seized by the defendant (Sheriff of Tehama County) under an attachment, and damages for their detention. Plaintiff recovered the property. Plaintiff moved for a new trial on the ground that certain special damages, claimed to have been proved, were not found for him. The motion was denied, and the plaintiff appeals from the order denying a new trial.

The appellant claims, that the evidence shows that the animals were placed by defendants in fields where the pasturage was poor, and that, in consequence of this act, they lost flesh and depreciated in value to the extent of five hundred dollars. Also, that the mare was a valuable brood mare, taken to Tehama County for the purpose of being bred to a particular horse, and that by reason of the taking and detention by defendants, the breeding season was lost, whereby a further damage was shown to have been sustained to the amount of five hundred dollars, and that the Court should upon the evidence have found these items of damage for plaintiff.

On examination of the pleadings, we find no averments in the complaint that would authorize the recovery of the items claimed. These damages are special, and the facts out of which they arise must be averred, or they cannot be recovered.

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Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as when some particular damage arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but only injurious in its consequences," etc. (1 Ch. Pl. 395.)

Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts, etc. * * * But when the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. * * * And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent surprise on the defendant which might otherwise ensue at the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So in trespass 'for taking a horse,' nothing can be given in evidence which is not expressed in the declaration, and if money was paid over in order to regain possession, such payment should be alleged as special damages." (Ib. 396.)

The complaint in this case only alleges the ownership of the animal, the value, the wrongful taking and detention, the demand and that plaintiff "has sustained damages by reason

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of such wrongful taking and detention of said chattels and property in the sum of one thousand dollars."

From these facts alone, the law does not imply either of the items of damages claimed to have been proved. The first item is not even consequential upon any of the facts alleged, but results from other acts of defendants while the animals were in his possession. And the second item of damages would not necessarily result from a mere taking and detention. These damages depend upon an extraordinary value of the animal for a particular purpose, and upon the special use to which she was capable of being applied. The facts out of which these items of special damages arise must be alleged in the complaint, or they cannot be recovered. They are not alleged, and are, therefore, not embraced within the issues to be tried. For this reason, if for no other, the plaintiff is not entitled to judgment for such items of damages. There was, then, no error in not finding for plaintiff on these points.

The only other point made by appellant is, that the Court erred in not giving plaintiff costs. There is no doubt in our minds that the plaintiff was entitled to costs. But this error in no way affects the finding and is not a ground for new trial. The error cannot, therefore, be corrected on appeal from an order denying a new trial. The proper mode of reviewing and correcting this error is on appeal from the judgment, but no such appeal has been taken in this case.

Judgment affirmed.

F. FARWELL v. A. P. JACKSON, JACOB L. FOSTER,
AND R. H. WATERMAN.

JOINDER OF CAUSES OF ACTION.—If a mortgage is assigned by the mortgagee to another party as a pledge for the payment of a debt due the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or encumbrances upon the mortgaged property and make them all parties.

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STATUTE OF LIMITATIONS.—The party relying upon the Statute of Limitations by demurrer must specially point out the objection in his demurrer, or it will be disregarded.

JUDGMENT ON DEMURRER.—Where one only of several defendants appears and demurs and the demurrer is sustained, it is error for the Court to give judgment in favor of the defendant who does not appear.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellant.

Whitman & Wells, for Respondents.

By the Court, RHODES, J.

This action was commenced against Jackson, Foster and Waterman, in August, 1863. It appears from the complaint that on the 26th of October, 1861, Jackson made and delivered to the plaintiff his promissory note for two hundred dollars, and to secure the payment of the note he assigned to the plaintiff a certain mortgage executed to him by Foster, November 29th, 1858, to secure and indemnify him against any loss that he might sustain in consequence of his having executed a promissory note as surety for Foster to M. A. Wheaton for the payment of five hundred dollars, three months after date, the note bearing even date with the mortgage. Suit was commenced on the note to Wheaton, and Foster having failed to pay the same, Jackson, on the 29th of November, 1859, paid the note, which then amounted to six hundred and nineteen and fifty-four one hundredths dollars. It is stated that Waterman claims to have some interest in or claim upon the mortgaged premises, which is subject and subsequent to the mortgage. The plaintiff seeks to foreclose the mortgage.

Foster was not served and he does not appear in the action, and Jackson neither demurred to nor answered the complaint. Waterman demurred to the complaint on the grounds: First—That several causes of action were improperly united—a

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cause of action against Jackson alone, with a cause of action wherein Waterman and Foster were necessary parties; Second—That the complaint does not state facts sufficient to constitute a cause of action; and Third—That the complaint is ambiguous, unintelligible and uncertain. The demurrer was sustained, and the plaintiff declining to amend, judgment was rendered against the plaintiff in favor of all the defendants. The plaintiff, and Jackson, one of the defendants who did not appear in the Court below, joined in the notice of appeal, and they unite in assigning for error, the order sustaining the demurrer to the complaint.

The first and third causes of demurrer are clearly not sustainable. We are not apprised of the point relied upon to sustain the second cause of demurrer, as no brief of the respondents is on file, but from the points of the appellants we presume that the Statute of Limitations was mainly relied upon. We held in *Brown v. Martin*, (25 Cal. 82,) that the party relying upon the Statute of Limitations, by demurrer, must specially point out the objection in his demurrer, otherwise the objection would be disregarded.

We may remark in explanation of our views of the case, that we regard the action as brought by the plaintiff, as the pledgee of the mortgage of Foster to Jackson, to foreclose the mortgage and recover the amount that became due to Jackson upon his payment of the note to Wheaton. The judgment in favor of the defendant, who was served, but did not appear in the action, cannot be sustained, whatever may be the nature of the action.

Judgment reversed, and the cause remanded with directions to the Court below to overrule the demurrer.

THE PEOPLE v. CHARLES H. REYNOLDS.

ERRORS ON THE ASSESSMENT ROLL PROPERTY NOT ASSESSED.—The Revenue Act of 1861 does not authorize the Board of Equalization of a county to add to the assessment roll other property than that assessed by the

Argument for Appellant.

Assessor. The Board may require the Assessor to enter on the assessment roll other property which has not been assessed; but when entered by the Assessor, he and not the Board must give it a proper valuation.

CHANGING ASSESSED VALUE OF PROPERTY BY THE BOARD.—The Board for the equalization of taxes cannot under the Revenue Act of 1861 diminish or increase the assessed value of property as fixed by the Assessor, unless complaint has first been made to them, and reasonable notice has been given to the party assessed or interested of the day when they will act in the case.

ADDING TO THE ASSESSED VALUE OF PROPERTY.—The Board for the equalization of taxes cannot under the Revenue Act of 1861 add to the valuation of property, as fixed by the Assessor, without evidence authorizing them to do so.

POWER OF BOARD TO MAKE A NEW ASSESSMENT.—If the Assessor fixes the assessed value of the property of a person or firm, and the Board of Equalization afterwards, instead of adding to the valuation of the property so assessed, makes a new assessment, this new assessment is void, even if the party interested receives notice and appears and evidence is taken.

ORDER OF BOARD INCREASING ASSESSED VALUE OF PROPERTY.—An order of the Board of Equalization adding to the assessed valuation of a person's property, should show upon its face that it is merely increasing the valuation of the particular property placed on the assessment roll by the Assessor.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The facts are stated in the opinion of the Court.

W. C. Belcher, for Appellant.

Under the revenue laws in force in 1861 the Board of Equalization could not make an assessment, and could not even fix a value upon any specific item of property which had been listed and entered upon the assessment roll, but had not been assessed or valued by the Assessor. (Statutes of 1861, p. 427, Sec. 23; *Ferris v. Coover*, 10 Cal. 633; *Adams v. Justices*, 21 Geo. 206; *Hamilton v. The State*, 3 Indiana, 452; *Hays v. P. M. S. S. Co.*, 17 Howard, U. S., 596; *People v. Pico*, 20 Cal. 595. The powers of Boards of Equalization were at that time and are now limited to equalizing assessments already made by the Assessor; that is to say, adding to or deducting from the assessed valuation of specific property, and to requiring the Assessor to list and assess any property which had been omitted from the assessment roll. (See section of statute above cited.)

Before the Board of Equalization could take any action in

Argument for Respondent.

regard to the valuation of property, it must have been listed and assessed by the Assessor; and a lumping assessment, under the head of "personal property," made by him, was not sufficient. (*Faulkner v. Hunt*, 16 Cal. 172.) All action of such a Board, outside of the authority conferred upon it by statute, is altogether void.

The action of the Board of Equalization of Yuba County, in changing the assessed value of the property of Reynolds Brothers, as shown by the records in this case, was making and not equalizing an assessment, and was without authority of law, and void.

George Rowe, for Respondent.

"The Board of Supervisors is a special tribunal, with mixed powers, administrative, legislative, and judicial. Its judgments or orders cannot be attacked in a collateral way any more than the judgments of Courts of record." (*Waugh v. Shauncy*, 13 Cal. 11, 12.)

The defendant had his day in Court before the Supervisors, after due notice. One of the firm was there as a witness. There is no evidence of unfairness. Their order or judgment still stands, and while it stands it is conclusive on the defendant as to the amount of tax which he should pay—nominally one thousand two hundred dollars. The delinquent list and the record of the Board of Equalization established the existence of all the facts found by the Court, and consequently the validity of the judgment.

It is the duty of the Board of Equalization to equalize the assessment of all the personal property in the county; and they had a right to add other property to the assessment list, as well as to increase or decrease the assessment on the property given in by the party or returned by the Assessor. And if a Board of Equalization add to the valuation returned by the Assessor, the law will presume it to be done upon sufficient evidence, unless the contrary appear. (*Hambleton v. Dempsey & Co.*, 20 Ohio, 168.)

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By the Court, CURREY, J.

This action was brought to recover one thousand two hundred dollars, alleged to be due from the defendant, as the survivor of the firm of Reynolds Brothers, for State and county taxes for the year 1861. From the case it appears that the Assessor of Yuba County assessed and set down upon the assessment roll as subject to taxation for said year, five hundred dollars, as the value of certain personal property of the firm of Reynolds Brothers, which list was furnished to the Assessor by one of the firm in a statement verified by affidavit. The property so assessed and placed on the roll was described as household furniture in the office of the firm. The assessment roll thus made up was afterwards duly submitted to the Board of Equalization, whereupon the Board, in the presence of a member of the firm, made an order assessing the property of the firm, without any specification of what it consisted, and without limitation of it to the property already assessed, at the value of fifty thousand dollars. To the action and decision of the Board, the firm, by the member thereof in attendance, objected. By the answer of the defendant, it is denied that the firm of Reynolds Brothers was worth or had, in the year 1861, in their possession in the County of Yuba personal property of any kind liable to taxation in said county for State or county purposes of the value of fifty thousand dollars, or of any greater value than five hundred dollars. It is then stated that the personal property of the firm was assessed in said year at the value of five hundred dollars, but it is denied that the Board of Equalization made or ordered any changes or corrections except as shown in the records of the proceedings of the Board, which are set forth in the answer. The defendant then averred a tender to the Tax Collector of the taxes upon the value of the property as originally assessed, and that he had always been ready and willing to pay the same; and with his answer he brought the money tendered into Court to be paid to the plaintiff. The plaintiff's attorney admitted the truth of this averment on the

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trial, and agreed with the defendant that such tender had been kept good, and should be regarded as a sufficient tender, provided the plaintiff was not entitled to recover beyond the amount of tax on the property at the valuation of five hundred dollars.

The Court before whom the action was tried without a jury, rendered a judgment against the defendant for the amount claimed, together with the fees of the District Attorney and the costs of the action. A motion for a new trial was made by the defendant and denied by the Court, and this appeal brings the whole case before us for review.

The twenty-third section of the Revenue Act (Laws 1861, p. 427) confers on the Board of Equalization the power to determine all complaints made in regard to the alleged value of any property; and the power to change and correct any valuation either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll too small or too great. It also provides that if the Board find it necessary to add to the assessed valuation of any property on the assessment roll, then they shall cause a proper and reasonable notice to be given to the person interested, of the day when they will act in the case. This statute does not authorize the Board to add other property to that contained in the assessment roll, though they may require the Assessor to enter thereon any mortgage, lien or other property which has not been assessed; and when entered on the roll it is the office of the Assessor to fix upon it a proper valuation.

In matters relating to the assessment of property the Board of Equalization may hear and determine complaints respecting the same, and may correct errors in the assessment roll submitted to them, by diminishing or increasing the valuation fixed by the Assessor upon the property therein described; but they cannot increase the assessed value without complaint, nor then until the party interested has had reasonable notice of the day when they will act in the case. When the party interested appears in answer to the notice or summons he is entitled to be informed of the matters which he may be

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required to meet; and until a case be established authorizing an addition to be made to the assessed valuation of the property, he will have nothing to rebut, but may rest securely upon the assessed valuation. The Board have no more right to add to the assessed valuation of property without evidence authorizing them to do so, than a Court or jury have to find facts and determine the rights of litigants without evidence. If Boards of Equalization may arbitrarily, and of their own mere caprice, increase the assessed valuation of property, then they possess a power without prescribed limits, which may be used for the purposes of the grossest oppression and injustice.

It is claimed, on the part of the plaintiff, that the Board of Equalization had the right to add other property to the assessment list, as well as to increase or diminish the assessed valuation fixed upon the property by the Assessor in the original assessment roll. A sufficient answer to this is, that the statute does not warrant any such conclusion; and no intendment is to be made in support of the acts of officers of inferior or limited jurisdictions, where it appears that such acts were not authorized. Such acts are, in the nature of things, *coram non judice* and void; and the party who is sought to be affected by them, to his injury, is at liberty to resist their execution, when attempted to be enforced, in an action at law, or otherwise. (*Ferris v. Coover*, 10 Cal. 633.)

The plaintiffs to make out their case produced in evidence the delinquent tax list of the County of Yuba for the year 1861, and read therefrom the following entry: "Reynolds Brothers, bankers—value of personal property, \$50,000; total value, \$50,000; total tax, \$1,200." They also read in evidence entries made in the record of the Board of Equalization for the same year, from which it appeared that on the 16th of August, 1861, in the matter of the application of the County Assessor for an increase of the assessed value of the property of Reynolds Brothers, R. J. Reynolds, one of the firm, who had been summoned; and the Assessor, came before the Board, and that R. J. Reynolds and one Marchaud were sworn and

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examined as witnesses, and then the further hearing of the application was passed. On the next day the Board met again, and the entry of that day's proceedings, as produced in evidence, was in the following words: "In the matter of the citation of R. J. Reynolds.—The Board having duly considered the matter herein, doth order, after the testimony of R. J. Reynolds having been heard and considered, that the said Reynolds Brothers be and the total assessed value of their property is set at \$50,000."

The forty-third section of the Act declares that the delinquent list, or a copy thereof duly certified, showing unpaid taxes against any person or property, shall be *prima facie* evidence in any Court to prove the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. The delinquent list, it will be observed, must show upon its face certain things, and these things are specified in the twentieth section of the Act. This twentieth section of the Act makes it the duty of the Assessor to prepare a tax list or assessment roll, in which shall be listed or assessed all the real estate, improvements on real estate, improvements on public lands, and other personal property within the limits of the county. When the owner of the property so listed and assessed is known, his name is to be set down in connection with it as the owner, and the cash value of the property, if it be personal property other than improvements on real estate or public lands, is also to be stated as the assessed value of the same. After the assessment roll shall have been submitted to the Board of Equalization and passed from them to the County Auditor, this officer is required to perform such things as are prescribed, in the correction and completion of the assessment roll, and then deliver a true copy of it, as corrected, to the Tax Collector. This corrected copy is styled in the statute, "Duplicate Assessment Roll" (Laws 1861, pp. 425, 428, Sections 20, 23, 24.). Having received the duplicate assessment roll, it is made the duty of the Tax Collector to proceed to

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collect the taxes; and at the close of his official business for the day, on the third Monday of November, he is required to enter upon the duplicate assessment roll a statement that he has made a levy upon all the property therein assessed, the taxes of which have not been paid; and immediately thereafter, to ascertain the amount of taxes then delinquent, and to file a verified statement thereof in the office of the Auditor; and within a prescribed period to make out and file in the Auditor's office a verified list of all persons and property then owing any taxes; which list it is declared shall be known as the "Delinquent List." (Same Act, Sections 32, 34.) Thus it is seen what must be the character of the delinquent list in order to constitute it *prima facie* evidence of the matters specified in the forty-third section of the Act.

As appears, the plaintiff produced in evidence the delinquent list in the form already set forth, showing that the personal property of Reynolds Brothers, in the County of Yuba, was assessed for the year 1861 at fifty thousand dollars, and that the amount of the taxes was twelve hundred dollars. But it also appears from the pleadings and evidence that the property of the firm was assessed in the first place by the Assessor at the value of five hundred dollars, and that the Board of Equalization changed the assessment, not by adding to the valuation of the property so assessed, but by making a new assessment. The order was, "that the said Reynolds Brothers be and the total assessed value of their property is set at fifty thousand dollars." The property thus valued at fifty thousand dollars, by the natural import of the words, comprehends all the property of the firm. If the Board intended to limit their action to increasing the valuation of the particular property placed on the assessment roll by the Assessor, it should have been made so to appear. But it is not pretended on the part of the respondent that such was the intention of the Board, and it cannot be presumed that such was the effect of the order in the entire absence of evidence thereof. As we have already observed, the statute does not authorize the Board to add other property to the list made by

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the Assessor. They may require the Assessor to enter on the assessment roll property which has not been assessed; and when entered on the roll the Assessor is to estimate and fix upon it a proper valuation. The action of the Board, as manifested by the record of its proceedings, was unauthorized, and therefore void.

The judgment is reversed and the cause remanded to the Court below with directions to enter judgment in favor of the plaintiff against the defendant for twelve dollars, the sum tendered, but without costs.

Neither Mr. Chief Justice SANDERSON nor Mr. Justice SAWYER expressed any opinion.

THE PEOPLE *ex rel.* JOHN STURGIS v. MARK SHEPARD, JUDGE OF THE COUNTY COURT OF CONTRA COSTA COUNTY.

WANT OF JURISDICTION RENDERS A JUDGMENT VOID.—A judgment of a County Court discharging an insolvent from his debts, when the Court has no jurisdiction, is void in the extreme sense, and leaves the creditors at liberty to enforce the collection of their debts at discretion.

JURISDICTION OF SUPREME COURT IN INSOLVENT CASES.—The constitutional amendments have not withdrawn from the Supreme Court the jurisdiction to review on appeal judgments in insolvent proceedings.

REVIEW OF JUDGMENTS IN INSOLVENT CASES.—Proceedings in insolvent cases must be brought before the Supreme Court by appeal and not by *certiorari*.

WHEN CERTIORARI WILL LIE.—*Certiorari* does not lie where there is an appeal.

THIS was an original proceeding commenced in the Supreme Court. On the 7th day of July, 1856, relator recovered a judgment in the District Court of the Seventh Judicial District, Contra Costa County, against George F. Worth.

On the 21st day of January, 1858, the insolvent (Worth) filed his petition in the District Court of the Seventh District, in Contra Costa County, praying to be discharged from his debts, under the Insolvent Act of 1852. After publication of notice to creditors, and on the 2d day of March, 1858, (the day appointed in said order for the meeting of creditors,) no

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creditor having appeared, the Court made and signed a formal order by which the Sheriff was authorized to act as assignee, and by which, also, the assets, both real and personal, of the insolvent, appearing to be exempt by law from process, were set apart for his and his family's use. On the same day an entry was made by the Clerk upon the "minutes" of the Court to the effect that the insolvent was ordered to be discharged from his debts.

In January, 1863, relator, a judgment creditor described in insolvent's schedule, applied to the Court to dismiss the proceedings upon the alleged ground of want of diligence in prosecuting the same to final judgment. This was refused. In February, 1863, relator applied to the Court to have execution issued on his judgment described in insolvent's schedule, as one of the debts from which he sought discharge. This also was refused. On February 23d, 1863, relator's application for leave to bring action to revive his judgment was granted. Such action was brought, and in defense, and as a bar thereto, insolvent pleaded and on trial introduced the entire record of his insolvency proceedings as constituting and presenting a judgment of discharge from the debt sued on. The Court held the record to constitute no defense, that the order or decree of discharge was "void," in being made ten days prior to the time prescribed by the twentieth section of the Insolvent Act for opposition by creditors; and upon this ground rendered judgment, in January, 1864, for the plaintiff.

In July, 1864, under the amended Constitution, and by virtue of the Act for the "Transfer of Civil Cases," (See Laws 1863-4, p. 3, Sec. 3,) these proceedings in insolvency, as still "pending and undetermined," were transferred to the proper County Court, which thereupon taking jurisdiction as provided in such cases, at its next regular term in September, 1864, after appearance and opposition thereto made by relator, rendered in behalf of insolvent a full, formal, and final judgment or decree of discharge from (as by its terms expressed) all his debts contracted after the passage of the Act of 1852, and duly set forth and named in his schedules filed in 1858.

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H. Allen, for Relator.

M. S. Chase, for Respondent.

By the Court, SHAFER, J.

Certiorari, to review the proceedings of the County Court of Contra Costa County, in *Worth v. His Creditors*.

It appears that an order was made in the said proceeding, on the 23d day of July, 1864, restraining the relator from enforcing the collection of a judgment for six thousand nine hundred and thirty dollars, recovered by him against Worth in the District Court of the Fourth Judicial District, January 6th, 1864; and that a judgment was entered on the 7th of September, 1864, discharging Worth from his debts. The point is made that it is apparent on the face of the record that the County Court had no jurisdiction to make the order or to render the judgment of discharge; and for the alleged reason that the insolvency proceedings had, anterior to both the order and judgment, been ended by a final judgment in the District Court wherein it was originally instituted. Should this be conceded, it would follow that the supplementary action of the County Court was void in the extreme sense; leaving the plaintiff at liberty to enforce the collection of his judgment at discretion. But assuming that the petitioner as one of the creditors of Worth, has the right to call upon this Court to review the proceedings of the County Court and that our interposition is essential to his just relief, then the remedy of the defendant is by appeal and not by writ of review. The latter lies only when the former does not. It was decided in *Kohlman v. Wright*, 6 Cal. 281, and in *Fisk v. His Creditors*, 12 Cal. 281, not only that the Supreme Court had jurisdiction in error in insolvency cases, but that such cases might be brought up by appeal. The jurisdiction in error has not been withdrawn by the constitutional amendments; nor has the three hundred and thirty-sixth section of the Practice Act,

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giving an appeal from final judgments in special proceedings, been repealed.

Petition dismissed.

Mr. Justice CURREY expressed no opinion.

HENRY A. CAULFIELD v. SYLVESTER STEVENS.

JURISDICTION OF JUSTICES OF THE PEACE.—Justices of the Peace have no jurisdiction of actions to recover possession of lands and tenements from those who detain the same after the termination of or contrary to the terms of the lease under which they entered into possession.

JURISDICTION OF COUNTY COURTS.—County Courts are vested, by the amendments to the Constitution, with exclusive jurisdiction of actions of unlawful detainer, as well as for forcible entry and detainer.

ACT OF APRIL 27TH, 1863.—The Act of April 27th, 1863, entitled, "An Act concerning unlawful holding over of lands, tenements, and other possessions," is unconstitutional and void.

APPEAL from the County Court, Sacramento County.

On the 15th day of February, 1864, plaintiff, as landlord, commenced an action before a Justice of the Peace against defendant, his tenant, for holding over contrary to the terms of his lease.

The action was commenced under the provisions of the Act of April 27th, 1863, entitled "An Act concerning unlawful holding over of lands, tenements, and other possessions." The defendant objected to the jurisdiction of the Court. The objection was overruled, and a trial had which resulted in a judgment in favor of plaintiff. Defendant appealed to the County Court, where it was held that the Justice's Court had no jurisdiction over the subject matter of the action, and accordingly the judgment was reversed and the case dismissed. From the judgment of the County Court the plaintiff appealed.

Robert Robinson, and P. Dunlap, for Appellant.

W. R. Cantwell, and George R. Moore, for Respondent.

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By the Court, SANDERSON, C. J.

The only question presented for our consideration relates to the constitutionality of the Act under which this suit was commenced, it being claimed upon the one hand, and denied upon the other, that it conflicts with the eighth and ninth sections of Article VI of the Constitution as amended in 1862.

The eighth section defines the jurisdiction of the County Courts, and among other things declares that they "shall have original jurisdiction of actions of forcible entry and detainer." The ninth section declares that "the Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State, and fix by law their powers, duties and responsibilities; provided such powers shall not in any case trench upon the jurisdiction of the several Courts of record. The Supreme Court, the District Courts, County Courts, the Probate Courts, and such other Courts as the Legislature shall prescribe, shall be Courts of record."

It is insisted on the part of the appellant that the words "forcible entry and detainer" contained in the eighth section embrace only cases of forcible entry into lands and tenements, and a forcible detainer after peaceable entry, and do not include cases like the present of unlawful holding over of lands, tenements, and other possessions after the termination of the demise or after a failure to pay rent according to the terms of the lease. This would doubtless be so if the reading of those words is to be confined to the language of strict definition; but we think the reading should give as broad a signification to the words in question as they have received in the nomenclature of modern legislation and in common professional parlance. Under the general head of "forcible entry and detainer," nearly every one if not all the States of the American Union have legislated, in the same Act, not only upon the subject of forcible entry and forcible detainer, but also upon the subject of unlawful detainer, thus treating all three as one general subject, sufficiently described by the words in question. If technical exactness is to be observed, a more

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full and complete statement of the subject of such legislation would find expression in the words "forcible entry and forcible and unlawful detainer." Yet this exactness of designation has not been observed in the legislation of the country nor in its legal parlance. We speak of such legislation as the Forcible Entry and Detainer Acts. We speak in general terms of this or that action as being brought under the Forcible Entry and Detainer Act, regardless of the minor fact whether it be for a forcible entry or a forcible detainer, or an unlawful detainer, thus using the words in a generic sense and as comprehending all three.

The Act in our own State upon this subject prior to the constitutional amendments of 1862 is entitled "An Act concerning forcible entries and unlawful detainers." This title is quite as inexact as the one which we have been considering. Yet under it the Legislature proceeded to provide for a forcible detainer as well as a forcible entry and unlawful detainer. The title used in most of the other States is the same as that adopted in the amended Constitution, yet they proceed under that general head to provide for unlawful detainers.

Our construction is also sustained by the terms of the Judiciary Act organizing the Courts under the amended Constitution. (Statutes 1863, p. 336.) Unlawful detainer as a subject distinct from forcible entry and detainer is not mentioned in that Act. Jurisdiction of actions of forcible entry and detainer is given to County Courts in accordance with the Constitution. No jurisdiction in cases of unlawful detainer is given to Justices' Courts. Hence, so far as that Act is concerned, no provision is made for the latter cases unless they are included in the former. Yet it is generally understood that the principal author of the constitutional amendments, and of the Judiciary Act of 1863, was the same person. Had he intended to separate unlawful from forcible detainers by his constitutional amendments, giving jurisdiction over the latter to the County Courts, and leaving jurisdiction over the former to be conferred by the Legislature upon Justices' Courts, or such other inferior Courts as they might create,

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that intention would have doubtless been carried out in the Judiciary Act; but such is not the case, and the whole subject of forcible entries and forcible and unlawful detainers seems to have been considered as provided for under the general head of forcible entries and detainers, and jurisdiction over the same given to the County Courts.

Another view may be taken of this question, which is perhaps more conclusive than the one already considered.

It cannot be denied but that actions, either for a forcible entry or a forcible or unlawful detainer, involve the possession of real property. Their primary object is to obtain that possession of lands and tenements which has been forcibly taken or is forcibly or unlawfully detained. The recovery of rents and damages is incidental to the recovery of possession, and the former cannot be had without the latter. The possession of real property is therefore as much involved in these actions as in an action of ejectment. Such being the case, it follows that if the jurisdiction of the County Courts, as defined in the Constitution, in these cases is confined to forcible entries and forcible detainers, the jurisdiction of actions for *unlawful* detainers is vested by the Constitution in the District Courts. For the sixth section of Article VI provides, among other things, that the District Courts "shall have original jurisdiction in all cases at law which involve the title or *possession* of real property." The only exception to this rule is found in the eighth section, which confers upon the County Courts jurisdiction in cases of "forcible entry and detainer." Read the two together, and the Constitution imperatively declares that the "District Courts shall have original jurisdiction in all actions at law which involve the title or possession of real property, except actions of forcible entry and detainer, of which the County Courts shall have jurisdiction." That it was one purpose of the constitutional amendments to transfer the jurisdiction over cases of unlawful detainer from Justices' Courts to the District Courts, it is presumed no one will affirm.

In conclusion, we may add that the Legislature seem to have doubted the constitutionality of the Act under considera-

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tion at the time of its passage; for on the same day they passed "An Act concerning forcible entries and unlawful detainers," in which they provide for the latter, and expressly declare that all actions for the recovery of the possession of lands or tenements, as specified in that Act, shall be prosecuted in the County Courts.

Our conclusion is that the Act in question is in conflict with the Constitution. and therefore null and void.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

J. S. SHELDON AND EMILY C. SHELDON v. C. S. LOOMIS.

VERDICT OF SHERIFF'S JURY ON CLAIM OF PROPERTY.—Where property is levied on by a Constable or Sheriff, by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in a suit brought against him by the claimant, nor is it admissible in evidence as a defense.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The defendant was a constable in Solano County, and an attachment and execution were placed in his hands, issued in the suit of *F. & M. Dinkenspiel v. J. D. Perkins*. By virtue of the writs defendant levied on a quantity of personal property as the property of Perkins. Plaintiffs laid claim to the property. This suit was brought to recover possession of the same. Plaintiffs recovered judgment, and defendant appealed. The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellant.

Swan & Hays, for Respondent.

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By the Court, SAWYER, J.

This is an action to recover a quantity of lumber. Defendant justifies the taking and detention under an attachment and execution issued in the suit of *Frank et al. v. Perkins*. Defendant offered in evidence the proceedings before a constable's jury to try the right of property on a claim made by plaintiffs in pursuance of sections two hundred and eighteen and six hundred and two of the Practice Act, and the verdict of the constable's jury against the plaintiffs in that proceeding. The evidence was excluded on objection by plaintiffs, and defendant excepted. This verdict did not protect the constable, and was properly excluded. (*Perkins v. Thornburgh*, 10 Cal. 191.)

We see no error of law, and cannot say that the verdict is not supported by the evidence.

Judgment affirmed.

THE PEOPLE *ex rel.* E. R. BUDD v. WILLIAM HOLDEN.

ACT FOR CONTESTING ELECTIONS.—The Act conferring upon any elector the right to contest the election of any person who has been declared duly elected to a public office, does not deprive the people in their sovereign capacity, on complaint made, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise.

JURISDICTION OF DISTRICT COURT IN ELECTION CASES.—The District Court has jurisdiction in an action brought by the Attorney-General, either upon his own suggestion or upon the complaint of a private party, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom if it be made to appear that he is a usurper having no legal title thereto.

RECORD IN ACTION FOR USURPING AN OFFICE.—In an action brought in the District Court to try the right to an office, if the record shows in any manner that all the election returns were given in evidence, the judgment will not be reversed by the appellate Court even though there is no formal statement in the record that such returns were all in evidence.

BALLOTS RETURNED TO COUNTY CLERK AS EVIDENCE.—In an action brought in the District Court to try the right to an office, the list of ballots cast in any precinct, and returned with the poll list and tally paper to the County Clerk, is better evidence of the number of votes cast at the precinct and for whom cast, than the tally list made from them by the officers of the election.

Points decided.

NAME.—The presumption of law is that the ballots are all returned to the County Clerk, and that they have not been mutilated, and if such is not the case, it should be shown by evidence.

SAME PERSON VOTING TWICE.—If the same elector votes twice at the same election, his second vote should be excluded in the count.

WHERE AN ELECTOR SHOULD VOTE.—When an elector moves his family to a county with the intention of residing there, that is the county where he should vote while his family remains there, although he passes his time and works in an adjoining county.

THIRTY DAYS RESIDENCE IN A COUNTY.—The thirty days residence in a county to entitle an elector to vote must be ascertained by excluding the day of the election.

WHAT CONSTITUTES A BALLOT.—A ballot is a single piece of paper containing the names of the candidates and the offices for which they are designated.

BALLOT CONTAINING SAME NAME TWO OR MORE TIMES.—If a ballot contains the name of a person voted for, and the office for which he is designated, two or more times, it is not for that reason to be rejected, but should be counted as one vote for the person named.

SAME.—A ballot having written or printed on it the name of a person voted for, and his office, two or more times does not constitute two or more tickets folded together.

RESIDENCE WHILE IN THE SERVICE OF THE UNITED STATES.—The clause in the Constitution of this State, which declares that "no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States," does not prevent a person who removes to a county while in the service of the United States, from acquiring a residence in that county while in the said service, if it is his intention so to do.

STIPULATION IN AN ACTION.—If a stipulation entered into by the respective attorneys in an action in subsequent proceedings virtually disregarded by both parties, the Court will not, after it has been thus disregarded, enforce it.

SAME.—Query? Is a stipulation, made by the relator or his private attorney with the defendant in an action brought by the Attorney-General in the name of The People against a person for unlawfully usurping an office and to remove him therefrom, binding upon the people?

CONTINUANCE ON GROUND OF SURPRISE.—If a party is taken by surprise by an extension of time to take testimony before a referee, and by the testimony thereby introduced, he should apply for a continuance for that reason in order to procure further evidence on his side, or he cannot have the benefit of the point in the appellate Court.

COSTS OF PRINTING TRANSCRIPT.—If the printed transcript in the Supreme Court is unnecessarily long, the party responsible for this will be adjudged to pay the cost of printing thus unnecessarily incurred.

APPEAL from the District Court, Seventh Judicial District, Mendocino County.

The relator and defendant were both voted for for the office of County Judge of Mendocino County, at the judicial election held in the fall of 1863. The defendant was declared electe-

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by the Board of Canvassers, and was thereafter duly commissioned by the Governor. After the defendant had entered upon the discharge of the duties of the office, the Attorney-General brought an action in the District Court, in the name of The People, upon the information of the relator against the defendant, charging him with having intruded into, usurped, and unlawfully exercised the office of County Judge of Mendocino County. The action was brought under the provisions of the Fifth Chapter of the Civil Practice Act. The complaint alleged that the relator received the largest number of legal votes, and the Court is asked to adjudge the defendant an usurper, and the relator entitled to the office.

An order was made by the Court on the 21st of March, 1864, by consent of parties, appointing James L. Broaddus a referee to take and report the evidence. The order further provided that plaintiff should close his testimony in forty days, and defendant should have forty days thereafter to close his testimony, and that each party should have fifteen days thereafter to take rebutting testimony. June 13th, on application of relator, another order was made that plaintiff have five days further time after June 24th, to take testimony.

June 23d, the attorneys for relator and defendant stipulated that plaintiff might take the testimony of S. M. Smith at any time before the 12th day of July.

On the 7th day of July the following stipulation was entered into:

William H. McGrew, attorney for the relator in the above entitled cause, and Thomas B. Bond, attorney for defendant therein, hereby stipulate and agree that the said cause may be tried at the next term of the District Court of Mendocino County, on the evidence already adduced before the referee, James L. Broaddus, subject to all legal objections, and that neither party will attempt to obtain or offer to produce on the trial any other evidence except that which is expressly herein stated, namely: the plaintiff shall have the right to take before the referee the deposition of Stephen M. Smith, and the defendant the right to take rebutting evidence of not more

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than one witness to that of said Stephen M. Smith, and also not more than one witness in rebuttal to Charles Shanbargen's deposition taken before said referee, and also that defendant be allowed to offer in evidence a certificate of the Adjutant-General, subject to like objections.

July 9th, an order was made, on application of relator, granting him five days from July 11th to take Smith's testimony.

July 8th, defendant's attorney served a notice that on the 18th of July he would move the Court for leave to file an amended answer. On the 18th of July the Court granted leave, and an amended answer was filed. The Court then, on application of plaintiff, continued the cause for the term, on the ground that plaintiff was taken by surprise in consequence of the amended answer.

The District Court rendered judgment excluding defendant from the office of County Judge, and awarding the same to the relator. The defendant appealed.

Bennett, Cook & Clarke, for Appellant.

It is insisted that the course provided by the election laws for a contest is merely cumulative to the rights to contest by information, in the nature of a *quo warranto*.

This we deny, for the reasons:

1. That both remedies are created by statute.
2. The right to hold the office, the manner in which it can be obtained, etc., is regulated wholly by the statute, which fixes and prescribes the mode of its exercise; which same statute provides, in case of contest, the mode and manner in which such contest shall be settled; consequently, the statute must be followed both in the election and contest.
3. Information in the nature of a *quo warranto* was intended to reach an entire different class of officers and persons; persons, for instance, appointed by the Governor, by the Board of Pilot Commissioners, or any other appointing power.

Stipulations have invariably been held binding by the Courts of this State. (*Kalkman v. Bayliss*, 23 Cal. 305; *Doe on*

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demise of *Wetherell v. Bird*, 7 Carr. & Payne; 32 English Common Law Reports, 415, 416; 2 New Hampshire, 521; *Elton v. Larkin*, 5 Carr. & Payne; 24 English Com. Law Rep 372; *Beck v. Lamot*, 13 Howard Pr. Rep. 27; *Malin v. Riney*, Cain's Rep. 117.)

We insist that Courts cannot set aside or disregard a stipulation of this kind, except after notice of motion for that purpose, and a showing that it was entered into by mistake or in ignorance of material circumstances; or, in other words, for the same causes that a Court of equity will set aside any other agreement. (See, as to stipulation, 5 Abbott's Digest, under title "Stipulations.")

George Cadwalader, for Respondent.

The proceeding to contest an election is given to an elector, but an information in the nature of *quo warranto* is a prerogative writ, filed at the instance of the Attorney-General, and designed to protect the State against the exercise of its offices by unlawful tenants. There is no similarity in the proceedings, and the question has always been, not whether the District Court had jurisdiction, but whether the County Court had — the jurisdiction of the latter being supported alone on the theory that the proceeding provided for by the statute was *special*. (*Saunders v. Haynes*, 13 Cal. 152.)

The stipulation of July 7th is a very curious one — and more curious still in a suit brought by the State against the unlawful tenant of an office. In the introduction of evidence in a State case *quasi criminal*, the State, as well as the Court, from high motives of public policy, have some rights which are entitled to respect, and in this particular the rule is different from that of an ordinary civil case, where the parties are at perfect liberty to barter away their rights. Thus, in the election contest of *Searcy v. Grow*, 15 Cal. 119, a judgment of ouster was rendered by default, of which Mr. Chief Justice Field observed that: "In this respect the ruling of the Court was clearly erroneous. The public is interested in a contest of this character; it is not a matter solely between the par-

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ties to the record, and the popular will is not to be set aside upon a mere failure of a party to respond to charges alleged against his right by an individual elector."

And so in this case, we can say that the State had an interest in having the office in dispute awarded to the person who was fairly elected thereto. Suppose, in a capital case, the defendant should rely upon the stipulation of a former District Attorney — during whose term of office he had been indicted — to the effect that only certain witnesses should be called and examined, would not a Court be justified in refusing to hold the State bound by it? We are not aware of a stipulation like this ever having made its appearance before a Court. The cases cited by appellant throw no light on the question, because they all were in cases between private parties, and affected rights of strictly a private nature.

It is claimed that Melindy, McGrew, and Whipple are disqualified on the ground of section four of Article XI of the Constitution of this State. This interpretation cannot for a moment be maintained, because it would make the residence of the elector compulsory — that is, the fact of his being an employé of the Government would continue his previous residence, although he might desire to change it, and manifest that desire by the most unequivocal acts. Appellant says Dr. Melindy, although he removed from Siskiyou in 1861, had been in Mendocino two years; was engaged in raising stock and practising medicine, and was a voter; yet because he had the appointment as physician to the Indians on the Reservation, that, by force of the constitutional provision, made him a resident of Siskiyou.

It is not necessary to say that such a construction of the fourth section of Article XI is absurd. Its words, "*shall be deemed to have gained or lost his residence,*" mean that the Government employment shall not operate so as to give him a residence at the place where his duties are to be performed, nor to subtract from him his previous residence. In other words, it leaves the elector free to fix the place of his residence

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by appropriate acts; and this is just what *People v. Riley*, 15 Cal. 48, decides.

By the Court, SANDERSON, C. J.

It is first claimed by the appellant that the District Court had no jurisdiction in the premises, and that the only remedy in cases like the present is under the statute which prescribes the mode and manner of contesting elections. (Wood's Digest, p. 380, Sec. 51.) No proposition could be more untenable. It is true that the Act providing the mode of contesting elections confers upon any elector of the proper county the right to contest, at his option, the election of any person who has been declared duly elected to a public office, to be exercised in and for such county. But this grant of power to the elector can in no way impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom if it be made to appear that he is a usurper having no legal title thereto. The two remedies are distinct, the one belonging to the elector in his individual capacity as a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative right to enforce their will when it has been so expressed by excluding usurpers and putting in power such as have been chosen by themselves. To that end they have authorized an action to be brought in the name of the Attorney-General, either upon his own suggestion or upon the complaint of a private party against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. It matters not upon what number of individual persons a right analogous in its results when exercised may have been bestowed, for the power in question none the less remains in the people in their sovereign capacity. It has been shared with the elector, but not parted with altogether. Sub-

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stantially the same point was made in the case of *The People v. Jones*, 20 Cal. 50, without success.

It is next claimed that it is nowhere shown by the record that all the election returns of the various precincts were given in evidence, and hence it is argued that neither the Court below nor this Court can determine which candidate received the most votes. It may be true, as claimed, that the record does not state in so many words that all the returns were given in evidence, yet it is apparent from a comparison of the allegations of the complaint, not controverted, as to the number of votes cast, with the number as shown by the returns contained in the record, that such was the case. A formal statement that they were all introduced was not indispensable. If it appear in any manner that such was the fact it is sufficient, and we are satisfied from an examination of the record that all the returns were before the Court. Thus it is stated in the complaint that according to the count of the Board of Canvassers the relator received four hundred and eighty-eight votes, and the defendant five hundred and thirty, which is not denied in the answer. It is also stated in the complaint, and not denied in the answer, that the returns from Noyo Precinct, showing upon their face forty-eight votes for the relator and ten for the defendant, were rejected by the Board of Canvassers. These votes being added to the estimate of the Board, make the entire vote of the county stand for the relator five hundred and thirty-six, and for the defendant five hundred and forty—which is the exact vote as shown by the returns contained in the record. It is manifest, therefore, that all the returns were given in evidence, and that they are now before us.

Upon the face of the returns, as already stated, the defendant received five hundred and forty and the relator five hundred and thirty-six votes, giving a majority of four to the defendant. Upon the trial the Court found that the defendant received five hundred and thirty-five votes and no more, and the relator five hundred and thirty-seven, which was subsequently, at the hearing of the motion for a new trial, reduced

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to five hundred and thirty-six, giving the relator one majority. It is alleged on the part of the appellant that the Court erred in thus deducting from Holden's vote.

Two of these five votes so taken from Holden by the Court were deducted from the returns from Sanel Precinct, which shows thirty-one votes for Holden. The ballots cast at that precinct were introduced in evidence, having been obtained from the Clerk's office, where they are required to be kept at least six months by the Clerk (Statutes of 1863, p. 354, Sec. 35,) from which it appeared that thirty-one Democratic tickets were polled at that precinct. Holden's name was upon all of these tickets except two, from which, as appears on inspection, his name had been torn off. Whether his name was torn off from these ballots before they were cast by the parties casting them or afterwards does not appear. Upon that question no evidence was offered by either side, and no explanation attempted. Thus the question as to the number of votes received by Holden at the precinct in question had to be determined upon the evidence afforded by the certified returns of the officers of the election on the one hand and the ballots on the other. The Court below held that the ballots were the most reliable evidence, and we are of the opinion that its conclusion was not erroneous.

Prior to 1863 there was no rule of law requiring the preservation of ballots cast at an election for any purpose. On the contrary the Inspector of Elections was required to destroy them after the count and completion of the returns. (Wood's Digest, p. 378, Sec. 35.) But in 1863 the law was amended so as to require the Inspector to string the ballots on a cord or thread, and return them with the poll list and tally paper to the County Clerk, to be kept by him for at least six months. (Statutes of 1863, p. 354, Sec. 35.) And it was further enacted that any person might appear before the Board of Canvassers on the day appointed for opening the returns and demand a recount of the ballots if he had any reason to believe that they had not been correctly counted by the officers of the election.

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The Legislature could have had no other design in thus providing for the preservation of the ballots than to make them evidence of their own contents and a test of the correctness of the returns made up from them by the officers of the election. They are in fact made a part of the returns, for it is expressly provided that they shall be sealed up with the poll list and tally paper, with the certificates of the officers attached, and indorsed "Election Returns." Thus they are recognized by the law not only as a part of the election returns, and therefore evidence of what transpired at the election, but as evidence of a higher and more satisfactory grade than the tally paper. Intrinsically considered, it must be conceded by all that the ballots themselves are more reliable, and therefore better evidence than a mere summary made from them. Into the latter errors may find their way, but with the former this cannot happen. The relation between the two is at least analogous to that of primary and secondary evidence. This we do not understand the learned counsel as controverting, but he insists that the use of the ballots as evidence is limited to a test of the correctness of the tally paper on the day appointed for the Board of Canvassers to open the returns, and that on that day they become and thereafter remain *functus officio*. That such was the intent of the Legislature we cannot admit. In no event can the Board of Canvassers postpone the opening of the returns beyond the second Monday after the election. (Statutes 1861, p. 529, Sec. 38.) If at that time it was intended that the ballots should become *functus officio*, and thereafter cease to be a part of the official returns of the election, why provide that they should be preserved and kept by the Clerk for at least six months? Why not direct that they should be destroyed by the Board of Canvassers, as was done by the Inspector under the law as it stood prior to the amendment of 1863? In the same section requiring the ballots to be preserved, we also find a provision requiring the Inspector to retain and preserve for at least six months a poll list and tally paper with the certificates of the officers attached. This provision was part of the law prior to

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the amendment of 1863, requiring the ballots to be preserved, and could have had no other object than to guard against the loss or fraudulent interference with those sent to the Clerk's office, and to furnish additional evidence of what transpired at the election. It is, therefore, manifest that the amendment of 1863, requiring the preservation of the ballots, had a like object, and was enacted for the purpose of further assurance.

Being, as we hold, competent, it is clear that the ballots are primary evidence, and therefore better evidence of the number of votes cast, and for whom, than the tally list made from them by the officers of the election. We must presume that the officers of the election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but on the contrary strung them in the condition in which they were found in the ballot-box on a thread, and sent them in that condition to the Clerk's office. The same presumption exists in relation to their custody by the Clerk. In other words, in the absence of any evidence on the part of the defendant showing that the ballots in question were mutilated subsequent to their being deposited in the ballot-box, we are bound to presume that they were in the same condition when produced on the trial from the proper office and by the proper officer in which they were when deposited in the ballot-box. Any subsequent alteration or mutilation by any one intrusted by law with their custody would be a public crime of great enormity (Wood's Digest, p. 385, sec. 105;) and the commission of a crime cannot be presumed. (*The United States v. Amedy*, 11 Wheaton, 408.) If they were mutilated while in the Clerk's office it was the duty of the defendant to make proof of that fact. Not having been in the custody of the relator, but in that of the proper public functionary, he was not called upon to explain when or how the name of the defendant was torn off. The presumption, as we have already seen, was that his name was torn off by the voters themselves. Upon this presumption the relator could rely, and the labor of overthrowing it rested upon the defendant, who made no effort in that direction.

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There is no force in the argument that the ballots are liable to become mutilated, and ought therefore to be considered of less weight as evidence than the tally list. The officers are required to string them on a cord or thread, and seal them up in a package, and deliver, or cause them to be delivered, to the County Clerk, whose duty it is to safely keep them for at least six months, and the presumption is that he has done so.

It is next claimed that the Court below erred in deducting from Holden's tally the vote of J. M. Neil, cast at Calpella Precinct. The Court found that Neil voted twice for Holden, and it is sufficient to say that, in our judgment, the finding is fully sustained by the evidence. According to the poll list the fourth vote cast at Calpella Precinct was cast by J. M. Neil, and the ninety-second and last vote was also cast by J. M. Neil. That these two votes were cast by the same person and not by two different persons of the same name, there can be no doubt. Neil himself testified that to the best of his recollection he voted in the afternoon, near sundown, for the defendant Holden. It further appears from his own testimony, and that of Mr. Cooley, one of the judges of the election, that on the evening of the election he asked to have his name erased, claiming that he was intoxicated and did not know at the time that he had voted before. There was also evidence tending to show that there was no other person of that name at that precinct, and none to the contrary. The first vote was legal, but the second was not, and the Court did not err in excluding it.

We are also of the opinion that the finding of the Court as to the residence of W. R. Robinson, who voted for Holden at Calpella Precinct, was correct. He left Mendocino County with his family in April, 1863, and went to Sonoma County with the declaration in effect that he was going there to reside. And from that time until and on the day of the election his family continued to reside in the latter county. The most that can be said on the side of the defendant is that the evidence as to Robinson's residence was conflicting. Such being the case, this Court will not disturb the finding. The fact of

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residence being found against him, Robinson's vote was properly rejected.

Nor did the Court err in rejecting the vote of John Carroll, cast at Gualalla Precinct. He came to the county on the 22d of September, and the election was held on the 21st of October following. In order to make thirty days, it would be necessary to count both of those days and the whole of each. The language of the Constitution and of the statute is that the voter must have resided in the county thirty days next preceding the election. In our judgment this language means that he must have resided in the county thirty days next preceding the day of the election. But conceding that it means next preceding the event of the election, such event cannot be said to have transpired until sundown on the day of the election, and a residence of thirty days in Carroll's case would not therefore have been complete until after the polls were closed.

We are satisfied that the foregoing five votes claimed by defendant were properly rejected by the Court, and that the finding that he received only five hundred and thirty-five legal votes was correct.

We now come to such of the votes, which were allowed and counted by the Court for the relator, as are claimed by the defendant to have been illegal.

It is first claimed that two votes at Sanel Precinct were improperly counted for the relator by the Court. It appears from the record that two ballots or pieces of paper with the name of the relator and the names of the other candidates of his party printed thereon three times were found in the ballot box and rejected by the officers of the election. At the trial the Court counted each of these ballots as one vote for the relator.

It is claimed that these pieces of paper were each three tickets folded together, within the meaning of the thirty-fourth section of the Act regulating elections, (Wood's Digest, p. 378,) which provides that where two tickets are found folded

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together, they shall both be rejected. In our judgment this point is not well made.

The twenty-fourth section defines a ballot to be "a paper ticket containing the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen." Thus a ballot, or a ticket, is a single piece of paper containing the names of the candidates and the offices for which they are running. If the elector were to write the names of the candidates upon his ticket twice or three or more times, he does not thereby make it more than one ticket. So long as there is but a single piece of paper there can be but one ticket, and if it can be discovered therefrom who are voted for and the offices for which each was intended to be chosen, it must be counted as one ballot, notwithstanding the voter may have, through inadvertence or otherwise, repeated the names and offices. Being but one piece of paper it can be but one ticket, and can only be counted as one vote. Cushing, in his work on the law and practice of legislative assemblies, at page 40, section 106, observes: "If a ballot happens to have the same name written or printed on it more than once, it is not therefore to be rejected, because as it is but one piece of paper it cannot be counted as more than one vote, and, though the same name is written on it several times, it is yet but one name. Thus, where ballots are prepared for distribution in the usual way practised in some of the States — that is, by the name of the candidate being written or printed several times on the same slip of paper, for the purpose of being cut into separate ballots, and being nearly cut apart, but so as to adhere together at one end — and an elector inadvertently puts two votes not entirely separated into the box, they will be counted as one ballot, unless there are circumstances present which afford a presumption of fraudulent intent, in which case they must either be rejected or the whole ballot set aside."

Nor did the Court err in allowing to the relator the votes of Melindy, Whipple and McGrew. The objection taken by the defendant to their votes is not well founded. They were not

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disqualified by reason of section four of Article Second of the Constitution. That section does not add to or take from the conditions upon which the fact of residence is made to depend. It merely declares that "no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States," which means simply that in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account, or, in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residence can be affirmed or denied. Hence the mere fact that Melindy came to Mendocino County in the capacity of physician, McGrew in the capacity of Supervisor, and Whipple in the capacity of laborer to the Indian Reservation, did not deprive the first of his former residence in Siskiyou, nor the second of his former residence in Sutter, nor the last of his former residence in Contra Costa. Nor did it preclude them from acquiring a residence in Mendocino, if disposed to do so. That it was their intention to acquire a domicile in Mendocino County sufficiently appears from the evidence. Such being the case, there is nothing in the constitutional provision in question (which is merely declaratory of the common law) which stands in the way of their doing so.

The claim that the Court allowed to the relator two votes folded together and found in the ballot box at Round Valley Precinct is not sustained. Whether the two ballots in question were folded together or not was a question of fact for the Court below to find, and that Court found that the evidence failed to prove it. The affidavit of Eberlee, who was Inspector at that place, used on the motion for a new trial, fully explains the alleged irregularity, and shows that, in fact, the two ballots were not folded together. Upon comparing the number of ballots with the poll list, it appears that there were no more ballots cast than there were persons who voted, thereby showing that in all probability the two ballots in question were not cast by the same person.

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So far as the vote of John Ward at Calpella Precinct is concerned, counsel for defendant is mistaken in supposing it was counted by the Court for the relator. The Court in effect found as a fact that Ward did not vote for the relator, but for the defendant; and we think the finding is sustained by the evidence. If Ward was a minor and he voted for the defendant, another vote ought to have been taken from him. The Court, however, so far as we are able to discover, allowed Ward's vote to stand. Of this action, at least, the defendant ought not to complain.

In regard to the points made by counsel for the defendant upon the stipulations of the 23d of June and the 7th of July, it is sufficient to say that in the progress of the case thereafter until the actual taking of the evidence to which they respectively relate, both parties seem to have virtually disregarded them. Thus, on the eighth day of July, the next day after the last stipulation was made, the defendant served notice of a motion for leave to file an amended answer, said motion to be heard on the 18th of the same month. The motion was allowed and the amended answer filed on that day. On the next day—the 19th—the plaintiff filed an amended complaint, and on the same day the Court made an order, on the motion of the defendant, directing that the amended answer be considered as the answer to the amended complaint. On the 9th of July—the next day after the notice of the defendant to the effect that he desired to amend his answer—the plaintiff obtained an order from the Judge of the Court allowing further time to take testimony, which was served on the opposite party.

What effect the amendments to the pleadings may have had upon the issues as they stood at the time these stipulations were made, we are unable to determine, for the original pleadings are not in the record. It may be that the relator could have safely gone to trial upon the issues as they then stood upon the evidence already taken at the time the stipulation was made, but could not if those issues were to be changed.

Moreover, it is very doubtful whether these stipulations

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were ever binding upon the people who were the real plaintiffs in the case. They were not made by the Attorney-General by whom the suit was instituted, but only by the private counsel of the relator. Theoretically the people alone are interested in the determination of the controversy involved in this case, and no Court would be justified in enforcing as against them a stipulation made by the relator or his counsel to their prejudice. The action is in no legal sense under the control of the relator. It was brought in the name of the people and to enforce their will as expressed through the ballot box and not merely to redress the wrongs or enforce the rights of the relator. (*Searcy v. Grow*, 15 Cal. 119.) It is very evident that the case could not have been fairly tried or its merits reached upon the evidence taken prior to the 7th of July, for the evidence then in only disclosed about one third of the official vote of the county, and it would have been impossible to determine upon the real merits of the case whether the defendant or the relator had been elected. Under all the circumstances, we think the Court might, in its discretion, allow the additional evidence to come in. Then the only question remaining would be whether the defendant was surprised; if so, he would have been entitled to a postponement of the trial in order to procure further evidence on his side, if there was any within his reach. But although he knew that the evidence had been taken by the referee and would be reported to the Court and might be received, yet, when it was received he did not claim that he was thereby surprised, and therefore not ready to proceed with the trial. On the contrary, he was silent, and with full knowledge of all the facts, took the chances of a finding in his favor. It will not do to say, as he now does, that he did not ask for an adjournment because he was precluded from so doing by the stipulation in question. The stipulation having been disregarded by the other side and by the Court was no longer obligatory upon him. This must have been known to both him and his counsel.

The record in this case contains nearly three hundred printed

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pages. It is manifest that the whole case could have been fully and fairly presented in a record containing, at the outside, not more than fifty pages. For this we are satisfied that the respondent was, in a great measure, responsible. He must therefore be taxed with half the costs of making up and printing the transcript.

Judgment affirmed, with costs, except as above directed.

SHAFTER, J., dissenting.

The Court below found that the defendant received five hundred and thirty-five legal votes and the relator five hundred and thirty-seven, and that finding is regarded as correct by my brethren. For the purposes of the argument I shall make no question except upon the votes of Melindy, McGrew and Whipple, cast and counted for the relator. Deduct those votes from those thrown for the relator, and the majority will be with the defendant. Counsel agree that those three persons while living in the County of Mendocino, were in the service of the United States.

The fourth section of the Second Article of the Constitution is as follows: "For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison."

Now, if the persons named acquired a residence in Mendocino County, how or by reason of what fact or facts did they acquire it? No reply can be given to this question which does not put the fact of their "presence" in that county as one of the grounds or "reasons" of the result. But that presence was "while they were employed in the service of the United States," and therefore "they shall not be deemed to have gained a residence by reason of it."

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The opinion of my brethren goes upon the idea that if a citizen, having a residence in a given county, enters the military or civil service of the United States and goes to another county and lives there, partly for the reason that it is his duty so to do and partly for the reason that he wishes and intends to change his domicile; or goes solely on the score of duty, but being on the ground, concludes to make the new county his permanent home, and manifests this purpose by appropriate conduct, in that event, his presence in the new county may avail him notwithstanding he may continue in the public service. The difficulty in the way is, that the Constitution provides expressly that his presence while in the public service shall not avail him. The fallacy lies in striking out the words "while employed" and inserting the words "as employé." "While" goes to time, or duration. "As" goes to character or quality. Had the provision been that "no person shall be deemed to have acquired a residence by reason merely of his presence as employé of the Government," perhaps such employé might say: "My presence is not to be referred solely to my employment; I came here for an entirely distinct reason, moving me in my capacity as a citizen." But the constitutional inhibition has no reference to the man nor to his capacities or purposes as such. It goes, instead, upon the relation which the individual bears to the Government, and provides that "while" or during the time that the relation shall subsist, the "presence" of the party shall "for the purpose of voting," be as though it were not. In the treatment of the point now in question, no use whatever can be made of the "presence" of Melindy, McGrew and Whipple in the County of Mendocino. If each acquired a voting residence there, it must have been by force of the facts proved — less the fact of the personal "presence" or inhabitancy. But that is impossible.

Further -- It is clear that all the different classes of persons enumerated in the fourth section of the Second Article of the Constitution are subjected to a common rule. Whatever is true as to one, is applicable to all. Now, this being given, it

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follows, that a person who having his residence in a foreign county, should procure admission as a pauper to the almshouse in the City and County of San Francisco, and should be kept there thereafter at public expense, might claim, on the ground of the opinion from which I feel myself compelled to dissent, that he had "by reason of" his "presence" in the county "while kept in the almshouse at public expense," acquired a right to vote in the county, in the event he could show that he went to the county, or that after he got there, he remained for a double purpose, viz: to afflict the county by his "presence" as a pauper, and to distinguish it by his "presence" as a citizen, after the lapse of thirty days. And whatever is true as to a pensioner upon the public charities, is equally true as to convicts in the public prisons.

It is unnecessary to refer to the historical causes that induced the adoption of the constitutional provision under discussion, or to remark that the habits of mind developed under our system of government, leave little room for the operation of those causes here. But, however it may be now, it is apparent that the force of traditional opinions had neither been broken nor seriously impaired at the time the Constitution was adopted. If the views of the people have changed since it is clear that we cannot notice the change so long as the Constitution remains as it is.

Under the views I take of the case, the judgment should be reversed, and judgment be entered in favor of the defendant affirming his title to the office in dispute.

PARDON G. SEABURY, WARD M. PARKER, AND
HENRY B. GIFFORD v. J. D. ARTHUR, W. N.
ARTHUR, LYNCH GRIFFIN, JOHN REGAN, JOHN
McTAMNEY, AND ANDREW THOMPSON.

BEACH AND WATER LOTS OF SAN FRANCISCO.—The Act of March 26th, 1851, making provision for the disposition of the beach and water lot property of San Francisco, operated as a confirmation of all "Ayuntamiento sales" and

Statement of Facts.

"Alcalde grants" of said property theretofore made, and upon the passage of said Act the title of the grantees and their successors in interest related back to the date of the sale or grant.

SAME.—Where there had been more than one grant of any portion of said property before the passage of the Act by an Alcalde in the usual mode, or in pursuance of a sale, or by order of the Ayuntamiento, the confirmation by relation attached to the oldest grant, and vested the title in the grantee of such eldest grant.

HOW TO ARRIVE AT MEANING OF LAWS.—The whole of a legislative Act must be construed together, and interpreted according to the intention of the Legislature apparent upon its face.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

On the 25th day of September, 1848, William C. Parker, presented a petition to T. M. Leavenworth, Alcalde of San Francisco, for a grant of the block of land then covered by water, bounded by Washington street on the north, west by a street now known as Front street, south by Clay street, and east by a street now known as Davis street, and numbered on a map of San Francisco as block No. 456, which block included the demanded premises. On the same day the Alcalde made and executed a grant of the premises to said Parker, and made a registry thereof in a book then kept by him and now in the possession of the County Recorder of the County of San Francisco, known as Book B of District Records, page 31. The grant was delivered by the Alcalde to Parker in January, 1849, and the same was presented for record and recorded in the Recorder's office, November 28th, 1849, in a book of records then kept by the Alcalde, and now in the possession of the County Recorder, and known as Book F of Deeds.

On the 11th day of October, 1848, the Ayuntamiento or Town Council of San Francisco ratified and confirmed all grants of land which had been made by Alcalde Leavenworth.

On the 1st day of April, 1850, the said Ayuntamiento again confirmed and ratified all grants of land made within the District of San Francisco by the Alcalde.

H. L. Douglass, the lessor of defendant, at the time this suit was commenced had acquired by mesne conveyances all

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the title of said Parker to the demanded premises, and had also acquired the reversionary interest of the State in the property, under a sale made by the Board of California Land Commissioners.

On the 3d day of October, 1849, the Ayuntamiento or Town Council of San Francisco passed a resolution directing all the water lots belonging to the town to be sold at public auction, after public notice of the same being given for three months, and further directing that immediate public notice be given that the grants of water property heretofore made by Alcalde Leavenworth, without three months' previous notice of the making of such grant, are illegal, and that the property will be claimed and held by the town until sold at public auction.

January 3d, 1850, John W. Geary, then Alcalde, sold at public auction, in accordance with the resolution of October 3d, 1849, water lot No. 464, including the premises in controversy, to Thomas Sprague, for one thousand seven hundred dollars, and executed and delivered to him a deed therefor.

Plaintiffs at the time this action was commenced had acquired all of Sprague's title to the demanded premises. The complaint was in ejectment, in the usual form. The District Court gave judgment for defendants, and plaintiffs appealed.

The other facts are stated in the opinion of the Court.

S. W. Holladay, for Appellants.

"The regularity of the respective grants is not contested." The following, then, are the positions assumed by the respective parties hereto.

The defendants claim superior title to the land, under the Water Lot Act, because:

1st. Their Alcalde grant is of a date prior to that of plaintiffs'; and,

2d. Because, as they are in possession, with title, plaintiffs cannot recover without showing better title.

On the other hand, plaintiffs claim:

1st. That, in a case like this, of two grants to the same

land, (one of each sort mentioned in the statute,) the Water Lot Act gave the land to the *purchasers* at the Alcalde's auction sale, (plaintiffs' title) in preference to the Alcalde's grantees, on petition, (defendants' title.)

2d. In case plaintiffs are not sustained in that position, then, as there are two grants to the same land, both of which come within the terms of the statute, then the law gives the land to *both* of them, equally, and as both cannot take the whole, it follows that each takes one half, and the judgment should have been for plaintiff for an undivided half.

The decision of this case depends upon the construction of the Water Lot Act of March 26th, 1851, entitled "An Act to provide for the disposition of certain property of the State of California."

The Act does not "confirm" these various city titles or Alcalde grants or deeds; but, on the contrary, it contains express, positive, and apt words of grant *in presenti*. "The same (i. e. the lots of land) are hereby granted," is the language of the statute. These papers produced by the respective parties, such as an Alcalde grant, or a deed by the Alcalde at the auction sale, according to the Kearny grant, are useful only to designate the legislative grantees respectively—they are referred to as the earmarks, to identify the donees contemplated in the Act as *descriptio personarum* of the legislative grantees; but the papers themselves, or rather the transactions noted in them, are not confirmed by the statute in terms, nor by implication.

As between the purchasers at the auction sale and the grantees of the Alcalde, the Act "hereby" grants the land, first and in preference, to the *purchasers* at the auction sale, as distinguished from the Alcalde grantees; or in the absence of such *purchaser*, then it gives the land to any grantee of the Alcalde. This plain distinction runs clear through the second section of the Act. The lands "which have been sold" are first enumerated before those which have been "granted" by any Alcalde. Next, the lands are hereby granted and con-

Argument for Respondents.

firmed to the *purchasers* before the grantees; and, lastly, the State relinquishes the use and occupation of the land to the *purchasers*, or in the absence of such, to the grantees.

Haight & Pierson, for Respondents.

Upon what ground any paramount right can be asserted by a party *out of possession*, under a *subsequent* confirmed grant, against a claim against a party *in possession* under a *prior confirmed grant*, it would not be easy to discover.

The argument seems to be that as the purchasers are named *first* in the order of the words in the statute, when the language is "purchaser or purchasers or grantees," *therefore*, in case of a conflict between a purchaser and a grantee, the purchaser has the better title.

This idea, now advanced for the first time, does not seem to have been suggested to the Court in the case of *Seabury v. Field*, involving this same lot, decided by the Supreme Court of the United States, in Howard, p. 324, and has therefore the merit of novelty. Where different classes of grants are named in a statute as the subject of confirmation, no one ever before supposed that the order of the words had anything to do with the question of priority.

If A. and B. each have a grant of the same lot, and both grants are confirmed, whether A. or B. is named first would be wholly immaterial. The confirmation would in each case relate back to the date of the grant, and the grant which was first made in fact must have precedence.

The word "confirm" is used, which indicates the nature of this legislative Act. (Sedgwick on Construction, 591.)

Burrill, in his Law Dictionary, defines confirmation as "a conveyance of an estate or right *in esse* whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased;" also as "an approbation of or assent to an estate already created by which the confirmation strengthens and gives validity to it as far as it is in his power." He says the most common and proper words are "ratified, approved, and confirmed;" and Blackstone says (Book 2d, marg. p. 325)

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the most usual words are "given, granted, ratified, approved, and confirmed;" thus indicating the similarity of sense between ratification and confirmation, which are really equivalent words.

If, then, the Act of 1851 was in its essence and effect a confirmation of these grants, the same rule applies which is stated by the United States Supreme Court in *Landes v. Brant*, 10 Howard, 372, "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation." (Viner's Abr. Tit. Relation, 290; *Jackson v. Ramsay*, [printed McCall,] 3 Cowen, 79, 80; *Crowley v. Wallace*, 12 Mo. 147.)

By the Court, SAWYER, J.

The lands in question constitute a portion of the "beach and water lots" of San Francisco, as defined by the Act of March 26th, 1851, entitled "An act to provide for the disposition of certain property of the State of California." (Laws 1851, p. 307.) The defendants are in possession, claiming title under the provisions of said Act, and a grant to William C. Parker from Alcalde Leavenworth, dated September 25th, 1848, confirmed by resolutions of the Ayuntamiento or Town Council of the District of San Francisco, and registered and recorded before the 3d day of April, 1850, in the books of record then in the Alcalde's office, but afterwards turned over to, and now remaining in the custody of the Recorder of San Francisco, and also constituting a portion of the records of his office.

Plaintiffs seek to recover the lands, and rely upon the same Act and a grant to Thomas Sprague, executed by Alcalde Geary in pursuance of a sale at auction of the beach and water lots by direction of the Ayuntamiento, made on the 3d day of January, 1850. The question is, as to which party acquired the title.

Section two of the Act provides, that, "all the lands mentioned in the first section of this Act, which have been sold

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by the authority of the Ayuntamiento, etc., * * *; or which have been sold or granted by any Alcalde, etc., * * * [describing the lands in terms sufficiently broad to embrace both of said grants,] shall be and the same are hereby granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the State relinquishing the use and occupation of the same and her interest therein to the said purchasers or grantees, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years." * * * It then exempts the Government reservations, "except that any estate held by virtue of any lease or leases executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof." * * *

Section three provides, that "the original deed or other written or printed instruments of conveyance, by which any of the lands mentioned in the first section of this Act were conveyed or granted by such Common Council, Ayuntamiento or Alcalde * * * may be read in evidence in any Court of justice in this State, * * * and shall be *prima facie* evidence of title and possession, to enable the plaintiff to recover the possession of the land so granted."

It is said that these provisions do not in terms purport to confirm the grants — the instruments executed by the Alcaldes — but, on the contrary, to make an original legislative grant without reference to any equitable rights of the parties claiming under the Alcalde grants; that those sales and grants were referred to, not because it was intended to validate and confirm them, but only to identify the individuals who were to be the recipients of the legislative bounty. It is true, the instruments in writing are not expressly mentioned as the objects to be confirmed. But the instruments are not the grants or things to be confirmed. They are but the evidence of the action of the municipal officers. But the Act does refer to lands "sold by authority of the Ayuntamiento," or "sold or granted by the Alcaldes," etc., and says that "the same are hereby granted and confirmed to the purchaser, or purchasers, or

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grantees aforesaid." The term "granted" is used, it is true, but the word "confirmed" is also used with reference to the prior sales and grants, and the purchasers and vendees under them, which shows that it was the intention to validate and give effect to the former sales and grants, which were invalid without such confirmation. When speaking in the same section of leases by the Government officers — which were equally invalid — the Legislature say, "that any *estate* held by virtue of any lease, etc., shall be and the same is hereby granted and confirmed to the lessees thereof." These leases did not purport to grant the land, and the Act did not grant or confirm *any estate* except that which the leases themselves purported to convey. It is evident from the whole object, scope and tenor of the Act, and the circumstances surrounding the subject matter about which the Legislature were then legislating, that there was something more intended by the language used than the identification of the objects of legislative bounty. Parties had procured grants and leases of lands from the only officers who assumed to act in such matters, upon the consideration usually demanded at that time, and had made valuable improvements on the faith of such contracts. It manifestly seemed to the Legislature that such parties had an equitable claim upon the State to have their grants confirmed, and in consideration of such supposed equitable rights these provisions were introduced into the Act, with the intent not only to grant these lands, but to grant and confirm them to the parties supposed to have the equitable title, and to no others; and to confirm the lands to such parties in the character of purchasers and grantees under the original grants, and not as the recipients of gratuitous favors. No other parties are referred to or provided for in the Act, and the word "confirmed" is an apt and proper one to express that intention. This intent appears the more clearly from the provisions of the third section, where the instruments executed by the Alcalde are mentioned in express terms, and it is provided "that the *original deed or other written or printed instruments of conveyance* by which any lands, etc., were conveyed by such Com-

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mon Council, Ayuntamiento or Alcalde, etc., may be read in evidence, etc., and shall be *prima facie* evidence of title," etc. These very instruments are here expressly made the evidence of title. Why was this, if it was not intended to ratify, confirm and give them effect; if it was not designed that the legislative grant should relate to, confirm and give vitality to the grants purported to be evidenced by these instruments? We must not confine ourselves in the interpretation of this statute to the word "granted" alone, or adhere too strictly to the mere definition of words. A legislative Act is to be interpreted according to the intention of the Legislature apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the Legislature. (*Wilkinson v. Leland*, 2 Peters, 662.) The whole Act must be construed together. And, looking to all its provisions, we can give it no other construction than that it was the intention to confirm and give effect to the grants referred to in the Act. The word "granted" was properly used, because the title was in fact then in the State, and it might be necessary—it was at least proper—to make the act of confirmation of the former sales effectual.

Such being the case, the confirmation has relation to the Alcalde grants—the first act in the series upon which the title depends—the consideration, so to speak, upon which the legislative grant and confirmation are based, and the title by relation will date from the date of said grants by the Alcalde. The title of the defendants is, therefore, the oldest, and must prevail.

In this case the equities also seem to be with the defendants, for at the sale at auction in 1850, when the lot in question was put up, notice of the prior grant to Parker, and that the parties claimed title under it, was publicly given, and Sprague purchased with actual notice. The last sale had no greater validity than the first; and it equally required the confirmatory grant of the Legislature to give it validity.

There does not appear to us to be any force in the argument

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based upon the order in which the various classes of titles confirmed are mentioned in the Act.

Appellants insist, that if they have not the prior right, the plaintiffs and defendants are, at least, both donees under the statute, standing *æquali jure*, each taking one half, and that they are entitled to recover to that extent.

Seabury before brought a suit against Field in the United States Circuit Court, to recover the lot now in controversy, and the cause went to the Supreme Court of the United States on a writ of error. Both parties relied upon these same titles. Upon the trial in the Court below, the Judge, in his charge to the jury, among other things, said: "Both parties in the suit bringing themselves within the classes designated, the defendants being in possession, as has been ascertained by the evidence, would, on principles of law, be entitled to a verdict." And the Supreme Court of the United States, in reviewing this portion of the charge, said: "In this the Court was correct." (*Field v. Seabury et al.*, 19 How. S. C. U. S. 330.) Admitting, then, that both parties are within the classes of grantees designated by the Act, under the law as here laid down, the plaintiffs are not entitled to recover. There is certainly no intention manifested on the face of the Act to grant an estate in common to Parker and Sprague, or their respective grantees.

But, if the views before expressed are correct, although both are within the terms of the Act, the title of the defendants originated in a prior grant, and takes the precedence. It must therefore prevail.

Judgment affirmed.

DAVID CALDERWOOD v. ROBERT C. BROOKS,
ANTHONY RILEY, AND JAMES BURKE.

PARTIES TO MOTION FOR NEW TRIAL.—One of several parties against whom a judgment is rendered, who does not join in a motion for a new trial, cannot complain of alleged error in denying a new trial.

Points decided.

RESIDENCE OF DEFENDANT SERVED WITH SUMMONS.—If the affidavit of service of summons states the county in which service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made.

DESCRIPTION OF LAND SUED FOR IN A SUMMONS.—In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint.

EVIDENCE OF SERVICE OF A NOTICE.—A statement on the back of a notice of motion for a new trial, signed by the attorney of the moving party, stating that the notice was served at a certain time, is not evidence of such service.

NOTICE OF MOTION FOR NEW TRIAL.—Unless the record contains evidence of the service of the notice of motion for a new trial, or it clearly appears from the record that service of the notice was waived, the Court has no jurisdiction of the motion.

WAIVER OF SERVICE OF NOTICE.—If the record does not show that the party resisting an application for new trial proposed any amendments to the statement, or participated in its settlement, it will not be presumed that he waived service of notice.

OBJECTION TO WANT OF FINDINGS.—If a party does not request the Court to file findings, or move the Court to amend its findings, and upon a refusal of the Court to do either, except thereto, he cannot complain of a want of or the insufficiency of the findings.

AGAINST WHOM A RECOVERY IN EJECTMENT IS EVIDENCE.—The recovery of a judgment in an action of ejectment is evidence that at the commencement of the action the plaintiff was entitled to the possession as against the defendant; but, in order to constitute it evidence against a third person, not claiming under the defendant, it must be shown that the third person bore such a relation to the defendant's title that it was his duty to have defended the action upon the requisite notice thereof being given, and that he had a proper opportunity to make a defense founded upon his title.

WAIVER OF FORFEITURE OF A LEASE.—The forfeiture of a lease is not waived by the lessor allowing the tenant to hold over without notice to quit, unless there are circumstances which show that a new term has been created between the parties.

APPEAL from the District Court, Twelfth Judicial District.
City and County of San Francisco.

The facts are stated in the opinion of the Court.

E. A. Lawrence, for Appellant.

David Calderwood, in *pro. per.*, for Respondent.

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By the Court, RHODES, J.

This is an action of ejectment. The default of Riley and Burke, two of the defendants, was entered, and the action was tried by the Court as against Brooks, the remaining defendant, and judgment was rendered against all the defendants. Brooks moved for a new trial, and the motion having been denied, all the defendants appeal from the judgment and from the order denying a new trial. Riley and Burke cannot complain of alleged errors of the Court in refusing the new trial, for they were not parties to the motion. They allege that the affidavit of service of the summons is insufficient, because it does not state that they resided in San Francisco. It states that they were served in that county, and it will be presumed, nothing to the contrary appearing, that they resided in the county in which they were served with process. It is also claimed that the summons does not warrant the default, because it does not contain a description of the land sued for. It appears that the three defendants were served with process in the same county, and that a copy of the complaint was served upon Brooks alone. The statute (Practice Act, Sec. 28) does not require the copy of the complaint to be served on more than one of the defendants residing in the county, and therefore the service upon the one, is deemed a service upon all the defendants within the county. In the summons the "cause and general nature of the action" is described in these words: "And said action is brought to recover the possession of certain land and premises, more particularly described in the complaint herein." The complaint is thus by reference made a part of the summons, and it affords a proper description of the premises. The summons and affidavit were sufficient to authorize the entry of the default.

The plaintiff insists that the order of the Court in denying the motion for a new trial cannot be considered, because the notice of the motion was not served upon him. The record must contain the evidence of the service of the notice, or it must clearly appear from the record that service of the notice

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was waived, (*Munch v. Williamson*, 24 Cal. 167; *Bear River v. Bolles*, Id. 354; *Flateau v. Lubeck*, Id. 364.) The following indorsement appears upon the notice of the defendant's motion for a new trial. "Service admitted of the within notice, November 17th, 1863, served D. Calderwood, November 17th, 1863, by sending notice in envelope (paying postage) directed to D. Calderwood, San Francisco. M. H. Furman." The notice was signed by "W. H. Furman, attorney for the defendant." The indorsement affords no evidence of the service, for it is not an admission by the plaintiff of service, and the service by mail is not verified by the certificate of an officer authorized to make service, nor by the affidavit of any person. Service upon a party may be personal, or by leaving the notice at his residence, or by mail if his residence is not known. (Prac. Act, Sec. 520.) It does not appear that the plaintiff's residence was unknown, and therefore the service by mail did not constitute a legal service.

It does not appear, either expressly or by implication, that service of the notice was waived. It appears, from a notice signed by the plaintiff, attached to the statement on motion for a new trial, that he offered to return the statement to the defendant's attorney, for the reason, among others, that the notice of the motion had not been served on him, and it does not appear that the plaintiff proposed any amendments to, or participated in the settlement of the statement. The minutes of the Court show that the plaintiff moved to strike out the motion for a new trial, and the statement. Under these circumstances he cannot be deemed to have waived the service of the notice of the motion.

The notice of the motion not having been served, the Court below had no jurisdiction of the motion; and the statement on the motion, including the grounds properly resting upon the statement for their support, must be disregarded by this Court on appeal. This leaves the case to stand upon the judgment roll, and we can notice only the errors appearing therein.

The defendant, among his points, assigns for error the order

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striking out a part of the answer of Brooks. We cannot find in the transcript a motion to strike out any part of the answer; the record fails to disclose what portion was stricken out; and it does not appear that the defendant took an exception to the order striking out a part of the answer; and we are therefore unable to understand why counsel should have presented the point.

The further points are made that the Court erred in overruling the defendant's exceptions for the want of a finding, and his motion to modify the same, and in ordering judgment without filing any findings. It appears from a paper copied into the transcript, but which forms no part of the judgment roll, or a statement or bill of exceptions, that the defendant, thirteen days after the Court ordered judgment for the plaintiff, and three days after the entry of judgment, excepted to the entry of the judgment for the reason that no findings of fact and conclusions of law were filed. But we find no motion that the Court amend the findings, nor any exception of the defendant to the refusal of the Court to file findings after objections made, as prescribed by the Act of 1861, to regulate appeals (Statutes 1861, p. 589); and the transcript shows that subsequently to the defendant's objections for the want of a finding, the Court filed its findings of fact and conclusions of law, and thus obviated the objection made. The points seem not only not well taken, but destitute of all support.

The only question in the case presenting any difficulty is whether the findings of fact support the judgment. It appears by the findings that the action of *Edmond Brooks v. Ross et al.*, in which Calderwood and R. C. Brooks were also defendants, was commenced March 14th, 1861, and judgment therein against R. C. Brooks, but not against Calderwood — the action having been dismissed as to him — was rendered November 12th, 1862, and on the 8th day of May, 1863, R. C. Brooks was dispossessed by virtue of the writ issued upon the judgment. This action was commenced in April, 1863, and it is found that R. C. Brooks entered under a written lease, dated November 13th, 1861, for the term of one year, and that he and the other

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defendants were in possession at the commencement of this action. It is argued that the proceedings, judgment and writ in the case of *Brooks v. Ross*, and the fact that under the writ R. C. Brooks was evicted from the premises, prove that the title of Edmond Brooks is paramount to that of Calderwood. The judgment roll in that case which is inserted in the statement in this case cannot be looked into to determine the question, for the reasons already given, but we are confined to the findings. It is not stated in the findings that the title of Edmond Brooks was superior to that of Calderwood, nor that he had the right of possession as against Calderwood, nor what was the right or title of Edmond Brooks upon which he recovered the possession, nor that any right or title of, or derived from, Calderwood, was in issue in that action. It is not to be presumed that Calderwood's title was in issue, for the reason, if for none other, that at the commencement of that action no privity between him and R. C. Brooks appears, but it is found that Brooks entered as his tenant after the commencement of the action. The recovery in ejectment by the plaintiff is evidence that at the commencement of the action the plaintiff was entitled to the possession as against the defendant, but in order to constitute it evidence against a third person, not claiming under the defendant, it must be shown that the third person bore such a relation to the defendant's title, that it was his duty to have defended the action, upon the requisite notices thereof being given, and that he had a proper opportunity to make a defense founded upon his title. The findings do not show any privity between Calderwood and R. C. Brooks at or before the commencement of the action of *Brooks v. Ross*, and the judgment is not evidence of title in Edmond Brooks paramount to that of Calderwood. It appears from the findings that R. C. Brooks entered as Calderwood's tenant for one year, that the year had expired, and that the tenant had forfeited his lease before the commencement of this action. The plaintiff was thereupon entitled to recover the possession of the leased premises. The forfeiture was not waived, as the defendant argues, in consequence of the tenant's holding over and no

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notice to quit being given, for the mere holding over would not entitle him to notice to quit, nor would it amount to a waiver of the forfeiture, unless the holding over was under such circumstances that the Court would be justified in finding that a new term had been created between the parties. This matter is set at rest by the fact that the Court has not found that a further term, commencing at or after the expiration of the year, was created. In our opinion the finding supports the judgment.

Judgment affirmed.

JOHN ECHOLS v. C. D. CHENEY.

DEED BY AN ATTORNEY IN FACT.—A deed made by an attorney in fact, in which he names himself as the attorney in fact for his principal as the party of the first part, and to which he signs his own name opposite the seal, as the attorney in fact of his principal, does not convey the title or interest of the principal in the land therein described, either under the Mexican or common law. The words "attorney," etc., are merely *descriptio personæ*, and the mere fact that the party of the first part is the attorney does not make the deed a deed of the principal.

APPEAL from the District Court, Third Judicial District, County of Santa Clara.

The following is the deed under which respondent claimed title:

This indenture, made the second day of November, in the year of our Lord one thousand eight hundred and forty-nine, between Henry P. Chase, attorney for Henry L. Sheldon, of the Sandwich Islands, in the Pacific Ocean, of the first part, and Richard M. Harmer, of the Pueblo de San José, of the second part, witnesseth: That the said party of the first part, in consideration of the sum of three hundred dollars, in hand duly paid, hath sold and by these presents doth grant and convey unto the said party of the second part, his heirs and assigns forever, all that certain piece or parcel of land lying and being in the Pueblo de San José, and known to be lot number eight, (8,) in block number three, (3,) and range

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four, (4,) north of the base line, containing fifty varas square, according to the survey of said city, said lot being the corner of Fourth and St. John's streets, together with all and singular the rights, privileges and appurtenances thereunto belonging, or in anywise appertaining; to have and to hold the same unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

[SEAL.]

HENRY P. CHASE.

Attorney for Henry L. Sheldon.

The other facts are stated in the opinion of the Court.

S. O. Houghton, for Appellant.

The deed is an indenture made "between Henry P. Chase, attorney for Henry L. Sheldon, of the first part," etc.; "and Richard M. Harmer," etc., "of the second part," whereby the said party of the first part, that is to say, Henry P. Chase, "grants and conveys unto the said party of the second part" the premises in question, and concludes as follows:

"In testimony whereof, I have hereunto set my hand and seal," etc.

[SEAL.]

"HENRY P. CHASE,

"Attorney for Henry L. Sheldon."

The party of the first part is Henry P. Chase, and the deed conveys the title of the party of the first part, and does not purport to convey anything more. The concluding clause runs thus: "In witness whereof, I," that is to say, Henry P. Chase, the said party of the first part, "have hereunto set my hand and seal, the day and year first above written;" then follows the signature of Henry P. Chase and his seal, under which it written, "Attorney for Henry L. Sheldon."

The conveyance is not made in the name of Sheldon, nor is Sheldon named therein as a party thereto. It is not therefore the deed of Sheldon, and did not convey his title to the prem-

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ises. (*Elwell v. Shaw*, 16 Mass. 46; *Fowler v. Wells*, 7 Mass. 18; *Devinney v. Reynolds*, 1 Watts & Sergeant, 328; *Townsend v. Corning*, 23 Wend. 440; *Clarke's Lessee v. Courtney*, 5 Peters, 31; 9 Curtiss, 366.)

Moore & Laine, for Respondent.

Passing the common law authorities cited by appellant, and granting for the sake of argument that he is correct as to the rule at common law, we claim that at the civil and Mexican law the rule was otherwise. The rule under the civil or Mexican law was, as we understand it, that a power executed by the attorney in his own name binds the principal when the agent acts in the business intrusted to him and within the scope of his power; the liability of the principal under that system depended on the act done, and not upon the form in which it had been executed; in this case there is no question as to the sufficiency of the power under which Chase acted, hence the execution is good. (See *Hopkins v. Lacouture*, 4 La. O. S. 64, and Story on Agency, Note 3 to Section 162.)

By the Court, CURREY, J.

This is an action of ejectment, commenced in December, 1863, to recover a lot of land in the City of San José. The defendant's answer is a traverse of each and every material allegation of the complaint. The action was tried before the Court without a jury and a finding was rendered in favor of the plaintiff. The defendant moved to set aside the conclusions of law stated in the finding, and instead to substitute that "the defendant is entitled to judgment for costs." The motion was denied and the defendant excepted. The defendant then moved the Court, upon the pleadings and facts found, to render judgment for the defendant. This motion was also denied and the defendant excepted, and thereupon judgment was entered for the plaintiff.

From the finding of facts it appears that both parties claim to derive title to the premises from a common source — Henry

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L. Sheldon. The Court find that in 1849 Henry L. Sheldon made, executed, acknowledged and delivered to Henry P. Chase a full power of attorney for the sale of said land, which was duly recorded in the records of the Pueblo of San José in that year.

"That in the year 1849 the said Henry P. Chase, as attorney of Henry L. Sheldon, for a valuable consideration made, executed, acknowledged and delivered a deed of the premises to Richard Harmer, of all the right, title and interest of said Sheldon to said premises, which said deed was duly recorded in the year 1849, in the records of said Pueblo, at San José, which deed bears date 1849, and is hereby referred to and made a part hereof."

That in June, 1862, Richard Harmer, for a valuable consideration, conveyed by deed his right, title and interest in the premises to the plaintiff, which deed was duly acknowledged and recorded in the same month.

That in October, 1862, Henry L. Sheldon, for a valuable consideration made, executed, acknowledged and delivered his deed of said lands and premises to Davis Devine, the defendant's landlord, which deed was duly recorded before this action was commenced.

In the transcript is found a copy of the deed, which is the one referred to by the Court, purporting to have been executed on the 2d of November, 1849, "between Henry P. Chase, attorney for Henry L. Sheldon, of the Sandwich Islands, in the Pacific Ocean, of the first part, and Richard M. Harmer, of the Pueblo of San José, of the second part," by which the "party of the first part, in consideration of the sum of three hundred dollars, in hand duly paid, hath sold and by these presents doth grant and convey unto the said party of the second part, his heirs and assigns, forever," the premises in controversy. The *testatum* clause of the deed is as follows: "In witness whereof I have hereunto set my hand and seal the day and year first above written." It is signed "Henry P. Chase, attorney for Henry L. Sheldon," and opposite the name of Chase is affixed a seal. The deed is acknowledged by him as the person who executed it, and it

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was recorded in Book Five of *Solars*, in the Recorder's office of the County of Santa Clara. The Court finds that the deed executed by Chase was a deed of all Sheldon's right, title and interest in the premises, and was executed by him as the attorney of Sheldon. This finding was not sustained by the deed referred to by the Court. The deed does not purport to have been executed by Chase as Sheldon's attorney, nor to convey any right, title or interest of Sheldon in the premises described.

It is not pretended on the part of the respondent that the deed executed by Chase would be effectual to transfer and convey the title and interest of Sheldon in the premises according to the rules of the common law, but it is contended on his behalf that at the date of the deed the law of Mexico was the law of the land, and that by the Mexican law the power which Chase, the attorney for Sheldon, possessed, might be lawfully executed by the attorney in his own name so as to bind his principal, and that it was so executed in this instance. Escribiche defines a letter of attorney (*procuracion*) to be a deed by which one person empowers another to do some particular thing in the name of the constituent, and the same authority defines an attorney in fact (*procurador*) to be one who, by virtue of power derived from another, is authorized to perform some specified act in the name of the constituent of the power. By reference to the deed executed by Chase it will be seen that he did not profess to act for or in the name of Sheldon, nor to convey the premises in dispute as the property of Sheldon. The addition to his name of the words "Attorney of Henry L. Sheldon" was a mere *descriptio personæ*. The fact that in truth he was the attorney or *procurador* of Sheldon cannot, by the most liberal rule of interpretation, impart to the instrument executed by Chase the character of a conveyance by Sheldon. Chase might as well have described himself as of any other profession or occupation belonging to him as that of "Attorney of Sheldon."

Judgment reversed and a new trial ordered.

Statement of Facts.

**JAMES B. HAGGIN *et al.* v. WILLIAM S. CLARK *et als.*
AND NATHAN ROGERS.**

APPEAL FROM AN ORDER MADE ON AFFIDAVITS.—In an appeal taken from an order made after final judgment, upon affidavits filed, it is not necessary to make a statement, nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order.

APPEAL FROM AN ORDER WHERE THERE IS A STATEMENT.—In an appeal from an order made after final judgment, if appellant makes a statement and relies upon it in the appellate Court, the statement must contain the grounds upon which the appellant intends to rely on appeal, or it will be disregarded.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

On the 9th day of February, 1863, James B. Haggin *et al.* recovered judgment in the District Court of the Fourth Judicial District, City and County of San Francisco, against William S. Clark *et al.*, for the possession of a lot of land in said city. Nathan Rogers was not one of the defendants by name in the judgment. On the 6th day of January, 1864, a writ was issued on the judgment and placed in the Sheriff's hands, by which he was commanded to place the plaintiffs in possession of the land described in the judgment. On the 22d day of June, 1864, the Sheriff returned the writ with an indorsement thereon dated February 7th, 1864, that he had placed the plaintiffs in possession of the premises.

On the 13th day of July, 1864, the plaintiffs presented affidavits to the Judge of said Court, stating that by virtue of the said writ Nathan Rogers was by the Sheriff dispossessed and put out of possession of a portion of the premises described in the writ and plaintiffs were put in possession, but that on the first day of July, 1864, said Rogers re-entered and by force excluded plaintiffs, and from thence had detained the same, in contempt of the Court and its process.

Plaintiffs asked for an order to show cause why Rogers should not be punished for contempt for re-entering without having any right so to do, after having been dispossessed. (See Laws of 1862, page 115.)

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The Judge made an order requiring Rogers to show cause before him on the 18th day of July, 1864. Rogers at the hearing filed counter affidavits. Considerable record evidence was introduced by plaintiffs at the hearing. The Court discharged the order and plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellants.

James M. Taylor, for Respondent.

By the Court, SHAFTEE, J.

This is an appeal from an order discharging an order requiring the respondent to show cause why an attachment should not issue against him for a contempt of Court, within the provisions of an Act passed April 8, 1862, entitled "An Act for the punishment of contempts and trespasses."

There is a statement annexed to the record of the order appealed from and all the errors complained of arise upon the statement.

The respondent insists that there is no sufficient specification in the statement of the grounds upon which the appellant intended to rely in this Court, and that for the want of such specifications the order should be affirmed. The appellant, in reply to this objection, insists, in the first place, that in a case like the present, no specification of the grounds intended to be relied on is necessary; and in the second place, if mistaken in the first position, that the record shows a specification, and one as precise in its terms as the law requires.

First — We consider that a specification was necessary to entitle the plaintiff to a hearing upon the statement. True, section three hundred and forty-three of the Practice Act provides: "That the last five preceding sections (338, 339, 340, 341, 342) shall not apply to appeals taken from an order made upon affidavits filed, but such affidavits shall be annexed to the order in place of the statement mentioned in those sec-

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tions." But the order appealed from here was not made upon affidavits alone. Had it been, it would not only have been unnecessary to specify the grounds of appeal, but a statement would have been unnecessary also. But the transcript contains a "statement" by designation, and the document is certified to by the Judge, at appellants' request, as a "correct statement for the purposes of the appeal." But the "statement," in addition to the affidavits used at the hearing on the order to show cause, contains the writ of restitution issued on the judgment recovered by the plaintiffs in *Haggin et al v. Clark et als.*, together with the officer's return thereon, and a stipulation that the judgment is correctly described in the writ. It shows, further, that when these papers were offered in evidence the respondent objected to their admissibility, that the objection was overruled by the Court, and that the respondent excepted. It further appears from the "statement," that the appellant gave in evidence the judgment roll in *Rogers v. Haggin et al.*, and Rogers' statement on motion for new trial therein, in which statement all the parol and documentary evidence introduced on the trial of that action was set forth, together with the order of the Court denying the motion. It further appears from the statement herein that the respondent objected to the admissibility of those records and files, and that he excepted to the decision of the Court overruling his objections. The "statement," then, is not only a statement in form, but it fulfils all the uses of a statement, and may be said to demonstrate its own necessity. The purpose of the appellants in putting the record and proceedings in *Rogers v. Haggin et al.* in evidence, was to estop the respondent from proving that he was not a party defendant in the ejectment suit of *Haggin v. Clark et als.*, or rather to estop him generally from averring and proving that he was not bound by the judgment in that action. Had the appeal been taken from the order as related to the affidavits alone, there could have been no doubt as to the correctness of the decision of the Court below; but the appellant having, as he considered, established an estoppel as against the affidavits of the respon-

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dent, very properly concluded that he could not have the benefit of it in an error unless he embodied the materials upon which the estoppel was cast in a statement to be annexed to the record of the order. The record, then, not only contains a statement in form but a statement in substance also; that is, a statement made to meet the legal necessities of a case to be brought to this Court for review. It follows that the statement made, to entitle the appellants to be heard upon it, should conform to the provisions of the three hundred and thirty-eighth section of the Practice Act; and one of the provisions of that section requires that whenever a statement is made it "shall contain the grounds upon which the appellant intends to rely on appeal;" and "if it does not contain such specification the statement will not be noticed." (*Barrett v. Tewksbury*, 15 Cal. 358; *Reynolds v. Lawrence*, Ib. 359; *Hutton v. Reed*, 25 Cal. 478.)

The record in this case contains a specification in the following language: "To which order and decision the said plaintiffs then and there duly excepted, and assign as error that said order and decision are against law." This specification is too general to subserve any useful purpose and might as well have been omitted. The objects intended to be secured by section three hundred and thirty-eight of the Practice Act are distinctly set forth in *Hutton v. Reed* and in the case of *Barrett v. Tewksbury*, and require no restatement here. This case is clearly within the rule established by those decisions. In *Barrett v. Tewksbury* the Court announced that it would forbear to apply the rule to cases then pending, but as to the future, parties and attorneys were distinctly told that the rule would be rigidly enforced; and this monition was reiterated, in effect, in *Hutton v. Reed*. The respondent does not waive the benefit of the rule, but claims that it should be enforced in his favor.

The order appealed from is affirmed.

Statement of Facts.

THE PEOPLE *ex rel.* CHARLES B. POLHEMUS v. O.
C. PRATT, JUDGE OF THE DISTRICT COURT, TWELFTH
JUDICIAL DISTRICT.

WHEN MANDAMUS DOES NOT LIE.—If the plaintiff in an action moves for a judgment of dismissal at his costs, and the motion is resisted by the defendant, and denied by the Court, a writ of mandate will not be issued commanding the Judge to enter a judgment of dismissal.

SAME.—In refusing to enter a judgment of dismissal in an action on plaintiff's motion, the Judge acts judicially, and a mandamus does not lie to compel him to reverse his decision and render a different one.

OBJECT OF WRIT OF MANDATE.—When the act to be done is judicial and discretionary, a writ of mandate cannot direct what judgment shall be rendered, nor can it be granted, after an inferior tribunal has acted, for the purpose of reviewing its decision.

REMEDY FOR JUDICIAL ERROR.—If in acting judicially the Court commits an error, the remedy is by appeal and not by mandamus.

On the 6th day of July, 1857, Charles B. Polhemus, the relator, and George W. P. Bissell commenced an action in the District Court of the Twelfth Judicial District, City and County of San Francisco, against William M. Carpenter, James P. Treadwell, and others, on a promissory note given by Carpenter, and to foreclose a mortgage given to secure the note. Treadwell was made a defendant under an allegation in the complaint that he claimed an interest in the mortgaged property which accrued subsequent to the lien of the mortgage. All the defendants except Treadwell made default—Treadwell answered. A judgment was rendered in the District Court, from which an appeal was taken to the Supreme Court, where the judgment was reversed and a new trial granted. The remittitur was sent down, and the cause was placed on the calendar for trial at the October term, 1864. December 5th, 1864, plaintiffs' attorney filed the following paper in the cause:

I consent that this suit be dismissed, and request the Clerk to enter such dismissal in his register, and to enter judgment thereupon.

DELOS LAKE,

Attorney for Plaintiff.

Argument for Relator.

December 6th, plaintiff's attorney served on Treadwell notice of the dismissal. December 7th, Treadwell served on plaintiff's attorney a written notice that he should proceed to try the cause and disregard the dismissal. December 8th, plaintiff's attorney moved the Court to enter a judgment of dismissal, which motion was denied. Plaintiff then applied to the Supreme Court for a writ of mandate commanding the Judge to enter a judgment of dismissal.

The other facts are stated in the opinion of the Court.

Delos Lake, for Relator.

The act which the statute required the Court below to perform, namely, to direct the entry of judgment of dismissal on the plaintiff's motion, was a ministerial and not a judicial act. The case contemplated by the statute having arisen, there was no room for the exercise of any discretion on the part of the Court. Its duty was plain, imperative, and absolute. Mandamus is in such cases the proper remedy. (Bacon's Abridgt., Vol. 6, p. 434, Mandamus D.; *Rex v. Barber*, 3 Burrows, 1,267.)

"Mandamus lies to all inferior tribunals, magistrates, and officers, and extends to all cases of neglect to perform a legal duty where there is no other adequate remedy. It applies to judicial as well as ministerial acts. If the duty be judicial, the mandate will be to the officers to exercise their official discretion or judgment without any direction as to the manner in which it shall be done. If it be ministerial, then the mandamus will direct the specific act to be performed." (*Carpenter v. Co. Commissioners*, 21 Pick. 259.)

There are many acts within the sphere of the duties of a Judge which are simply ministerial, such as receiving and recording the verdict of a jury, confirming referee's report, where there is no opposition, signing and sealing bills of exceptions, etc. As to signing and sealing bills of exceptions, see *Delevan v. Boardman*, 5 Wend. 132; *People v. Judges of Westchester*, 2 John. Cas. 118; *People v. Judges of Washington*, 1 Caines' R. 511.

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A mandamus lies to compel the transfer of a cause from a State to a Federal Court, where the party has complied with the necessary conditions to entitle him to such removal. (4 H. & M. 173.)

In the case of *People v. County Judge*, 13 How. Pr. Reports, where it was contended that an appeal had been improperly dismissed, the Court awarded a mandamus, on the ground that the act of the Judge in dismissing the appeal was a ministerial and not a judicial act.

J. P. Treadwell, in *pro. per.*, against the writ.

This writ lies to compel an inferior Court to proceed and render judgment, but not to retrace its steps, or to direct in advance its judicial action, or what particular judgment to render. The present application for the writ is clearly within the decisions under this head, and precluded by them. The doctrine is well illustrated in an opinion that seems to have had the unanimous concurrence of the Court of Errors in *The Judges of the Oneida C. P. v. The People*, 18 Wend. 92.

By the Court, SANDERSON, C. J.

This is an application for a mandamus to the Judge of the Twelfth Judicial District, commanding him to enter a judgment of dismissal in an action pending in his Court wherein the relator and another are plaintiffs and James P. Treadwell and others are defendants.

It appears that the plaintiffs in that action, upon notice, moved the Court to enter a judgment dismissing it at their costs, as provided in the first subdivision of section one hundred and forty-eight of the Civil Practice Act. This motion was contested by defendant Treadwell, upon the ground that he had made a counter claim; and hence the plaintiffs could not dismiss against his consent; and in support of his opposition to the motion Treadwell relied upon the pleadings, proceedings and a stipulation made in the action between the parties thereto and an affidavit made by himself. After hearing the

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argument of counsel the Court denied the motion, thereby sustaining the grounds of the objection to the motion interposed by the defendant.

We do not think a mandamus will lie in this case. The real and substantial question presented for the decision of the Court by the motion to dismiss was whether the defendant had set up a counter claim against the plaintiffs upon which he was seeking affirmative relief. If he had not, the plaintiffs were undoubtedly entitled to the judgment which they asked, otherwise not. The solution of that question depended upon the judicial reading and construction of the defendant's answer and the stipulation between the parties, and the effect of the latter upon the former. It was claimed on the part of the plaintiffs, first, that the counter claim made in the answer could not be legally made in the action; and, second, that the counter claim had been withdrawn by the force and effect of the stipulation. Both of these propositions were denied by the defendant, and in deciding them the Judge acted judicially, not ministerially; and, having decided them according to the best of his ability, a mandamus does not lie to compel him to reverse his decision and render a different one. (*Chase v. Blackstone Canal Company*, 10 Pick 244; *The People ex rel. Doughty v. The Judges of Dutchess County*, 20 Wend. 658.) This writ lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so; but when the act to be done is judicial or discretionary the writ cannot direct what decision or judgment shall be rendered, nor can it be granted, after the inferior tribunal has acted, for the purpose of reviewing its decision. (*The People v. Sexton*, 24 Cal. 79.) If the Court has committed an error in denying the plaintiffs' motion the same can be reviewed on appeal, which is a speedy and adequate remedy in the ordinary course of law within the meaning of the four hundred and sixty-eighth section of the Practice Act. To review errors is not the office of the writ of mandamus.

The case of *The People ex rel. Smith v. The Judge of the Twelfth District*, 17 Cal. 548, was a much stronger case for the

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relator than this. There the Legislature by a special Act had directed the Court to make an order changing the venue in a certain action then pending before it. The language of the Act was clear, explicit and mandatory, leaving nothing to the discretion of the Court. The Court nevertheless refused to make the order, and it was held that a mandamus would not lie.

Mandamus denied.

Mr. Justice SHAFER, being disqualified, did not participate in the decision of this case.

**T. WALLACE MORE, ALEXANDER P. MORE, AND
HENRY H. MORE v. YGNACIO DEL VALLE *et al.***

RULES OF PRACTICE ACT IN FORCIBLE ENTRY AND DETAINER.—The provisions of the Civil Practice Act, with regard to the denials of the allegations of the complaint by the answer, apply to actions of forcible entry and detainer instituted under the Act of 1863, and to said actions upon all other points not otherwise provided for in said Act.

ANSWER IN FORCIBLE ENTRY AND DETAINER.—If the answer in forcible entry and detainer under the Act of 1863 does not deny the material allegations of the complaint, and no material new matter is set up, no issue is raised, and plaintiff is entitled to judgment on the pleadings.

FORM OF DENIAL IN ANSWER.—If an allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied.

GOLD COIN JUDGMENT FOR COSTS.—It is error for the Court to adjudge the costs in an action of forcible entry and detainer to be paid in gold coin.

DESCRIPTION OF LAND IN COMPLAINT.—The description of the premises in a complaint in forcible entry and detainer was as follows: "That tract or parcel of land situated in the County of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican nation to Don Carlos Antonio Carrillo, by grant dated November 29th, 1833, and bounded and described as follows: bounded by the Misalons San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues * * * a little more or less." *Held*, that upon the face of the pleadings the description was sufficient.

AVERTMENT IN COMPLAINT OF LOCATION OF LAND.—If the complaint in forcible entry and detainer avers that the lands are in the county where the suit is brought, a failure to mention the State will not be a fatal defect.

AVERTMENT OF POSSESSION IN COMPLAINT.—If the complaint in forcible entry and detainer sufficiently shows an actual peaceable possession in plaintiff,

Argument for Respondents.

It will be sufficient without the use of the word "actual;" but it is better to use the statutory term.

JUDGMENT OF APPELLATE COURT WHEN NO ISSUE IS RAISED.—If the answer does not deny the allegations of the complaint, and plaintiff moves for judgment on the pleadings, and the motion is denied, and on the trial defendant recovers judgment, on appeal the judgment will be reversed and a new trial awarded, with leave to defendant to amend.

EXCEPTIONS TO BE ATTACHED TO JUDGMENT ROLL.—Bills of exceptions made during the progress of a trial should, under sections one hundred eighty-eight, one hundred eighty-nine, and two hundred three of the Practice Act, be written down, settled, and signed by the Judge, filed in the case, and afterwards annexed to the judgment roll.

AVERMENT OF TITLE IN FORCIBLE ENTRY AND DETAINER.—If the complaint in forcible entry and detainer avers title in plaintiff the averment may be treated as surplusage.

APPEAL from the County Court, Santa Barbara County.

The facts are sufficiently stated in the opinion of the Court.

S. F. & J. Reynolds, for Appellants.

The answers contain no denial of any material allegation in the complaint. There is no attempt to deny the damages alleged, nor that the plaintiffs were in the "quiet, peaceable and exclusive possession" of the premises, as averred. And the attempted denial that the defendants "did forcibly, unlawfully, and fraudulently enter into the possession," is entirely insufficient. The answers, in effect, admit the entry as averred. (*Busenius v. Coffee*, 14 Cal. 83; *Blankman v. Vallejo*, 15 Cal. 644; *Kuhland v. Sedgwick*, 17 Cal. 127; *Woodworth v. Knowlton*, 21 Cal. 168.)

The rules of pleading and practice are the same in these as in other civil cases. (Stat. of 1863, p. 655, Sec. 14.)

Eugene Lies, for Respondents.

Actual possession should be alleged, being an essential fact necessary to the support of this action. The complaint neither sets forth the facts that would constitute actual possession, nor uses the statutory word.

As to what constitutes actual possession, see *Preston v. Kehoe*, 15 Cal. 315; *House v. Keyser*, 8 Cal. 499; *City of San Francisco v. Beideman*, 17 Cal. 451.

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A mere answer of not guilty would be sufficient. (*Kinney v. Hartman*, 4 Iowa, 154; *Henderson v. Allen*, 23 Cal. 519; *Watson v. Whitney*, 23 Cal. 375.)

The assertion that the boundaries of the tract are uncertain puts at issue a material fact. And in the absence of a statement, we may freely assume that plaintiff failed to prove his boundaries.

By the Court, SAWYER, J.

This action was brought in the County Court of Santa Barbara County, under the Act of 1863, concerning forcible entries and detainers. A motion for judgment on the pleadings, on the ground that no material allegation of the complaint is denied by the answer, having been made and denied, a trial was had, and a verdict and judgment rendered in favor of defendants. Plaintiff appeals.

There is no attempt in the answer to deny several of the material allegations of the complaint, as the peaceable possession of the plaintiff, the damage, etc. There is an attempt to deny the allegations as to the forcible entry and the forcible detainer; but if the provisions of the Civil Practice Act on the subject are applicable to this action, the denials in the answer, under the repeated decisions of this Court and of our predecessors are insufficient. Portions of the allegations are denied conjunctively. An allegation consisting of several clauses or propositions connected by the copulative "and" may not be true, as a whole, and can therefore be safely denied in that form, while one material branch of it may be true, and cannot for that reason be separately denied. A denial of the entire proposition in such case is evasive and insufficient.

The party must specifically deny each allegation he desires to controvert, and when the allegation is complex, embracing several clauses or propositions, he must deny each branch of the proposition separately and disjunctively, or his denial will be insufficient. (*Landers v. Bolton*, 26 Cal. 417.) We think also, that in this action the rules of pleading prescribed by the

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Practice Act upon the point in question, and upon all other points not otherwise provided for in the Forcible Entry and Detainer Act, are to govern. The only denial contained in the answer being defective, and no material new matter having been set up, the answer raised no material issue.

The Court also erred in adjudging the costs to be paid in gold coin.

The respondents insist that the complaint is insufficient in two particulars, viz:

Firstly — The complaint does not “describe the premises sought to be recovered with reasonable certainty,” as required by section eight of the Act. It is described as follows: “That certain tract or parcel of land situate in the County of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican Nation to Don Carlos Antonio Carrillo by grant dated November 29, 1833, and bounded and described as follows: ‘Bounded by the Missions of San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues, or six *sitios de ganado mayor*, a little more or less.’”

We cannot say that this description appears upon the face of the pleadings to be insufficient. We cannot tell what the evidence may show in regard to it. It may be that there will be no difficulty in applying the description to the lands. The plaintiffs can only recover the lands of which they were in the actual peaceable possession, and upon which the forcible entry was made. And the precise lands sought to be recovered should be described “with reasonable certainty.” The suit is brought in the County of Santa Barbara, and the land is described as being in the County of Santa Barbara. We think the intentment must be, that the land is in the county where the suit is brought, and that a failure to mention the State in the description is not a fatal defect.

Secondly — The allegation of possession is insufficient because the word “actual” is omitted, that word being used in section two, which prescribes the particulars necessary to be proved to entitle plaintiff to recover. We think the objection not

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tenable. Taking the entire allegations of the complaint, an actual, peaceable possession is sufficiently alleged. It would be better, however, to use the word "actual" in those cases. The plaintiff alleges title, but this is unnecessary and may be regarded as surplusage.

As the Court below held the answer to be sufficient we think a new trial should be had. Had the ruling of the Court been otherwise, probably the defendants would have asked leave to amend. When the case goes back they can apply to the Court below for leave to amend their answers if they so desire.

In this case, as in many others, the entire minutes of the Court are copied into the transcript. This is not proper, as we have often held. See *Harper v. Minor*, 27 Cal. 107, where we distinctly pointed out the proper practice.

Exceptions taken during the progress of a trial under sections one hundred eighty-eight and one hundred eighty-nine of the Practice Act, whether "delivered in writing to the Judge" by the counsel, or "written down by the Clerk," should be written upon sheets of paper, settled and signed by the Judge, and filed in the case; and when the judgment roll is made up, attached to the judgment roll. The proper place for these exceptions is not in the minutes of the Court, for they are to form a part of the judgment roll. (Section 203, second clause.) When an appeal from the judgment is taken, these bills of exceptions are certified up as a part of the judgment roll, and not as copies from the minutes of the Court.

Judgment reversed and new trial ordered.

Mr. Justice SHAFER delivered the following opinion, concurring specially, in which Mr. Justice RHODES concurred:

I concur in the opinion, but still do not consider that the plaintiffs' allegation that they were peaceably possessed involves an averment that they were actually possessed. The complaint, however, states that the plaintiffs had the land "reduced to their absolute dominion and control," and that the defendants "drove

Points decided.

and expelled the plaintiffs and their cattle from said lands." These statements presuppose an actual possession on the part of the plaintiffs. But as the fact of actual possession appears only by way of argument or inference, advantage can be taken of it only by special demurrer, and no such demurrer was interposed in the Court below.

EDWARD FRANKLIN v. THOMAS DORLAND.

ESTOPPEL BY DEED.—A deed of land executed by a defendant in an action of ejectment, to which the plaintiff in the action is an entire stranger, cannot operate in that action as an estoppel by deed upon the defendant who executed it.

ESTOPPEL IN PARS.—If it does not appear that the description of the land was inserted in a deed with a view to influence the plaintiff in the conduct of his own affairs, or that he was influenced by it in fact, the elements of an estoppel *in parte* are lacking also.

DISCREPANCY IN THE DESCRIPTIONS IN A DEED.—In case of a discrepancy between the monuments mentioned in a deed, and the courses and distances therein set forth, the monuments govern.

RECITALS IN A DEED AS EVIDENCE.—If a deed executed by one of the parties to an action, and to which the other party is an entire stranger, is used as evidence in that action, its recitals can only be used as simple admissions made by the party by whom it was executed.

WHEN THE VERDICT IS AGAINST EVIDENCE.—In a trial in an action of ejectment upon a question of boundary, the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, the Court found the fact as recited in the deed. *Held*, that the finding was so far opposed to the evidence as to justify awarding a new trial.

DEFENSE IN EJECTMENT BY GRANTEE AGAINST THE GRANTOR.—If one who is not the owner of a lot of land executes a deed of it to another, and the grantor is afterwards placed in possession of the lot by the real owner, he may avail himself of this fact as a defense in ejectment brought against him by the grantee.

GRANTOR MAY DISSEISE GRANTEE.—If the grantor in a deed takes adverse possession of the land granted subsequent to his deed, and holds continuous adverse possession for five years, he may set up the Statute of Limitations as a defense in an action of ejectment brought against him by his grantee.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant.

Argument for Respondent.

It will hardly be pretended that a quitclaim in 1854 by a party who in 1863 is in possession adversely and making improvements, will exempt a purchaser of the interest of the first grantee from inquiring by what right the property is now held. If Dorland's deed had been bargain and sale, another rule might apply; but a mere quitclaim would not prevent his acquiring any other title the next day, and if it was better than the other, holding the property even against his own deed. (*Clark v. Baker*, 14 Cal. and cases cited; 2 Smith's Leading Cases, 547, 550; *Landers v. Bolton*, 27 Cal. 104; *Clarke v. Huber*, 25 Cal. 593; *Hunter v. Watson*, 12 Cal. 363; *Lestrade v. Barth*, 19 Cal. 675.)

It is claimed, however, that the recital in the Debus mortgage, that the Groat lot was two hundred and fifty feet from Coater's land, estops Dorland from denying it. But estoppels never apply except between parties and privies. Plaintiff is neither. They must be mutual to bind either. (2 Smith's L. Cases, 568; 2 Johnson's R. 383; 3 Johns. Cases, 303.)

Edward F. Head, for Respondent.

The words "*remise, release and quitclaim*," where an intent to convey the estate of the grantor is manifest, and a pecuniary consideration appears, are effectual as words of bargain and sale, though in a deed to one not in possession. (10 Johns. 456; 18 Johns. 60, 78; *Lynch v. Livingston*, 6 N. Y., 2 Seld. 422; *Lynch v. Livingston*, 8 Barb. 468.)

In *Clark v. Baker*, 14 Cal. 613, this Court says: "Where it distinctly appears upon the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive respectively a certain estate, the grantor will be estopped from denying the operation of the deed according to that intent."

A grantor cannot set up the Statute of Limitations against his own deed. His deed explains his possession, and is a declaration that the title is in another. (*McCracken v. San Francisco*, 16 Cal. 636.)

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By the Court, SHAFTER, J.

This action was brought to recover the pieces or parcels of lands in San Francisco described in the complaint and referred to throughout the case as parcels 1, 2 and 3. The plaintiff had judgment for the first and third parcels and the defendant for the second. The defendant appeals from the judgment in favor of the plaintiff for the first and third parcels and from the order denying his motion for a new trial. No appeal has been taken by the plaintiff from the judgment against him for the second parcel.

The answer denies the right of the plaintiff to the several lots—sets up title in the defendant and adverse possession of the first parcel for more than thirteen years, and title in Samuel Crim and adverse possession of the third parcel for thirteen years, and that defendant is not and has not been in the possession thereof except as the tenant of said Samuel Crim.

The defendant quitclaimed the first parcel sued for, to Groat, June 12th, 1854; who quitclaimed to Robles in 1856, who, on the 20th of March, 1863, conveyed to the plaintiff. The north line of the parcel was described in the plaintiff's deed to Groat as follows: "Commencing at a point on the west line of Dolores street, in said city, where it is intersected by a post and rail fence designed for pickets, along which is planted a row of cottonwood trees." The location of this row of trees was one of the governing questions of fact controverted by the parties at the trial. The defendant introduced five witnesses all of whom placed the trees on the line claimed by him; and the one witness who located them in the first instance according to the views of the plaintiff by whom he was called, after hearing the witnesses for the defense, went voluntarily upon the stand and so corrected his first statement as to bring it into substantial agreement with the testimony given by them. All of these witnesses were acquainted with the locality; none of them were impeached, nor is there anything in the record reflecting in the slightest degree upon their trust-

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worthiness. The only evidence relied upon in rebuttal, was found in a mortgage executed by the defendant Dorland to one Debus, in August, 1856. The premises covered by the mortgage are described therein as follows: "Commencing at a point on the western line of Dolores street, formed by the intersection of the southern line of lands owned by J. P. Coater with said Dolores street; thence running southerly on said line of Dolores street two hundred and fifty feet, to lands recently deeded by the party of the first part to R. V. Groat; thence at right angles," etc. It is conceded, if the northern line of the lot conveyed by the defendant to Groat in 1854—that is, the row of cottonwood trees—was in fact two hundred and fifty feet south of the starting point named in the mortgage, that the lot so conveyed to Groat in 1854 is the one described in the complaint.

It is insisted for the respondent that the defendant was estopped by the mortgage from saying that the northern line of the Groat lot was not in fact two hundred and fifty feet to the south of the point where Dolores street is intersected by Coater's south line. This position is not tenable. The plaintiff is an entire stranger to the mortgage and the mortgage right, and therefore there can be no estoppel by deed; and as it does not appear that the description was inserted in the mortgage with any view to influence the plaintiff in the conduct of his own affairs, and particularly as it does not appear that the plaintiff ever was influenced by it in fact, it is apparent that the elements of an estoppel *in pais* are lacking also. The description in the mortgage stands then as a simple admission. If it had been proved that the defendant, having his attention called to the point as a principal question, had deliberately stated that the north line of the Groat lot was to his knowledge two hundred and fifty feet south of the Coater corner, the statement would in our judgment have been entitled to much higher consideration than can be claimed for it as it stands in the mortgage. Nothing is more common than discrepancies between the monuments and the courses and distances set forth in deeds. In such cases the monuments

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govern; and for the reason that they are usually stated upon full knowledge and reflection, while as to courses and distances they are most frequently arrived at by estimate or guess in all those cases where visible monuments are named. For these reasons we consider that the admission contained in the mortgage to Debus does not detract materially from the weight of the testimony of the six witnesses referred to as to the location of the row of cottonwood trees named in the deed under which the plaintiff claims. We therefore hold that the finding of the Court on that point is so far opposed to the evidence as to justify the awarding of a new trial.

As to lot number three, there was no conflict in the evidence on the question of title. The plaintiff claimed under title derived from the defendant through a chain of quitclaim deeds. There was no evidence that the defendant from whom the title started was himself the owner of the lot, or that he, or the plaintiff, or any intermediate party in the chain, was ever in possession before or at the time when the deed was given. The defendant under proper allegations in his answer, introduced evidence tending to prove that he, after the execution of the deed under which the plaintiff claimed, was placed in the possession or custody of the lot as the agent of one Crim, who claimed to be, and, as the evidence tended to prove, was in fact the owner of the land. If Crim was the owner of the lot and put the defendant in custody of it after the date of the defendant's quitclaim, there can be no just pretense that the defendant could not avail himself of that state of facts to protect himself in that custody (assuming now that his custody amounted to a personal possession on his part), even though he had prior to his assuming such custody, quitclaimed the lot to Martel under whom the plaintiff claimed directly. We consider the findings in relation to this lot as opposed to all the evidence having to do with the rights of the parties with respect to it.

It appears from the record that the "defendant offered to prove by legal and competent testimony that he had been in the open, notorious and adverse possession of the Groat lot for

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more than five years next preceding the commencement of the action." The plaintiff objected to the evidence generally, and it was excluded by the Court. The counsel for the respondent seeks to justify this ruling on the broad ground that a "grantor cannot set up the Statute of Limitations against his own deed." We consider that a grantee can, under circumstances, be disseized by his own grantor as well as by another. In the matter of an adverse possession taken by a grantor subsequent to his deed, and continuously held thereafter, the possession is not the possession of the grantee's "predecessor," as that term is used in the sixth section of the Statute of Limitations. The effect of that section is to allow a grantee to tack to his own the possession of his grantor preceding the grant, for the purpose of working out a bar against him who has the legal title.

The terms of the offer in this case were of the broadest, and if the maker of a quitclaim deed can under any conceivable state of facts hold the premises quitclaimed adversely to the party to whom the deed is given, then the ruling was erroneous. We hold such adverse possession to be possible in law, and that is the only point raised upon the record for review.

Judgment reversed and new trial ordered.

MOSES HOPKINS IMPEADED WITH G. P. BRONSON v.
L. H. CHEESEMAN.

JURISDICTION OF SUPREME COURT.—The Supreme Court has no jurisdiction, either on appeal or writ of error, where the amount in controversy in the Court below is less than three hundred dollars.

WRIT OF ERROR to the County Court of Solano County.

August 28th, 1863, plaintiff commenced an action against defendants in the District Court of the Seventh Judicial District, Solano County, to recover judgment for the sum of two hundred and sixty-eight dollars and seventy-seven cents, alleged to be due plaintiff for work and labor performed for defendants,

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and for money paid by plaintiff for their use. Defendant Hopkins alone answered. The answer was served and filed on the 28th day of January, 1864. The answer denied the allegations of the complaint, and raised the objection that the Court had no jurisdiction because the amount in controversy was less than three hundred dollars.

On the 16th of May, 1864, an order was made on motion of defendant, transferring the cause for trial to a Justice's Court in Solano County. Plaintiff had judgment in the Justice's Court, and defendant appealed to the County Court, where plaintiff recovered judgment for two hundred and sixty-eight dollars and seventy-seven cents, and six hundred and eighty-eight dollars and twenty-five cents, costs of suit, for taking care of cattle which had been attached when the suit was commenced. Defendant moved to retax the costs by striking out the costs for keeping attached property, because the Court had no jurisdiction to enter any judgment for such costs. The motion was denied, and defendant excepted. Defendant thereupon brought the case to the Supreme Court by writ of error, for the purpose of reversing the order refusing to strike out said costs.

W. S. Wells, for Plaintiff in error.

M. A. Wheaton, for Defendant in error.

By the Court, SANDERSON, C. J.

The amount in controversy in this case is less than three hundred dollars, and this Court has no jurisdiction either on appeal or writ of error.

Let the writ be quashed.

Statement of Facts.

JOHN LUCAS, ADMINISTRATOR *de bonis non* OF THE ESTATE
OF TIMOTHY MURPHY, DECEASED *v.* SAMUEL TODD,
et al.

RESIGNATION OF AN ADMINISTRATOR OR EXECUTOR.—If the administrator or executor of an estate resigns his trust, and an order is made by the Probate Court accepting the resignation, and the resignation and order of acceptance are in proper form, when the proceeding is collaterally questioned in another Court, the presumption is, that the order accepting the resignation was properly made, and that the executor or administrator had settled his accounts and delivered up all the estate to some person appointed by the Court.

JUDGMENTS AND ORDERS OF PROBATE COURT.—When the Probate Court has jurisdiction of the subject matter, all intendments are, under the statutes of California, in favor of the correctness of the action of the Court, the same as in other Courts of record.

SAME.—One attacking a judgment or order of a Probate Court made within the scope of its jurisdiction, must affirmatively show error.

COMPLAINT IN AN ACTION BROUGHT BY AN ADMINISTRATOR.—A complaint in an action brought by an administrator, who has been appointed after the resignation of a former administrator, is sufficient, if it avers the issue of letters to the former administrator, that he qualified and entered upon the discharge of the trust, that he resigned, and his resignation was accepted by the Probate Court, and that the plaintiff was afterwards appointed administrator, and qualified, and that letters were issued to him.

PETITION FOR LETTERS OF ADMINISTRATION.—A petition for letters of administration is sufficient, if it states facts showing that the petitioner is one of the persons entitled to administer.

APPOINTMENT OF ADMINISTRATOR.—The amount and value of an estate are not jurisdictional facts in an application for letters of administration.

DEFENDANT CANNOT QUESTION HOW ADMINISTRATOR CAME BY NOTE.—When an administrator has qualified, and received letters, he is entitled to the assets of the estate wherever they may be; and if he has obtained possession of a note, no matter from whom, the defendant cannot, in action brought on it, object that it is not properly in his custody.

ORDERS OF PROBATE COURT NOT TO BE REVIEWED IN COLLATERAL ACTION.—The Supreme Court will not, in an action brought by an administrator, review the action of the Probate Court in ascertaining the value of the estate and fixing the amount of the administrator's bond.

APPEAL from the District Court, Seventh Judicial District,
Marin County.

The complaint averred that Timothy Murphy died in 1853. in Marin County, leaving a will, by which he appointed James Black and James Miller his executors, and that the will was probated; that in 1854 they qualified; that letters were

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issued to them, and they entered on the discharge of the duties of the trust, and continued to act until 1856, when they resigned, and their resignation was accepted by the Probate Court; that plaintiff was a nephew of deceased, and in 1858 was appointed by the Probate Court of Marin County administrator of the estate, and qualified, and letters were issued to him, and that he was still administrator.

The action was brought on a bond made by defendant Todd to the former executors, for money held by them belonging to the estate and loaned to Todd, and to foreclose a mortgage given to secure the bond.

Defendants first demurred, and after the demurrer had been overruled, answered. The answer denied that the former executors duly resigned or were discharged from their trust as executors, and also denied that letters were duly issued to plaintiff, or that he qualified, or that Black and Miller delivered the bond sued on to plaintiff, or that he was entitled to collect or receive the money due on the bond. The answer set up as new matter, that it appeared from the report of the executors that the bond was of the value of eight thousand dollars, and that when plaintiff was appointed no showing was made of the value of the bond, and that the administrator was required to give a bond in the sum of four thousand dollars only.

Plaintiff had judgment in the Court below, and defendants appealed.

S. F. & J. Reynolds, for Appellants.

The demurrer was well taken, and should have been sustained.

Black and Miller were never legally discharged from their office and trust as executors, and were, at the time of the attempt to grant letters to Lucas, the executors of the will, and the only persons entitled to the possession of the estate, and to administer it and execute the trusts of the will.

Section one hundred of the Probate Act (Wood's Dig. p. 400) authorizes an executor, by writing filed in the Probate

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Court, to resign his appointment, "*provided he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the Court.*"

It is very clear that before an executor can resign his trust, and before the Probate Court can accept the resignation, so as to relieve him from his duties and responsibilities as such executor, two things must plainly appear to have been done. First—A full settlement of the executor's accounts, showing the true condition of the estate, and how much and what part of it is unadministered. Second—That the Court has appointed some other person competent and qualified to receive the estate and finish the administration and execute the trusts. Without these the Court has no power or jurisdiction to discharge the executor, and any attempt to do so by the Probate Court would be void, and confer no power upon the appointee.

The complaint shows that the executors were discharged, if at all, in September, 1856. That discharge only appears as the result of the acceptance of the resignation on that day. The complaint does not show that they had rendered any account of their doings as such executors, or that any action was ever taken by the Probate Court as to their accounting; nor does it appear from this complaint how much, if any, property was in the hands of the executors at the time they undertook to resign, or when Lucas claims to have been appointed. This is manifestly necessary; for after they are discharged, the Court has no further power over them.

Watkins & Wise, for Respondent.

By the Court, SAWYER, J.

More than a year elapsed after the entry of the judgment appealed from before the appeal was taken. The appeal from the judgment, therefore, was not in time.

On the appeal from the order denying a new trial, the appellant relies, substantially, upon the insufficiency of the

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evidence to show that Lucas is the administrator of Murphy. The question is raised in various forms, as upon rulings of the Court admitting portions of proceedings in the Probate Court, and as to the effect of the evidence when admitted, but the substantial question is, as to the sufficiency of the evidence to sustain that issue.

Letters testamentary had been issued to James Miller and James Black upon the same estate. Miller filed his resignation September 13, 1856, and Black his, August 26, 1856. The resignation of the former was formally accepted by an order to that effect entered by the Probate Court, September 22, 1856, and of the latter, August 27, 1856. Both the resignations and the orders of acceptance are in proper form. It is insisted, however, that these orders are void, because it does not appear that the executors had settled their accounts, and delivered up all the estate to some person appointed by the Court. It does not appear that they had not performed these acts, and it is not shown that the entire proceedings of the Probate Court are in evidence. The Probate Court had jurisdiction of the subject matter, and even conceding that the proceeding can be collaterally questioned, it is not to be presumed that the orders accepting the resignations of the executors were improperly made. All intendments must be in favor of the action of the Court, the same as in other Courts of record. (Wood's Dig. 912; *Irwin v. Scriber*, 18 Cal. 503.) But there is in the record a decree of final settlement of the accounts of Miller and Black as executors, entered July 30, 1856, in which it is adjudged that the debts of the estate and expenses of the administration have all been paid, and the property all distributed, except the bond and mortgage now in suit, and that there is a considerable sum due the executors for over payments. And there is other testimony that, on the resignation of the executors, Black delivered the bond and mortgage and all other papers to the Probate Court, and it is now found in the possession of plaintiff.

The petition of plaintiff for letters of administration *de bonis non* states all the jurisdictional facts and gave the Court juris-

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diction of the case. The duty of ascertaining the value of the property of the estate, and fixing the amount of the administrator's bonds with reference thereto, is devolved upon the Probate Court, and we must presume that the Court discharged that duty properly, at least till the contrary is shown. We have no evidence that the value of the bond and mortgage in suit was more than half the amount of the bond fixed by the Probate Court. It may have been worthless. It is at least doubtful whether we can collaterally review the action of the Probate Court in this respect. The amount and value of the estate are not jurisdictional facts. We think the evidence shows that the plaintiff is the administrator *de bonis non* of Murphy, and as such entitled to maintain the action.

Judgment affirmed.

By the Court, SAWYER, J., on petition for rehearing.

The complaint is sufficient. We supposed our opinion was sufficiently indicated on this point in discussing, substantially, the same questions raised by counsel on the rulings made upon the trial.

The petition of Lucas for letters states, that the applicant is a nephew of the deceased, and a nephew is one of the persons entitled to letters. There may be others having preference, and if so, on application of a nephew for letters, the persons entitled to be preferred may appear, under section sixty-one of the Probate Act, and contest the application or assert their own rights on that ground. Even other persons, "not entitled," may be "competent," and letters may be granted to such person on "the request of the person entitled." "The request shall be in writing and shall be filed in the Court." (Sec. 66.) The Act does not say that the request shall be stated in the petition. It would be well to state in the petition all the facts upon which petitioner relies to entitle him to letters in preference to other parties. But we think the petition of Lucas states "all the facts essential to give the Court jurisdiction of the case."

It is unnecessary to determine, whether the Probate Court was the proper custodian of the bond from the time of the acceptance of the resignation of the former executors till the appointment of plaintiff, or not.

The resignations of the executors respectively were accepted by the Court, and there is nothing to affirmatively show that these proceedings are invalid. When Lucas was appointed administrator *de bonis non*, he became entitled, as such administrator, to the possession of the assets of the estate, wherever they might be, and he has obtained possession — no matter from whom — of the instrument in suit. He is now the proper custodian, and entitled to maintain this action.

This is not an appeal from an order, or judgment of the Probate Court, and it is not our province to collaterally determine in this case whether the Probate Court erred in ascertaining the value of the estate and fixing the amount of the administrator's bond. The Probate Court had jurisdiction of the subject matter, and it determined the question of the value of the property and fixed the amount of the administrator's bond upon the evidence before it. If the Court erred, its action must be reviewed in some other mode.

Rehearing denied.

GEORGE W. HOAG v. JESSE A. PIERCE, ISRAEL COMSTOCK, AND J. D. KEYES.

EVIDENCE IN FORCIBLE ENTRY AND DETAINER.—In an action of forcible entry and detainer, the defendant, for the purpose of showing the character and extent of his possession, may introduce in evidence the deed of his grantor, and that his grantor, before plaintiff's entry, took up the land under the Possessory Act of 1852, and occupied and improved it, even though he failed to comply fully with the Act.

POSSESSION OF LAND.—One who receives a deed of land from another who is residing on a portion of it, and claiming to the boundaries described in the deed, and who then enters on the possession of his grantor, is, in contemplation of law, in possession of the whole tract described in the deed.

POSSESSION NECESSARY TO MAINTAIN FORCIBLE ENTRY AND DETAINER.—One who in the morning enters upon a portion of a tract of land in the possession of another, and incloses it with a fence and puts a house on it before sun-

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down, does not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor, who at sundown of the same day destroys the house and fence and drives him away.

SAME.—The plaintiff in forcible entry and detainer must show an actual, peaceable, and exclusive possession in himself; a scrambling or interrupted possession is not sufficient.

RIGHT TO PROTECT ONE'S POSSESSION.—One who is in the possession of a tract of land has the right to resist and expel an intruder if the resistance and expulsion take place before the possession of the intruder has become actual and peaceable.

IMMATERIAL ERRORS.—A judgment will not be reversed for errors which do not injure the complaining party.

APPEAL from the County Court of Shasta County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

J. Chadbourne, for Respondents.

By the Court, CURREY, J.

In June, 1853, Meredith Meador, for the purpose of obtaining the right to hold and possess a certain tract of the public lands situated on the Sacramento River opposite the present town of Red Bluffs, under and in pursuance of the Act entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands in this State," (Laws 1852, p. 158,) made an affidavit, describing the land, the possession and enjoyment of which he desired to secure, and stating therein that the description given was not intended to embrace more than one hundred and sixty acres, and that he had not taken up any other claim under said Act, and also to the best of his knowledge and belief there was no existing title or claim to the same. This affidavit was filed in the office of the proper county. The land was surveyed at the time by his procurement by the County Surveyor, and was found to contain one hundred and fifty-four acres. Within ninety days thereafter, he put improvements on the land, partaking of the realty to the value of three hundred dollars, a part of which consisted of a dwelling house, which became occupied by himself and family within the ninety days. He continued to

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reside on the premises until in the latter part of October, 1855, during which time he put improvements on the land, amounting in value to about two thousand dollars, and used the property for the purposes of husbandry. In October, 1855, he removed to another place, after which the premises were occupied by his tenants, until he sold and conveyed the same to Pierce, Church and Comstock, by deed bearing date the 17th day of January, 1861, which was duly acknowledged and recorded in the same month. From the time of the execution of this conveyance to the time of the commencement of this action, Pierce, Church and Comstock were in the possession of the Meador tract, by the defendant, Keyes.

On the 29th of December, 1861, which was Sunday, the plaintiff and some four or five men in his employment went upon this tract of land at a point opposite Red Bluffs, taking with them a quantity of lumber, with which they constructed a fence on three sides of a piece of land of about an acre in extent. The fourth side of it was bounded by the Sacramento River. The plaintiff also commenced the erection of a house on the land, which he inclosed on one side, and partly on the other side. At the two ends it was left open, and it was also without a roof. This work was done between the hours of ten in the morning and two in the afternoon. One of the plaintiff's workmen, who was a witness on his behalf, testified that while the work was being performed the weather was wet and dismal, and another of them said it was a rainy day. Near sundown of the same day the defendants came upon the ground, and found one Jordan at the house, whose furniture and provisions, according to his own account, consisted of a bed and two bottles of whiskey. The whiskey, he said, was provided by the plaintiff, in whose employment he was at the time. Pierce asked Jordan what he was doing there, and one of the defendants told him he had come to knock the house down, and then commenced the work of demolition. Upon this Jordan told them not to tear down the house until he could get his things out. The defendants then proceeded to remove the fence, and finished their work by throwing a por-

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tion of it and a portion of the house into the river. Jordan said the reason he did not prevent them was because they were too strong for him. They made no threats, but Pierce said it was customary, when they tore down a house of that kind to throw the man into the river and the house on top of him; and that it was a good thing the plaintiff was not there; and he also said Comstock was armed. Keyes was in possession of the Meador tract at the time, under Church and the defendants Pierce and Comstock.

A few days afterward the plaintiff commenced an action under the Act concerning forcible entries and unlawful detainers. His complaint contains the usual allegations in such cases, which are traversed by the defendants' answers. The cause was tried in the County Court of Shasta County, and a verdict was found for the defendants, on which judgment was rendered. A motion was made for a new trial, which was denied, and the plaintiff has appealed.

The transcript of the record and statement contains two hundred and thirty-five printed octavo pages, when all that is necessary to present the case might well have been embodied in one sixth the space; but notwithstanding the unnecessarily imposed labor we have examined it and the fifty-nine points of error assigned; all of which, in our view of the case, are immaterial or otherwise invalid.

There can be no doubt of the admissibility of the evidence relating to the taking up by Meador in 1853 of the land called the Meador tract, and of his occupation and improvement of it, even though it were admitted that he failed to so comply with the Act of 1852 as to entitle him in his own right to all the benefits which a complete compliance therewith would have invested him. His possession of the land, for nearly eight years claiming the same, and his sale and conveyance of it to Pierce, Church and Comstock, and their subsequent occupation of it, invested them with the right as against any mere intruder upon it to the possession of the land. Their deed from Meador, with their actual occupation of a considerable portion of the land, extended their possession as against per-

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sons having no right or title from a source of paramount proprietorship, to the whole of the Meador tract; and for the entry of the plaintiff and the ouster of them by him of the parcel of land particularly in controversy — had he remained in possession — might have had their action of ejectment. When the plaintiff entered upon the Meador tract, on the 29th of December, 1861, Pierce, Church and Comstock were in legal contemplation, in the actual possession of the land, within the doctrine of *Hicks v. Coleman*, 25 Cal. 122, and the cases there cited, and the entry thereon by the plaintiff was a trespass.

The grantees of Meador being in possession of the premises on the day of the plaintiff's entry, it is proper next to inquire, did the plaintiff obtain such an actual peaceable possession of the parcel of land which he inclosed on that day as to give him a right to maintain this action against the defendants for retaking the possession and removing the fence and partly constructed house from the premises? If the possession of the plaintiff was not actual and of sufficiently long standing to become to a legal intent peaceable, then he was not in a condition to maintain his action. In *Treat v. Stuart*, 5 Cal. 113, the Court said: "The plaintiff, in an action of forcible entry and unlawful detainer, must show an actual peaceable possession in himself at the time of the entry;" and in *House v. Keiser*, 8 Cal. 500, which was an action brought under the Act concerning forcible entries and unlawful detainers, the Court said that "a party who desires to avail himself of the summary remedy provided by this Act must bring himself clearly within its provisions. He must show a possession, actual, peaceable and exclusive; a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises is not sufficient." By the ninth section of the Act it is provided that "on the trial the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession of the premises at the time of a forcible holding over." Before the plaintiff could be entitled to recover he was bound to establish a case

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from which it could at least be presumed that at the time of the alleged forcible entry and ouster he was peaceably in actual possession. This the statute requires. But instead of this the testimony of his witnesses showed that his own entry was tortious, and that his adverse holding had not yet become quiet and peaceable. He had not yet acquired a *status* affording him the right to resist the defendants' assertion by necessary force of their own right to the possession of the premises, when they came upon the ground and removed the structures erected there by the plaintiff during the same day. His acts of trespass were *in fieri* when the acts of the defendants of which he complains were committed. In such condition of things a mere intruder or trespasser is not entitled to the remedies provided by the statute. (*People v. Reed*, 11 Wend. 159.)

The evidence, which was properly introduced before the Court and jury, established beyond controversy the possession of Pierce, Church and Comstock of the parcel of land described in the complaint, and the testimony of the plaintiff's witnesses alone showed that his entry was a trespass, which was resisted before his possession had become, in the sense of the Act, actual and peaceable. If a verdict and judgment had been rendered upon the evidence properly admitted in the case, in favor of the plaintiff, it would have been erroneous. There was no evidence improperly admitted or excluded that could have justly changed the result to which the jury came; so that if the Court committed any errors in admitting testimony, or in instructing the jury, they were of a character that could not by any possibility have harmed the plaintiff. It is only errors which may have injured the complaining party that will authorize this Court to reverse a judgment of the Court charged with having committed them. (*Merle v. Matthews*, 26 Cal. 455, and the cases there cited.)

We are of opinion the verdict was right, and that the judgment should be affirmed.

Opinion of Shafter, J., dissenting.

SAWYER, J., concurring.

There was, doubtless, irrelevant testimony admitted on both sides, and the rulings of the Court are not free from errors; but it is clear to my mind that without any of the errors committed the verdict of the jury must have been the same. It is clearly apparent from the evidence properly admitted upon the question of possession—in which it can scarcely be said there was any conflict—that the plaintiff was in the act of attempting to acquire possession by an unjustifiable trespass upon an actual possession in the defendants of long standing; and that this attempt was immediately, upon the same day, interrupted and frustrated by defendants, in the manner stated by Mr. Justice Currey, before the acts of plaintiff had crystallized, so to speak, into that actual, peaceable possession contemplated by law, which constitutes the foundation of the right to maintain the action of forcible entry and detainer.

The Court expressly instructed the jury that the right to the possession could not be determined in this action, and substantially told them that the survey of Meador, and the conveyance to him by defendants, could only be considered with reference “to the extent and boundary of such possession.” For the purpose to which this testimony was thus limited, I think the evidence admissible. I am satisfied, from the testimony, that the plaintiff had acquired no such possession, as against the defendants, as would entitle him to maintain this action, and that on this ground the judgment should be affirmed.

SHAFTER, J., dissenting.

I am compelled to dissent from the opinion of my brethren. The only question is whether Hoag had succeeded in disposing the tenant of Pierce, Church and Comstock, to a legal intent at the time when the tenant, in company with his landlords, came upon the ground and demolished the house and fence and expelled Jordan, the plaintiff's servant. The

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building of the fence was not *in fieri* at the time the defendants came upon the premises, but was a fact accomplished; nor was the plaintiff in the act of going within the inclosure with a view to take possession, but was already within it, in the person of his servant. All the steps essential to an ouster by Hoag of the tenant in possession had been taken, and the fact could have had no additional force or meaning imparted to it by lapse of time. On the ground of the acts of Hoag performed upon the land, the tenant of Pierce, Church and Comstock could have maintained ejectment against him. By force of those acts the Statute of Limitations was set in motion in his favor, and he was placed in a position where he was amenable to taxation. The possession of Hoag was undoubtedly a hostile possession, but it was peaceable during the time it subsisted, and that is all that can be said of a possession of the longest duration.

C. D. HORN v. WILLIAM JONES, J. G. FORDYCE,
AND THE VOLCANO WATER COMPANY.

ACTION TO QUIET TITLE.—A person in the possession of property is in a position to bring an action, under the two hundred and fifty-fourth section of the Practice Act, to quiet his title thereto, and on the trial no other evidence on his part than proof of possession is necessary in the first instance.

TITLE UNDER A SHERIFF'S DEED.—The title of a party acquired by a Sheriff's deed, executed under a Sheriff's sale made on an order of sale issued on a decree foreclosing a mortgage, relates back to the date of the mortgage.

EVIDENCE IN ACTION TO QUIET TITLE.—One claiming title to property under a Sheriff's deed, executed on the foreclosure of a mortgage, may, in an action brought by him to quiet his title against one who claims under a Sheriff's deed executed on the foreclosure of a mechanic's lien, in which foreclosure he was not a party, go behind the decree foreclosing the mechanic's lien, and show that no lien in fact existed.

PURCHASER *pendente lite* ESTOPPED BY THE DECREE.—If an action is brought against a corporation to foreclose a mortgage purporting to have been executed by it, and a *lis pendens* is filed, and a decree is rendered enforcing the mortgage, a party who buys the mortgaged property, *pendente lite*, at Sheriff's sale, made on a judgment which does not enforce a lien older than the *lis pendens*, is estopped from saying that the mortgage was not the act of the corporation.

PARTIES TO FORECLOSURE OF MORTGAGE.—A party who has no interest in mortgaged property at the time an action is brought to foreclose the mort-

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gage, and who buys, *pendente lite*, and after a *lis pendens* has been filed, is not a necessary party to the foreclosure.

WHEN SUIT MAY BE BROUGHT TO QUIET TITLE.—One in possession of property, claiming title under a Sheriff's deed executed on a mortgage foreclosure, may maintain an action to quiet his title against another who claims a title against him which would be good against the mortgagor, although void as against the plaintiff.

APPEAL from the District Court, Eleventh Judicial District, Amador County.

Plaintiff recovered a judgment in the Court below, and defendant Jones appealed. The other facts are stated in the opinion of the Court.

P. L. Edwards, for Appellant.

Possession can be evidence or notice of no more than the title actually in the possessor. (*Welsh v. Welsh*, 5 Ohio, 425.) Here are all the facts *in pais*, all the record *indicia*, and all the averments of the complaint, show that the plaintiff has always claimed and now claims only under and in virtue of proceedings had under a void mortgage. From his complaint, from the evidence, and from the findings, no other claim of title on his part can be inferred. He cannot now rely upon simple possession under a claim of higher title, for he has shown that his possession is qualified and procured through proceedings *in pais*, and in Court, which, as against the defendant claiming under an older and better title, are wholly inoperative and void. (2 Sugden on Vendors, 558; *Fagg v. Mann*, 2 Sum. C. C. R. 555.)

If a person be simply in possession, the presumption is that he is the rightful owner; but when his own acts, averments, and deductions show a different estate, he is thereby bound. His possession cannot avail him when he himself shows that it is not rightful. Thus, "a person in possession of real estate is presumed to be seized *in fee*. This presumption, however, may be rebutted by a stronger presumption arising from circumstances." (1 Cow., Hill and Edwards' Phil. on Ev. 646.) The presumption arising from possession may always be rebut-

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ted or qualified by its character, or other opposite evidence. (*Jayne v. Price*, 5 Taunton, 326.)

If the title relied upon either as a cause of action or ground of defense be a nullity, it results that the possession is wholly inoperative, at least as against a better title. (*Livingston v. Peru Iron Co.*, 9 Wend. 511.) To the same effect are the notes 1 Cow., Hill and Edwards' Phil. on Ev. 646-7.

The effect of our statute was merely to abrogate the rule of the common law, that the simple pendency of an action should import notice, not to require or authorize the filing of a *lis pendens* where there was already notice in fact, or constructive under the recordation acts. (*Samson v. Ohleyer*, 22 Cal. 200; *Richardson et al. v. White et al.*, 18 Cal. 102.)

Section twenty-seven of the Practice Act provides that the filing of a *lis pendens* shall be notice of the plaintiff's right, but it does not say that it shall be notice of a right which he has not, nor that mortgages and other liens when properly recorded shall not import notice, but be dependent upon the filing of a *lis pendens*. The statute only gives effect to such notice when there would otherwise have been none. Even in New York, where a *lis pendens* is required to be filed in an action for the foreclosure of a mortgage, though of record, the recordation has been held to import notice. (*Potter v. Rowland*, 4 Seld. 448.)

To affect a party as a purchaser *pendente lite*, the holder of the legal title must be shown to have been impleaded before the purchase which is to be set aside. (*Carr v. Callaghan*, 3 Litt. 365.)

If the mortgage was the deed of the corporation, there is an end of our case, and if not, there is an end of the respondents'. If not such deed, then as already held by this Court in another case, the foreclosure could give it no force or effect as against the corporation or its grantees, whether voluntarily or *in invitum*. The Sheriff's deed in pursuance of such foreclosure could not vest any title in the respondent, and all the subsequent proceedings, including the decree, sale, and deed, were

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utterly void. All this is aptly and fully illustrated in (*Branham et al. v. The Mayor, etc. of San José, et als.*, 24 Cal. 604.)

The foregoing proposition cannot be evaded by the assumption that a *lis pendens* had been filed by the respondent. He could not by filing such notice create title in himself. He could thus at most only give notice of the claim which he actually asserted. There is no room here for the doctrine of *estoppel*. Neither the corporation nor the appellant claiming under it can be estopped by force of a void mortgage. Does a *lis pendens* whose only legitimate function is to give notice of actualities have such potency? Concede that the appellant by virtue of this *lis pendens* had notice, still he had notice only of a false and void claim of title.

John W. Armstrong, for Respondent.

Jones was not a *bona fide* purchaser *pendente lite*. The *lis pendens* imparted notice to him of the object of the suit and the extent of the relief claimed, and therefore he is estopped by the force of the foreclosure decree, as it has the same conclusive effect as was given to judgments and decrees under the old common law and equity systems of practice.

This is so held after full and deliberate consideration of the twenty-seventh section of the Practice Act, in the case of *Richardson v. White*, 18 Cal. 107, where the Court sum up in the following clear and forcible language: "The object of the statute evidently was to add to the common rule a single term, to wit: to require for constructive notice not only a suit, but filing a notice of it; so that this rule is as if it read: The commencement of a suit and the filing of notice of it, are constructive notice of it to all the world of the action, and purchasers or assignees, afterwards becoming such, are mere volunteers, and bound by the judgment."

This doctrine was afterwards affirmed in *Ault v. Gassaway*, 18 Cal. 205, and *Sampson v. Ohleyer*, 22 Cal. 211.

But if the mortgage was not the deed of the corporation, the plaintiff is in possession under color of title, and this must prevail against the defendant who has no title. In *Winans*

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et al. v. Christy et als., 4 Cal. 79, the Court said: "This is a much stronger case than the one of '*Hutchinson v. Perley*,' referred to. It is not a mere prior possession, but possession coupled with color of title is shown in defendants." (See Adams on Ejectment, Sec. 77; *Livingston v. Walker*, 7 Cowen; *Woods et als. v. Lane et als.*, 2 Sergeant; *Raule ex dem.* 53; *Murry v. Denn*, 5 Cowen 200; *Ludlow et als. v. Myers*, 3 John.; *Doe ex dem. v. Hubert et als.*, Breese's Ill. Rep. 279.)

Neither were the plaintiffs, although they had alleged in their declaration a fee simple title, compelled to prove the same. They could properly rely upon prior possession, if they chose to do so. (See Adams on Ejectment, Sec. 275; *Day v. Alerson*, 9 Wendell, 110.)

The decree through which defendant claims did not become a lien, as against Horn, who had no notice of the suit.

No *lis pendens* was filed and the decree was not rendered until after Horn commenced his suit, as the facts show. It seems to us that this point is settled in the case of *Head v. Fordyce*, 17 Cal. 151.

The proceeding which resulted in the rendition of that decree was *in rem*, not *in personam*.

This proposition is sustained to the fullest extent by the decision in the case of *Chapin v. Broder*, 16 Cal. 421, 422, where the judgment considered was in the form of this one, the only difference being, that was the foreclosure of a mortgage, and this the enforcement of a mechanic's lien; but this we insist makes no difference, as the sections of the Practice Act referred to above, applies as well to the enforcement of liens as a foreclosure of a mortgage, by its express language; and, besides, upon general principles of law there is no difference—the analogy is complete between them. (*Doughty v. Devlin*, 1 E. D. Smith, 631.) The mechanic's lien being invalid, the foundation of the decree is *sapped*, and the effect of it, together with all the proceedings under it, destroyed. (*Branham v. The City of San José*, 24 Cal. 604, 605.)

Why is this so? Because it is a proceeding *in rem*. The

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rule is also well stated in 2 Hilliard on Mort., p. 47, Sec. 5, in these words: "*If a foreclosure is void the fee still remains in the mortgagor*, and no action can be maintained, either of ejectment or trespass, which affirms the title to be in the mortgagee."

By the Court, SHAFER, J.

It appears that both parties claim under the Volcano Water Company; the plaintiff through the foreclosure of a mortgage, and the defendant through the foreclosure of an alleged mechanic's lien; and the question is as to which of the parties has the better title under the common source. The facts bearing upon the case are substantially as follows:

On the 4th day of October, 1855, the defendant, J. G. Fordyce, entered into a written agreement with the Volcano Water Company to do and perform work upon, and to furnish material for the construction of the ditch set forth in plaintiff's complaint, known as the Volcano Water Company's ditch.

Said work was completed by said Fordyce on or before the 15th day of December, 1855, according to the terms of the aforesaid agreement.

On the 29th day of August, 1856, Fordyce filed in the office of the County Recorder of Amador County a verified copy of the amount due him for such work — said amount so claimed to be due being thirty thousand nine hundred and seventy-eight dollars and thirty-four cents — together with a description of the property to be charged with the lien, and a notice of his intention to hold a lien upon the said Volcano Water Company's ditch, etc., for the purpose of securing the payment of the sum so alleged to be due him for work and materials furnished upon the said property.

On the 25th day of February, 1857, Fordyce commenced an action in the District Court of the Fifth Judicial District, in Amador County, against the Volcano Water Company, to recover of the company the said sum (\$30,978.34), with interest from August 29th, 1856, and costs of suit, and to

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obtain a decree foreclosing and enforcing his lien claimed upon said property.

Such proceedings were afterwards had in said action that upon the written stipulation of the plaintiff and defendant herein, judgment was rendered therein in favor of Fordyce and against the Volcano Water Company for the sum of eight thousand dollars, and for the foreclosure of the lien claimed by Fordyce, and adjudging the lien to be good, and directing a sale of the property to satisfy such judgment and costs.

Thereafter Jones, a defendant herein, became the owner and holder of such judgment and decree and of all the right of Fordyce thereunder.

On or about the 19th day of November, 1858, execution and decree of sale were issued upon such judgment, and under and by virtue of the same the Sheriff of Amador County did, on the 11th of December, 1858, sell said property to the said defendant Jones, who was the highest bidder, for the sum of \$——.

The certificate of sale was, by the Sheriff, given to Jones, as required by law.

The time for redemption of said property from such sale expired, and no redemption thereof was made.

After the time for redemption had expired, and on or about the 14th day of August, 1859, the Sheriff executed and delivered to said defendant, Jones, the usual Sheriff's deed of conveyance of all and singular the aforesaid property.

Under and by virtue of such deed, and the proceedings theretofore had, the defendant, Jones, at the time of the commencement of this action, claimed and now claims to be the owner, and entitled to the possession of all of said property.

On or about the 3d day of May, 1856, the said Volcano Water Company — one of the defendants — made, executed and delivered a mortgage to the plaintiff upon the whole of said ditch and other property, to secure the payment to the plaintiff of the sum of twenty-one thousand nine hundred and one dollars, with interest thereon at the rate of four per cent per month from its date.

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Said mortgage was duly acknowledged and recorded in the office of the County Recorder in and for Amador County, on the 10th day of May, 1856.

On or about the 29th day of September, 1857, C. D. Horn, the plaintiff, commenced an action in the District Court of the Fifth Judicial District, in and for Amador County, against the Volcano Water Company, defendant, to recover the said sum of money, so secured by said mortgage, and for a decree foreclosing said mortgage, and for an order of sale of said property to satisfy said debt, judgment and costs of suit.

On the 29th day of September, 1857, the plaintiff also filed in the office of the County Recorder of Amador County a notice of the pendency and object of such action, together with a correct description of the property to be affected by the judgment prayed for in plaintiff's complaint.

Such proceedings were had in said action that, on the 6th day of June, 1859, a judgment and decree was rendered in said action in favor of the plaintiff and against the defendant, the Volcano Water Company, for the sum of twenty-one-thousand nine hundred and one dollars, together with interest thereon at the rate of four per cent per month from May 3, 1856. That the said mortgage be foreclosed, and the mortgaged property be sold to pay and satisfy such judgment and costs, etc.

On the 9th day of June, 1859, an order of sale and execution was issued upon and to enforce such judgment and decree in due form.

Under and by virtue of said execution and order of sale, the Sheriff of said county, having levied upon the property, did, on or about the 23d day of July, 1859, sell all and singular of said mortgaged property to the plaintiff, C. D. Horn, and one F. E. Barney, who were the highest bidders therefor, for the sum of eighteen thousand dollars.

A certificate of sale was by the Sheriff duly issued to them as purchasers.

The time for redemption from such sale expired, and no redemption of such property was made therefrom.

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After the time for redemption had expired, and on or about the 24th day of January, 1860, the Sheriff made, executed, acknowledged and delivered to the plaintiff and F. E. Barney a deed of conveyance in the usual form, of all of said property; which deed was on the same day recorded in the office of the County Recorder of Amador County.

Afterward F. E. Barney, by deed in writing, bargained, sold and conveyed all his right, title and interest in said property to the plaintiff herein.

Thereafter the plaintiff, C. D. Horn, entered upon, took possession of, and at the time of the commencement of this action was and is now in the actual possession of all and singular of the aforesaid property.

First—It appears, by the record, that the plaintiff was in the possession of the ditch at the commencement of this action and that fact establishes, *prima facie*, that the plaintiff was the owner of the property. By the two hundred and fifty-fourth section of the Practice Act a person in possession of real property by himself or by his tenant, is in a position to bring an action to quiet his title thereto; and it follows, if the allegation be proved at the trial, that no further evidence of title on the part of the plaintiff can be essential in the first instance. Possession, whether proved by the plaintiff in an action to quiet title or in an action of ejectment, is followed by the same consequences. (*Curtis v. Sutter*, 15 Cal. 259.)

Second—As to the title of the defendant under the proceedings in foreclosure of the mechanic's lien.

The decree in the suit brought by Fordyce against the company for the purpose of foreclosing his alleged lien was entered upon a stipulation of the parties. The decree is valid on its face, and is binding upon the company and upon all persons claiming under it, by title subsequent and with notice.

Assuming, for the present, the validity of the plaintiff's mortgage, it appears that it became a lien upon the ditch on the 3d of May, 1856, and the defendant had notice of the fact on the tenth of that month, the day the mortgage was recorded. The title of the plaintiff under his Sheriff's deed relates back

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to that date. (*Sands v. Pfeiffer*, 10 Cal. 265.) On that day Fordyce not only had no lien, but his right to acquire one had been lost by lapse of time, assuming that he once had the right. The ditch was completed, as the case finds, on the 15th of December, 1855, and no notice of intention to claim a lien was filed in the Recorder's office until August 29th, 1856. Whether the right to a lien be tested by the Act of 1855 or by the Act of 1856, can make no difference, for the Acts respectively require every person wishing to avail himself of "their benefits" to file in the Recorder's office of the county in which the building, etc., is situated, a just and true account of the demand due him, etc., within sixty days after the work shall have been completed. But further: It has been held (*Ellison v. Jackson Water Company*, 12 Cal. 543,) "that neither the mechanic's lien law of 1855 or 1856 gave a lien upon canals or ditches." The language of these Acts is "building, wharf or other superstructure." A ditch is not a building, nor is it a wharf, and in no sense can it be designated as a superstructure. And it was further held, that "flumes, constructed at different points of the line of a ditch, cannot change the general character of the work as an excavation. Such flumes are mere connecting links of the ditch over ravines and gulches; and the whole work must be regarded as a ditch." The plaintiff is at liberty to go behind the Fordyce decree, and show that no mechanic's lien in fact existed in his favor, for the action was brought, not only subsequent to the mortgage, but subsequent to its registration, and the plaintiff was not made a party. And further: There was no notice of *lis pendens* filed. (*Montgomery v. Tutt*, 11 Cal. 314.)

It is insisted on the part of the appellant that Fordyce, in his suit against the company, recovered a personal judgment, and that the sale of the ditch was under a levy of execution issued on that judgment, and not under the order of sale issued upon the decree. In the first place, the fact claimed does not appear with any proper distinctness; and, in the second place, if such personal judgment was recovered in fact, the defendant should have made the judgment a lien by docketing it

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while he held it as assignee, and then redeemed the ditch from the prior lien of the plaintiff's mortgage; or else he should have redeemed as successor to the interest of the Volcano Company after he became a purchaser at his own sale.

It is further insisted, however, on the part of the appellant, that the Volcano Company, a corporation, never gave a mortgage to the plaintiff, and that the mortgage actually given was the deed of the individuals merely who signed it as Trustees.

The question has been ably argued by the respective counsel, but it is not necessary that we should pass upon it. The defendant Jones is estopped from saying that the mortgage was not executed by the company. The company against which the action to foreclose the mortgage was brought is estopped by the decree, and the defendant is estopped for the reason that a notice of *lis pendens* was filed in the action, and the defendant bought *pendente lite*, (*Richardson v. White*, 18 Cal. 107,) and neither he nor Fordyce had in fact any interest in the premises at the time when the action was brought by way of lien or otherwise. The defendant is therefore bound as effectually by the decree as he would have been had he purchased from the company *pendente lite* under a voluntary sale. It is of no moment that Fordyce was not a party to the action to foreclose the mortgage, for he had in fact no interest in the premises at the time when the action was brought. (10 Cal. 552.)

Third—It is further insisted by the appellant, that his title is not absolutely good as against the plaintiff, is absolutely void on the face of the record under which the title is claimed, and that the plaintiff has therefore no need of equitable relief.

The title of the defendant is, as we have already stated, a perfect one as against the Volcano Company; and the defendant claimed prior to the commencement of this action and to the plaintiff's damage that the title was perfect as to him also. It was held in *Head v. Fordyce*, 17 Cal. 151, that a party "has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property."

Statement of Facts.

We consider the case at bar to be clearly within the principle of that decision.

Judgment affirmed.

THE PEOPLE v. AH WOO.

SUFFICIENCY OF AN INDICTMENT.—The sufficiency of an indictment in this State is to be determined by the rules prescribed in the "Act to regulate proceedings in criminal cases," and if an indictment, upon a fair reading, stands this test, it is sufficient, though not good at common law.

INSTRUMENT FORGED IN THE CHINESE LANGUAGE.—An indictment for forging an instrument in a foreign language is good if it set out a translation in the English language of the instrument charged to be forged, without containing a copy of the original in the foreign language.

MISNOMER OF FORGED INSTRUMENT.—Where the instrument charged to have been forged, or a translation of it, is set out in full in the indictment, a misnomer of its technical designation is immaterial.

PASSING A FORGED INSTRUMENT.—If a forged order is made payable to the defendant, it is sufficient to charge him in the indictment with uttering and passing the same to another with intent to defraud, without charging an indorsement. The manner in which the fraud was committed is matter of evidence.

USE OF TERMS IN INDICTMENT CONJUNCTIVELY.—Where the intent to defraud by a forgery is described in the statute by different terms stated disjunctively, the indictment may state these terms conjunctively.

WHAT IS FORGERY?—The uttering and passing, as well as the making of a forged instrument, is forgery.

APPEAL from the County Court, El Dorado County.

The following is a copy of the indictment in this case:

"The above named defendant, Ah Woo, *alias* Ma Yien Fang, is accused by the Grand Jury of said County of El Dorado by this indictment, of the crime of forgery, committed as follows: The said defendant, Ah Woo, *alias* Ma Yien Fang, on the—day of February, A. D. 1864, and before the finding of this indictment, at the County of El Dorado and State of California, did feloniously, wilfully, and unlawfully, falsely utter and pass to one Ah You, a certain false, forged, and counterfeit order, as a true and genuine order of one Wang Ah Chung, for the payment of one hundred dollars, which aforesaid order then and there was written in the Chinese lan-

Argument for Appellant.

guage, and of the tenor and effect following when translated into the English language, to wit:

'To Yet Wha's Store—Sirs: Please pay to Ma Yien Fang the one hundred dollars which I deposited at yours sometime ago, because I am sick now and need money to employ a doctor to attend me. Be sure to pay it to him, please.

'WANG AH CHUNG.

'February 28th, 1864.'

"With the intent then and there to prejudice, damage, and defraud the said Ah You, he, the said Ah Woo, *alias* Ma Yien Fang, then and there well knowing the said false, forged, and counterfeit order to be false, forged, and counterfeit, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

The defendant was convicted and sentenced, and appealed.

Charles A. Tuttle, for Appellant.

The indictment should have set forth the instrument. The indictment avers that the tenor of the instrument is set forth. Tenor means an exact copy. (1 East, P. C. 180; Barbour's Crim. Law, 122.) As to setting forth an exact copy, I refer to Barbour's Criminal Law, 121, 122; 2 Wharton's Crim. Law, Sec. 1,469; 3 Archibold's Crim. Pleadings, 536, 19; Wood's Digest, 289, Sec. 252.

The indictment charges the uttering and passing, and not forging the instrument. It is described as an *order*. The translation set forth is not an order but a direction to pay money deposited; it is a draft. It is alleged that the instrument was uttered to injure Ah You, who is neither the drawee or payee. Neither the words "bearer" or "order" are inserted. Ah You could not be injured by having the paper passed to him by Ah Woo.

J. G. McCullough, Attorney-General, for The People.

The objection that the indictment does not set forth the instrument in the original language as well as an English translation, whatever weight it might have had at the common law, if taken at any time subsequent to demurrer, is cured now in England by the provisions of the statute of 7 George IV, c. 64, sec. 21. Our Criminal Practice Act is more liberal than the English statute; and if there the objection must be taken by demurrer, here certainly it should also. (*Rex v. Harris*, 32 Eng. Com. Law R. 571; *Rex v. Moses*, 32 Eng. Com. Law R. 571; *Rex v. Balls*, 32 Eng. Com. Law, R. 571, and notes "a" and "b" appended thereto; 2 Russell on Crimes, *375; *Rex v. Warshauer*, R. and M. C. C. R. 466.)

But it is by no means sure, had the objection that the indictment does not set forth the instrument in its original language been raised at the proper time in the Court below and been overruled, that such a course would have worked any substantial injustice to the defendant. The object of setting out the instrument in full in the indictment is to furnish some information to the Court, and where no such information can be obtained by such a course, it is unnecessary that it should be set out. (*Regina v. Coulson*, 1 Eng. Law and Eq. 550.)

This indictment only purports to set out the "tenor and effect of the instrument when translated into the English language." Whether the translation is correct or not is a question to be tested by the evidence upon the trial. We take it that the instrument was sufficiently set forth to sustain an indictment for larceny, and we think that under our statute no greater strictness is required in indictments for forgery. An English translation of the instrument must be set out, but what good could have been accomplished by setting it out in the Chinese language. (*Rex v. Goldstein*, Russ. and Ry. 473.) But whatever may be the common law decision upon this point, under our statute we urge that this indictment is sufficient. The Criminal Practice Act prescribes the rules by

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which the sufficiency of pleadings is to be determined in this State; nor shall any indictment be deemed insufficient by reason of any defect which shall not tend to the prejudice of the defendant. (*People v. Littlefield*, 5 Cal. 356; *People v. Lloyd*, 9 Cal. 55; Wood's Digest, 288, Secs. 235, 237, 246, 247; Wood's Digest, 318, Sec. 601; *People v. Ybarra*, 17 Cal. 169; *People v. Ah Sing*, 19 Cal. 599; *People v. Gatewood*, 20 Cal. 149; *People v. Vance*, 21 Cal. 403.)

By the Court, SANDERSON, C. J.

I. The objection to the indictment upon the ground that it does not contain a copy in the Chinese language of the forged and counterfeit order therein mentioned is not well taken, even though it should be conceded that it would have been fatal at common law. As we have had frequent occasion to remark, the forms of pleading in criminal actions in this State are prescribed in the "Act to regulate proceedings in criminal cases," and the sufficiency thereof is to be determined by the rules or tests therein provided. Such is the express will of the Legislature, and we are not allowed to disregard it. (Section 235; *People v. Ah Sing*, 19 Cal. 598; *People v. Vance*, 21 Cal. 403; *People v. King*, 27 Cal. 507.) With much particularity that Act provides a series of tests by which to determine the sufficiency of an indictment. If an indictment upon a fair reading is found to stand these statutory tests it must be declared sufficient, notwithstanding a contrary result might follow when subjected to the tests of the common law. These tests are enumerated in section two hundred and forty-six. The sixth and seventh in order are the ones applicable to the question now before us. The first provides that the act or omission charged as the offense shall be clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. The last requires that the act or omission charged as the offense shall be stated with such a degree of certainty as to enable

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the Court to pronounce judgment upon a conviction according to the rights of the case.

The question before us relates solely to the description of the forged instrument which, it is charged, the defendant uttered and passed; and under the foregoing tests we think the description given in the indictment is sufficient for all purposes which can be directly or remotely subserved by the record in this case. The instrument is described as purporting to be an order of one Wang Ah Chung for the payment of one hundred dollars, written in the Chinese language. An English translation is then given which, so far as the demurrer is concerned, must be assumed to be literally correct. (If the translation is not correct, the objection could be made by demurrer to the evidence when the instrument is offered at the trial.) In one sense an exact copy in the Chinese language would have been a more perfect description, yet for all practical legal purposes a correct translation would be far more useful to the Court and the jury. While the highest degree of certainty in point of description is desirable, it does not follow that a less degree is not sufficient for all legal purposes. A description which serves to establish the legal character of the instrument, to show that it is one of those enumerated in the statute against forgery, and to identify the offense sufficiently to protect the defendant against a second prosecution, answers every useful purpose, and more than that our forms of pleading do not require. A correct translation of the instrument in question is sufficient to enable the Court to determine its legal character, even if we assume that the Chinese language is as familiar to the Court as household words. It is equally as effectual to protect the defendant against a second prosecution. What useful purpose, then, can a copy in the Chinese language serve which is not as well served by a correct translation? If it be said that greater certainty would be attained, the answer is that where sufficient certainty is attained greater certainty is not needed. Not unfrequently a more certain and complete description of stolen

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goods might be given than is found in an indictment for larceny, but the indictment is not therefore vicious. The question is not, can a more certain description be given? On the contrary, it is, does the indictment contain a sufficient description? Doubtless in all cases of forgery, where the instrument is written in a foreign language, it would be better to set out the instrument in the language in which it is written, for by so doing greater certainty, which is always desirable in legal proceedings, would be attained; but it is not indispensable that this should be done, for in our judgment sufficient certainty may be otherwise obtained.

If a statement of the foreign language in which the instrument is written, accompanied by a correct translation, can serve all the useful purposes of a pleading, as we have attempted to show, or if a copy can be dispensed with where the instrument is not written in a foreign language, as at common law, because it has been lost or destroyed or is in possession of the defendant, (1 Wharton on Crim. Law, Sec. 311; 2 Wharton on Crim. Law, Sec. 1,468,) or if, in the latter case, a misdescription of the instrument is to be regarded as immaterial as prescribed in our statute, (Crim. Prac. Act, Sec. 252,) it follows that the question under consideration is one of form rather than substance; in which case it must be determined in accordance with the two hundred and forty-seventh section of the Criminal Practice Act, which declares that "no indictment shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant." In our judgment all the substantial rights of the defendant have and are as fully secured and protected under this indictment as they would have been had it contained a copy, in the Chinese language, of the forged instrument. It is true that a more perfect description would have been afforded by a *fac simile*, but we think one sufficiently certain for all purposes has been obtained by the course adopted. If no legal prejudice can result therefrom to the defendant, and we think there cannot, all the calls of the

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statute upon the subject of criminal pleading are satisfied by the indictment, so far as the present question is concerned. (*People v. Littlefield*, 5 Cal. 355; *People v. Lloyd*, 9 Cal. 55; *People v. Ybarra*, 17 Cal. 166.)

II. It is next claimed that the forged instrument is misnamed an "order." Admitting this to be so the indictment is not thereby made vicious. Where the instrument is set out in full as in the present case a technical designation of its legal character becomes immaterial for the obvious reason that the Court can determine from the face of the instrument whether it comes within the statute against forgery. (2 Wharton's Am. Crim. Law, Sec. 1,467.) But independent of this we think the word "order" a proper designation of the instrument within the meaning of the statute. (*Evans v. The State*, 8 Ohio State Rep. H. S. 196.)

III. It is next claimed, in effect, that the intent alleged in the indictment is an impossible one, and it is argued that inasmuch as the person intended to be prejudiced is neither the drawee nor the payee mentioned in the order, and the order is not drawn payable "to order" or "bearer," and is not transferred by indorsement, Ah You could not have been defrauded by the altering and passing in question. This position is untenable in our judgment. The order was payable to the defendant under the name of Ma Yien Fang, and he is directly charged by the defendant with uttering and passing the same to Ah You, with intent to defraud him. It was not necessary, in order to constitute an uttering within the meaning of the statute, that there should have been a formal indorsement. A delivery of the order with the intent to defraud would be sufficient; and a mere failure to comply strictly with the forms of law cannot be relied on to defeat the charge of criminal intent.

So far as it is claimed that the indictment fails to show in what manner Ah You was or could be defrauded by the transaction, it is sufficient to say that all that is matter of evidence. The charge is direct that the transfer was made with intent to defraud Ah You, which is sufficient so far as the indictment is

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concerned. It may have been passed as security for a loan. All this is to be proved, but need not be alleged.

IV. The objection to the indictment upon the ground that it reads "with intent to prejudice, damage and defraud," instead of using only one of those terms, is not tenable. It is true that the statute reads "with intent to prejudice, damage or defraud." The use of either of these terms in describing the criminal intent would have been sufficient; but where the intent is described in the statute by different terms stated disjunctively, it is well described in the indictment by the use of all stated conjunctively. (2 Wharton's Criminal Law, Sec. 1,466.)

V. Nor is the objection that the defendant could not be found guilty of forgery because the charge was for "uttering and passing a forged instrument" tenable. By the statute the uttering and passing, as well as the making, etc., of a forged instrument, is declared to be forgery.

Judgment affirmed.

SAMUEL C. HARDING v. TURNER COWING AND H. E. REANARD.

JUDGMENT BY DEFAULT ON GOLD COIN NOTE.—In an action upon a note payable in gold coin, if the defendant suffers a default, the Clerk may enter a judgment against him payable in gold coin.

A JUDGMENT FIXED BY LAW.—When the law declares what the judgment shall be, a judgment entered on default is not the judgment of the Clerk.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendants appealed from the judgment.

The other facts are stated in the opinion of the Court.

Bennett, Cook & Clarke, for Appellants.

The Clerk has no power under the statute to enter a *gold coin judgment*. He has no authority to do more than is

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expressly conferred upon him by statute. (See *Wallace v. Eldridge*, 27 Cal. 498.)

It requires the *judgment* of the Court to decide whether the plaintiff was entitled to a *gold coin judgment*.

There was a fact to be determined which required the interpretation of the contract and its character. This the Clerk could not do.

Section one hundred and fifty of the Practice Act "empowers the Clerk to enter judgment for the amount specified in the summons, including the costs;" but it goes no further than this. It does not constitute the Clerk a Court to determine any question which requires or may require judicial action, and the question whether a contract is payable in gold coin or not, may be, in certain cases, a question of very great doubt and difficulty, and requiring wise judicial discrimination.

E. W. F. Sloan, for Respondent.

The whole proceeding is in strict accordance with the requirements of the statute, vide Practice Act, §§ 26, 150, and 200, as amended in 1863. (Statutes of 1863, p. 687.)

In *Wallace v. Eldridge*, 27 Cal. 498, it did not appear from the facts stated in the complaint that the money mentioned in the contracts sued on was payable in a specified kind of money or currency, hence the judgment as there entered in the District Court was not the judgment of law. But here the complaint does show that the contract is payable in gold coin, and, consequently, the judgment as entered up conforms strictly to the provisions of section two hundred, and is the judgment of law.

By the Court, SHAFER, J.

This is an action upon a note payable in gold coin of the United States. The defendants were duly served, and on failure to answer, defaults were duly taken, and a judgment for the recovery of one thousand two hundred and twenty

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dollars in gold coin, with interest thereon, was thereafter entered against them by the Clerk. The question is, whether the Clerk, as such, had power to enter the judgment without judicial direction.

The action was brought for the recovery of "money only" — (Practice Act, sec. 150,) — for a particular kind of money, but still a recovery of nothing but money was sought, and that fully liquidated in amount. The default admitted the facts stated in the complaint. Thereafter, no question could have been raised except by motion to set aside the default, or perhaps on motion in arrest. No such motion was made, and every point within the purview of a motion in arrest, is within the purview of this appeal. The plaintiff was entitled to a judgment for gold coin, and the statute pronounced the judgment of the law arising upon the facts stated in the complaint. As was held in *Wallace v. Eldridge*, 27 Cal. 498, "the Clerk adjudged nothing; he was merely the hand that entered the judgment of the law." The relief was *sub modo* special, but still "the action was for money only;" and the relief provided for the judgment is the relief dictated, identically, by the law. The judgment is in no just sense the judgment of the Clerk. His head did not conceive it; it was merely written out by his hand.

Judgment affirmed.

THE PEOPLE v. GEORGE THOMPSON.

INDICTMENT CONTAINING MORE THAN ONE COUNT.—If the indictment contains more than one count, it should appear clearly on its face that the matters set forth in the different counts are descriptive of one and the same transaction.

WHAT DIFFERENT COUNTS IN INDICTMENT SHOULD CHARGE.—An indictment charging the defendant with entering a dwelling house with intent to steal, may contain different counts, charging the ownership of the goods intended to be stolen in different persons, if each count charge the same entry into the same house and at the same time.

STATEMENT OF OFFENSE IN SECOND COUNT IN INDICTMENT.—The words "said," "aforesaid," or equivalent expressions in the second count of an indictment, are necessary to fix the identity of the offense therein stated with that stated in the first count, except as to facts, of which the Court will take judicial notice.

Statement of Facts.

NAME OF HOUSE IN DIFFERENT COUNTS OF INDICTMENT.—In an indictment for entering a dwelling house with intent to steal, if the second count give the name of the house entered the same as the first, the Court will presume that it is the same house without the word "said" or its equivalent.

ENTERING A HOUSE WITH INTENT TO STEAL.—The offense of entering a dwelling house in the daytime with intent to steal, created by the Act of February 27th, 1864, is complete, if the value of the property the defendant intended to steal is less than fifty dollars.

REVIEW OF INSTRUCTIONS IN A CRIMINAL CASE.—On an appeal in a criminal case, the appellate Court will not review alleged errors in instructions of the Court, unless embodied in a bill of exceptions, or there is an indorsement thereon, signed by the Judge, showing the action of the Court thereon.

APPEAL from the County Court, Sacramento County.

The defendant was indicted under the Act of the 27th of February, 1864, (Statutes of 1863-4, p. 104,) against breaking and entering, or wilfully and maliciously entering without breaking, in the daytime, any dwelling house, etc., with intent to steal or to commit any felony whatever therein. The indictment contains two counts. The first count charges him with feloniously entering, on the 21st day of July, 1864, in the daytime of that day, at, etc., a certain dwelling house, to wit: the hotel known as the Crescent City Hotel of one John McRaith, then and there situate, with intent the goods and chattels of the said John McRaith, then and there being, then and there feloniously to steal, etc.

The second count charges the defendant with "feloniously entering on the *said* 21st day of July, 1864, at, etc., the dwelling house of one John McRaith, known as the Crescent City Hotel, then and there situate, with intent to steal the goods and chattels of one James McGrath, then and there being," etc.

The indictment was demurred to upon the ground that more than one offense was charged. The demurrer was disallowed, and it is now claimed that such disallowance was error.

The first count in the indictment charged the value of the goods at sixteen dollars. Defendant was convicted and appealed. The other facts are stated in the opinion of the Court.

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A. Compte, Jr., for Appellant, referred to section two hundred and forty-one, Criminal Practice Act, and *People v. Connor*, 17 Cal. 361; and Wharton's A. Criminal Law, Secs. 565 and 1,903, on the question of the indictment charging two offenses.

J. G. McCullough, Attorney-General, for The People, in answer referred to *Josslyn v. Commonwealth*, 6 Metcalf, 236; *People v. Shotwell*, 27 Cal. 394.

By the Court, SANDERSON, C. J.

Under our practice an indictment must not charge more than one offense, but it may set forth that offense in different forms under different counts. (Crim. Prac. Act, Sec. 241.) But this must be done in such a way as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transactions. The object of allowing different counts is to provide against fatal variances between the material parts of the indictment and the proofs brought forward in their support. Where a material fact is doubtful, that is to say, where it is uncertain as to which of two or more conditions is the true one, and either is equally effectual in completing the offense, it is proper to frame a count embracing each, in order that there may be at the trial no fatal variance between the matters alleged and the matters proved. By way of illustration take a case of larceny. Suppose, from the evidence in the possession of the pleader, and upon which the indictment is to be framed, it is doubtful whether the stolen goods were the property of A. or B., and it is material for the purpose of identifying the larceny (Crim. Prac. Act, Sec. 243,) to allege the ownership of the goods with certainty. In such a case two counts, one alleging the ownership in A. and the other in B., is proper. But it must appear from the averments in the second count that the larceny therein set forth is the same as that charged and described in the first count, and unless this

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is done the indictment will be obnoxious to the objection that it charges more than one offense. Or, take the present case. The first count charges that the defendant intended to steal the goods of John McRaith. The second charges that he intended to steal the goods of James McGrath. Now, assuming that it was necessary to allege the ownership of the goods, which the defendant intended to steal, in order to make a statement of the offense which would be sufficient in law, the two counts are proper, and there is no legal objection to the indictment merely upon the ground that the ownership of the goods intended to be stolen is charged to be in two different persons, which seems to have been the principal ground relied upon by counsel for the defendant in the Court below.

The use of the words "said" or "aforesaid," or equivalent expressions in the second count of an indictment, will generally be found indispensable in order to fix the identity of the offense therein stated with that contained in the first count. It is a little remarkable that in the indictment before us those words are not used in a single instance where their presence would have been proper if not necessary for the purpose of identification, but are used where they were not needed. Thus the date of the transaction is preceded by the word "said," which was not necessary, since the Court must know that there can have been but one 21st day of July in the year 1864. But when we come to the dwelling house, the identity of which with that mentioned in the first count must be shown with certainty, neither the word "said" nor any equivalent expression is used. It is true that it is described, word for word, the same as in the first, but so far as the use of words is concerned there is nothing to show that the Crescent City Hotel of the second count is the Crescent City Hotel of the first, except that the name of the hotel and its proprietor is the same in both.

The dwelling house having been described in the first count, no further description in the second count was required. A simple reference to it as "the said dwelling house" or as "the dwelling house aforesaid," was all that was necessary in

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the execution of the deed to the plaintiff. The *presumption of law* was that his residence *continued* where it is shown to have been at the time of the conveyance to him. (*Prather v. Palmer*, 4 Pike, Ark. 486; 2 Stark. Ev. 937.)

This presumption, we think, was not overcome by its appearing that there was a person bearing the *same name* at Oroville, in the County of Butte, at the time the deeds to the plaintiff were executed.

But were we mistaken in this last proposition, and were it held that the presumption against identity, arising from difference of residence, was counterbalanced by the presumption in its favor, arising from similarity of name, even then the matter was left in *equipoise*, and, therefore, *not proved*. (*Doe ex dem. Hanson v. Smith*, 1 Camp. 196; *Middleton v. Sandford*, 4 Camp. 34; *Parkins v. Hawkshaw*, 2 Starkie, 239; Buller's *Nisi Prius*, p. 171.)

W. W. Crane, Jr., for Respondents.

The exact similarity of the names in the two deeds raises, at least, the presumption of identity of the persons. *Prima facie* they are the same; and it was for the appellants to rebut this presumption by showing, if they could, that the persons were different. (*Thompson v. Manrow*, 1 Cal. 428; *Hatch v. Rocheleau*, 18 New York, 86.)

By the Court, RHODES, J.

Ejectment to recover a portion of the lot No. 1,188 in the City of San Francisco. Both parties claimed under the prior possession of their respective grantors, and both claimed title under the "Van Ness Ordinance," and the statute ratifying and confirming the same, and the plaintiff also relied upon adverse possession for a period exceeding five years before the entry of defendants. The jury found for the plaintiff. The defendants moved for a new trial, and the grounds relied on are errors in law, committed by the Court and excepted to by them. Insufficiency of the evidence to justify the verdict is

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stated as one of the grounds, but as they do not specify the particulars in which the evidence is insufficient, that ground must be disregarded; and if the proper specifications had been made, the ground could not be maintained, for the evidence appears quite sufficient to sustain the verdict. Several of the specifications of errors in law committed by the Court do not amount to specifications within the meaning of section one hundred and ninety-five of the Practice Act. The general statement that the Court erred in admitting illegal and incompetent evidence for the plaintiff or in excluding legal and competent evidence offered by the defendants, or in excluding evidence offered by them to show title in the defendants' grantor, amounts to but little, if anything, more than an allegation that the Court committed errors in law. The defendants have annexed to the judgment a statement on appeal, and the grounds therein contained will be examined so far as it may be necessary to a proper disposition of the case.

1. The plaintiff having introduced in evidence a deed executed to Benjamin T. Black, of San Francisco, in 1859, offered in evidence a deed of the same premises to the plaintiff, executed by Benjamin T. Black, of Oroville, in the County of Butte, in 1862, and the defendants objected to its admission without proof that the grantor was the same person as the grantee of the former deed. The question of the identity of the grantor of the last mentioned deed with the grantee of the previous deed, is a question of fact for the jury, and neither a question of law nor a preliminary question of fact, to be passed on by the Court, before the admission of the deed; and the party producing the deed must satisfy the jury upon this point by competent evidence, otherwise the deed will be disregarded, because it does not show a transmission of the title of the previous grantee. The general rule is that the identity of the name is *prima facie* evidence of the identity of the person. (2 Phil. Ev. C. H. and E. Notes, 606; *Thompson v. Marrow*, 1 Cal. 428; *Mott v. Smith*, 16 Cal. 554; *Jackson v. Boneham*, 15 Johns. 226.) The name of the city or county, usually following the name of the grantor, forms

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no part of his name, but it simply indicates his residence at the date of the deed; and the recital of the residence of the grantor as in a different county from that of the grantee of the prior deed of the same name, would be presumptive evidence of a change of residence of the same person between the dates of two deeds; but in the absence of proof that there were two persons of the same name, it would not raise the presumption that the grantor was a different person from the previous grantee of the same name. The addition of the place of residence is in many respects of less significance than that of "junior," and it is said of "junior" that it forms no part of the name—that it is a casual and temporary designation that may exist one day and cease the next. (See *Padgett v. Lawrence*, 10 Paige, 170; *People v. Collins*, 7 John. 549; *Fleet v. Youngs*, 11 Wend. 522; *Kincaid v. How*, 10 Mass. 203.) In *Hatcher v. Rocheleau*, 18 N. Y. 86, which was an action on a judgment rendered in the State of Mississippi, it was held that the identity of the name of the defendant in the two actions was "presumptive evidence (and sufficient, no suspicious circumstances appearing) that the defendant is the person against whom the judgment was rendered."

2. The Court did not err in overruling the defendants' motion for a nonsuit as to either or both of said defendants, for there was evidence tending to show the prior possession of the plaintiff's grantor, and to connect both of the defendants with the alleged ouster.

3. The questions relating to a sale under execution of the interest of the City of San Francisco in the land that passed to the city, as the successor in interest of the former pueblo, were fully and satisfactorily passed upon in the case of *Hart v. Burnett*, 15 Cal. 530; and the conclusions announced in that case have been too frequently adopted and acted upon in subsequent cases to be now disturbed, except for the most cogent reasons.

4. The defendants insist with great zeal, and with a most abundant citation of authorities and legal principles, that the Court erred in excluding the preamble and resolutions, and an

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order of the Board of Supervisors, purporting to repeal the Van Ness Ordinance, passed a few days prior to the Act of the Legislature confirming the ordinance. The purpose of the evidence, was mainly to show that the ordinance was repealed before the passage of the confirmatory Act, and that the city did not consent to, but protested against its passage, and it is argued therefrom, that the Act was powerless and ineffectual to pass the title of the city in the premises. Questions arising upon the ordinance and the confirmatory Act, have been presented to this Court in almost every conceivable form, and the legality and validity of the ordinance and the Act, have uniformly been maintained by the Court. It has been steadily held, that they vested in possessors described in the ordinance, a title to the lands therein mentioned, as against the city, and those decisions have become a rule of property, lying at the foundation of a large portion of the titles to real estate in that city, and the rule is now upheld, not only upon principle, but upon consideration of policy, requiring certainty and stability in the rules constituting the landmarks of property. The doctrine of *stare decisis* does not find a more clear, forcible or necessary application in respect to any of the rules governing the transmission of the property of the city or of the former pueblo, than to this rule. (*Hart v. Burnett*, 15 Cal. 612; *Holladay v. Frisbie*, Id. 630; *San Francisco v. Beideman*, 17 Cal. 443; *Hubbard v. Sullivan*, 18 Cal. 508; *Board of Education v. Fowler*, 19 Cal. 11; *Wolf v. Baldwin*, Id. 306; *Hubbard v. Barry*, 21 Cal. 321.)

But if the proposition of the defendants is conceded, that the title to the premises did not and could not pass from the city by virtue of the ordinance and confirmatory Act, their position is not materially strengthened, for the title still remains in the city, and they do not in any manner—other than through the ordinance and the Act—connect themselves with it; and they, as well as the plaintiff, can rely only upon the rights growing out of the possession of the premises by themselves and those under whom they respectively claim. If the defendants were not in possession at the commencement

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of the action, the plaintiff of course could not recover, and if they were then in possession they will be presumed to be rightfully in possession until the plaintiff shows a better right in himself, and until that is shown it would be idle for the defendants, even if permitted, to prove an outstanding title in the city. If the plaintiff shows possession in himself, or the better right to the possession as between him and the defendants, at the time of the entry of the defendants, as alleged in the complaint, they would not be permitted to overcome the presumption of title in the plaintiff, that the law raises upon such proof, by showing title in a stranger. They could not obviate the consequences of their own trespass, by showing that the entry of the plaintiff was a trespass upon the possession of a third person.

5. The remaining points in the case relate to the instructions given or refused by the Court, and in this respect the case is nearly identical with that of *Greely v. Townsend*, 25 Cal. 604, in which the rulings of the Court below were sustained. We think this case was fully and fairly presented to the jury by the Court, and that the instructions given to them declare the law applicable to the evidence in the cause with commendable clearness and precision.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

**BENJAMIN WALLS, ADMINISTRATOR OF THE ESTATE OF
MANUEL VERA, DECEASED v. WILLIAM PRESTON.**

WHAT DETERMINES THE RELATION OF LANDLORD AND TENANT.—If the tenant, after the expiration of his lease, leaves the premises and removes his property therefrom, and notifies the landlord that he delivers him possession, and the landlord takes possession, the relation of landlord and tenant ceases; and if the tenant afterwards enters, the landlord cannot remove him under the thirteenth section of the Forcible Entry and Detainer Act.

RELATION OF LANDLORD AND TENANT.—If the tenant on the expiration of his lease delivers possession of the premises to the landlord, an intention on his part to afterwards re-enter, and a re-entry without the consent of the landlord, do not restore the relation of landlord and tenant.

APPEAL from the County Court, Solano County.

This case was before the Supreme Court at the April Term, 1864, and is reported in 25 Cal. 59. A new trial took place in the Court below in July, 1864, when defendant recovered judgment, and plaintiff appealed.

On the second trial below, the Court permitted the defendant to testify that he re-entered under a pre-emption right.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant, argued that the relation of landlord and tenant being established by the lease, defendant was estopped from denying that it still subsisted, and referred to *Frisbie v. Price*, 27 Cal. 253, and *Page v. Hobbs*, Id. 483.

M. A. Wheaton, for Respondent, argued that the estoppel ceased when the lease expired and the possession acquired under it had been restored to the landlord, and referred to *Jackson v. Whitford*, 2 Caine's, 216; *Anderson v. McLeod*, 12 John. 183; and *Wilde's Lessee v. Serpell*, 10 Gratt. (Virginia) 415.

By the Court, **SHAFTER, J.**

This is an action to recover the possession of certain premises, under the thirteenth section of the Act concerning forcible entries and unlawful detainers. The premises in question were leased to the defendant by the plaintiff's intestate for a term ending October 1st, 1863. The defense was put upon the ground that the respondent surrendered the possession of the premises to the plaintiff a few days after the term expired. The facts as shown by the record are substantially as follows: The defendant left the premises with his family about the 10th of October, 1863, and took with him everything that belonged to him; and on the same day he delivered the keys of the house to the plaintiff personally at his residence, saying to him, "there are the keys of the house and I give you the pos-

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session." The plaintiff replied "all right." It further appears that the house occupied by Walls was within the same general inclosure as the tract in question. In two or three days after the defendant so left the premises he entered upon and took possession of them anew.

This action is brought upon the assumption that the relation of landlord and tenant is now on foot between the parties; but we consider that the relation came to an end on the day the defendant evacuated the premises and surrendered the keys. It may be that the defendant, when he quit the possession, intended to re-enter, but as he quit in fact and within the plaintiff's knowledge, and in compliance, too, with a notice to quit which the plaintiff had previously given, and as the plaintiff was himself in possession of the premises for two or three days thereafter, the mere intention of the defendant when he left to re-enter at a future day cannot be regarded as a matter of any moment. There was no simulation about the defendant's surrender. Everything was just as it appeared to be. It was the defendant's duty to leave and he seems to have performed it. We cannot inquire into the motives by which he was governed nor as to his ulterior designs. If the right of possession is now in the plaintiff, he has, in our opinion, mistaken his remedy.

Judgment affirmed.

J. H. POETT v. ABEL STEARNS, E. H. WORKMAN, WILLIAM WORKMAN, J. M. HELLMAN, PEDRO DOMEQ, JOHN PARROTT, WILLIAM DODGE, WILLIAM E. DODGE, JR., JAMES STOCKS, A. G. P. STOCKS, D. W. JAMES, AND GEORGE H. HOWARD.

COMPLAINT IN ACTION TO FORECLOSE MORTGAGE.—In an action on a note and to enforce the lien of a mortgage given to secure its payment, where other parties beside the mortgagor are made defendants on the ground that they have or claim an interest in the mortgaged property, a general allegation in the complaint that such parties have or claim to have some interest in the property is all that is required.

Statement of Facts.

Demurrer.—If the complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind or how much relief shall be granted to him cannot be made on demurrer.

APPEAL from the District Court, First Judicial District, Los Angeles County.

The complaint contained the usual allegations on a promissory note, of which the following is a copy:

“SAN FRANCISCO, April 4, 1861.

“\$15,000.

“Value received, I promise to pay to the order of J. H. Poett, twelve months after date, fifteen thousand dollars, with interest at the rate of one and one-fourth ($1\frac{1}{4}$) per cent per month until paid.

“ABEL STEARNS.”

“I agree to pay the above written sum of fifteen thousand dollars in gold coin of the United States.

“ABEL STEARNS.”

It then averred that on the 2d day of July, 1861, the defendant Stearns, to secure the payment of the note, executed to plaintiff a mortgage on certain property (describing it) in Los Angeles. A copy of the mortgage was attached to the complaint. The allegations concerning the mortgage were in the usual form. The complaint also alleged that the parties other than Stearns made defendants then had or claimed to have some interest in or claim upon the mortgaged premises, or some part thereof, as mortgagees, attaching creditors, or otherwise, which interest and claims were all subsequent and subject to the lien of plaintiff's mortgage.

The prayer was in the usual form in such cases, and for judgment in gold coin, and for such other and further relief as plaintiff might require and to the Court might seem proper.

The defendants, Stearns, Hellman, and Domec, demurred to the complaint, because it did not state facts sufficient to constitute a cause of action, and because there was a defect of parties defendant. The Court sustained the demurrer on the

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ground that the supplement to the note promising to pay in gold coin could not be enforced because it bore no date, and upon failure of the plaintiff to amend, gave judgment for defendants. Plaintiff appealed from the judgment.

Robert F. Morrison, and S. M. Wilson, for Appellant.

Volney B. Howard, and Benjamin Hays, for Respondents.

By the Court, SANDERSON, C. J.

In sustaining the demurrers to the complaint the Court below manifestly erred. The complaint does state facts sufficient to constitute a cause of action, and upon the face of the complaint there does not appear to be any defect of parties defendant. The facts stated as to those defendants who were made parties because they had, or claimed to have, some interest in the mortgaged premises, are sufficient. The plaintiff was not bound to set forth their interests. The general allegation that they had, or claimed to have, some interest, is all that is required on the part of the plaintiff. And the defendants, if they have any interest, and desire to defend the suit, must set it out. The question as to what kind or how much relief the plaintiff is entitled to recover, cannot be made on the demurrer. The complaint shows that he has a cause of action and is entitled to relief of some kind—which is a complete answer to the demurrer, upon the general ground that sufficient facts are not stated. The demurrers ought to have been overruled.

Judgment reversed and cause remanded for further proceedings.

THE PEOPLE *ex rel.* M. G. COBB v. THE BOARD OF SUPERVISORS OF SAN JOAQUIN COUNTY.

BILLS FOR EXPENSES OF VOLUNTEER COMPANIES.—It is the duty of the Boards of Supervisors of the respective counties in this State to audit and allow the bills of organized volunteer companies for rent of armory, etc.

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and to direct a warrant to be issued therefor, payable out of the county funds in the hands of the County Treasurer; and if they refuse to issue such warrant in a proper case, a writ of mandate will be issued commanding them to do so.

EXPENSES FOR VOLUNTEER COMPANIES PAID BY COUNTIES.—The sums paid by counties for expenses of volunteer companies are to be allowed and credited to such counties by the State Treasurer, in his annual settlements with the County Treasurers.

THIS was an original proceeding commenced in the Supreme Court.

The other facts are stated in the opinion of the Court.

M. G. Cobb, in pro. per., for Relator.

John C. Byers, for the Defendant.

By the Court, SAWYER, J.

The relators are members of a military company in San Joaquin County, organized under the Act of 1862, in relation to the militia of this State, as amended by the Act of 1863. In pursuance of the provisions of the Act, the said military company, with the approbation of the Board of Supervisors, rented a room for a drill room and armory, and employed an armorer to take charge of the same. On the 6th of February, 1865, the rent of the building, wages of armorer and other necessary incidental expenses unpaid, had accumulated to the amount of seven hundred and fifty dollars. A bill for the amount was duly presented to the Board of Supervisors of said county, and the said Board requested by said company to allow the same, and direct it to be paid out of the funds of said county. The Board of Supervisors allowed said bill, and ordered a warrant to be issued therefor, payable out of the general State funds in the hands of the County Treasurer of said County of San Joaquin; but refused to order the same to be made payable out of the county funds of said county. At the time mentioned there were no funds belonging to the State in the hands of the County Treasurer. The relators now ask for a peremptory mandate directing the said Board of Supervisors to order the said warrant to be issued payable out of

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the county funds of said San Joaquin County. The question therefore is, whether the relators are entitled, under the law, to have the said sum paid out of funds belonging to the county, or whether they are confined to such funds as may be in the County Treasurer's hands belonging to the State—whether such State funds were raised by general taxation, or by a poll tax for military purposes.

The determination of the question depends upon the construction to be given to section twenty-two of the Act referred to, which is as follows, to wit:

“SEC. 22. It shall be the duty of the Board of Supervisors of each county in which there shall be one or more organized volunteer companies, upon application of the Captain or commanding officer of the same, to provide for each company in said county an armory, safe and suitable for the drill of squads in the School of the Soldier, and an armorer to take charge of the same; and it shall also be the duty of the Board of Supervisors of each county in which there shall be one or more organized regiments, upon application of the Colonel or commanding officer of the same, to provide for each regiment in said county a drill room, suitable for skeleton regimental drill; and said Board shall also, at each of its sessions, audit and allow, and cause to be paid, the necessary incidental expenses of said company or regiment previously incurred; *provided*, that the total amount for all the purposes above mentioned shall not exceed fifty dollars per month for each company, and one hundred dollars per month for each regiment; and for light batteries, not less than two hundred and fifty dollars per month; and, *provided*, further, that at the annual settlement of the several Treasurers of such counties with the State Treasurer, the amount so paid, or caused to be paid by the several Boards of Supervisors thereof, shall be allowed and credited to such counties.” (Laws of 1863, p. 442.)

It will be seen that this section makes it “the duty of the Board of Supervisors of each county in which there shall be

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one or more organized volunteer companies * * * to provide for each company in said county an armory * * * and an armorer to take charge of the same;" and that "said Board shall also, at each of its sessions, audit and allow and cause to be paid the necessary incidental expenses of said company or regiment, previously incurred." There is no limitation to any particular fund out of which these expenses are to be paid. No fund is specified in this or any other section. Nor does the Act appear to us to give the Board of Supervisors authority to deal with the funds of the State, as such. It provides, however, that, "at the annual settlement of the several Treasurers of such counties with the State Treasurer, the amounts so paid, or caused to be paid, by the several Boards of Supervisors thereof shall be allowed and credited to such counties." We think the only reasonable construction is that these expenses are primarily made a charge upon the county, and the charges paid are to be refunded by an allowance and credit in favor of such counties to be made by the State Treasurer in his annual settlements with the respective County Treasurers. The State fixes the rate of taxation for State purposes, which are assessed and collected at the same time with county taxes, and through the same officers. They pass through the hands of the County Treasurer, and are to be paid by him into the State Treasury at certain designated periods. The Board of Supervisors have no direct control over the funds of the State while in the hands of the County Treasurer, nor at any other stage of the proceedings. They can neither increase or diminish the amount except so far as it is incidentally affected by its acts as a Board of Equalization. There may, or may not be, at any given time, funds of the State in the hands of the County Treasurers; but whether there be or not does not depend upon the acts of the Boards of Supervisors. But the Board do have the management, control and disposition of the funds of the county within the limits prescribed by law, and can, within certain prescribed limits, increase or diminish the amount of its revenues. And it is out of these revenues, which are under the control of the Board of

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Supervisors, that they must make all appropriations for expenditures which are incurred under the exclusive direction of the Board, unless it is clearly manifest that their powers are extended to the funds of the State. It may be that it was supposed that, to make the county primarily liable for expenses which are incurred under the direction of the Board, would stimulate that body to practice more rigid economy. However that may be, we are of the opinion that such liability is directly thrown upon the county in the first instance, and that the relators are entitled to a peremptory mandate. And it is so ordered.

A. S. JEWELL AND J. R. JEWELL v. POLLY E. JEWELL, ADMINISTRATRIX OF THE ESTATE OF GEORGE C. JEWELL, DECEASED.

DECEASED HUSBAND'S HALF OF COMMON PROPERTY.—Upon the death of the husband intestate, leaving no descendants, the surviving wife and surviving father of the deceased each inherit one half of the husband's half of the common property.

DEFINITION OF "DESCENDANTS."—The "descendants" of a person are his children, grandchildren, and their children to the remotest degree.

SURVIVING WIFE.—The surviving wife inherits one half of the common property if the husband dies leaving descendants.

ONE HALF THE COMMON PROPERTY.—In this State, prior to April 4, 1864, if the husband died leaving a wife and descendants, the descendants inherited one half the common property, and it was not subject to the husband's testamentary disposition. But if the husband died, leaving a wife and no descendants, one-half the common property was subject to the husband's testamentary disposition.

APPEAL from the Probate Court, Sonoma County.

The facts are stated in the opinion of the Court.

A. W. Thompson, for Appellants.

The only question now, therefore, to be considered is, who are the *descendants*, and whether that word can properly be used with reference to the father. Words must be regarded in the sense in which they are used by the Legislature rather than by their abstract meaning. "If he or she shall leave no issue, or husband, or wife, the estate shall go to his or her

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father." (Descents and Distributions, Statutes 1861, p. 570, latter part of second section.)

If such had been here the state of facts, would not the estate have fallen to the father, and would he not have then, as to the estate, been the descendant of the husband?

By the rule of estates held under strict feudal tenure, where from the nature of things the father could not have done military service, the estate might, at a very early period in the history of our laws, have even escheated for the want of a "descendant;" but, even at common law, the strict rule that descents (using the word in its technical sense) must always be downward, has been disregarded, and in tracing descents we must necessarily ascend in very many cases.

The word "descendant" means in the statute one who could properly take by descent, and in that sense is constantly used in the books. "Property of lands by descent is," says Lord Bacon, "where a man hath lands of inheritance, and dieth, not disposing of them, but leaving it to go (as the law casteth it) upon the heir. This is called a descent of law." (2 Washburn on Real Property, 401.)

"The rules of *descent* prescribed by the statutes of the several United States are as follows: In Alabama the real estate of an estate descends. * * * In California, I. * * * II. If there be no issue, then to the surviving husband or wife, and to the intestate's father in *equal shares*." (2 Washburn on Real Property. Note—Statute Rules of Descent, pp. 417, 418.)

"But in default of such brothers and sisters and their issue, the estate *descends to the father in fee simple*." (4 Kent Com. 393.)

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E. D. Colton, for Respondent.

A brief examination of the statutes (Sec. 11 of the "Act defining the rights of husband and wife," Statutes 1862, p. 211, and Sec. 1 of the "Act to regulate descents and distributions," Statutes 1862, p. 569) will show that appellant's definition of the word "descendants" used in section 11 is incor-

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rect, and that the word "descendants" is not synonymous with "kindred" and does not include father, etc. If we substitute the word *kindred* in the place of the word *descendants* in section 11, it will read as follows:

"Sec. 11. Upon the dissolution of the community by the death of the husband, one half of the common property shall go to the surviving wife, and the other half to the *kindred* of the deceased husband, the whole being subject to the payment of his debts. Upon the dissolution of the community by the death of the wife, the entire common property shall go to the surviving husband. In case of the death of the husband, if there be no *kindred* of the husband, one half of the common property may be subject to his testamentary disposition, and in the absence of any such disposition, shall be subject to distribution *in the same manner as the separate property of the husband.*"

Now the separate property of the husband (Statutes 1862, pp. 569, 570) is distributed to the kindred, (and husband and wife,) and in default of kindred (and husband and wife) it escheats to the State.

Putting these two statutes together, they would read in effect: "*If there are no kindred of the husband, then one half of the common property shall be distributed among the kindred of the husband,*" which makes them absurd.

Again: by one statute, if there are no kindred, the property would be distributed; by the other, if there are no kindred, it would escheat to the State. There is no pretence that the one Act was intended to or did repeal the other.

*Taking section 11 alone as a full disposition of the whole common property, and appellant's definition of the word *descendants* would make the section absurd. It would provide: 1st. That the wife takes half and the *kindred* half. 2d. If no *kindred*, one half is to be distributed. Distributed to whom? To the world generally? But to get this other half of the common property into the father, appellants are compelled to resort to section one, subdivision second, of the

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"Act to regulate descents and distributions," Statutes 1862, p. 570, and that provides that it shall go, one half to the surviving wife and one half to the father.

If the word *descendants* in section eleven means kindred, then appellants have got too much already. Their ground is that they take by virtue of the first part of section eleven, that the husband died, leaving a surviving wife and *descendants*, that is, *kindred*, viz: a father, etc., and that therefore the surviving wife takes one half and the *descendants* take the other half. The word "kindred" includes all kin to the remotest degree—it would not be the *next of kin* who would take by virtue of section eleven, but *all kindred*, to the remotest degree. There are undoubtedly ten thousand persons who are kin to the intestate in some degree. By section eleven they would all take *equally*, and hence the judgment would give the appellants too much.

By the Court, RHODES, J.

George C. Jewell died intestate March 27th, 1863, leaving a widow (the respondent) and a father, but neither a child, nor the issue of a deceased child. The estate of the intestate was common property of the deceased husband and his wife. The father of the deceased conveyed his interest in the estate to seven of his children—the petitioners being two of the number. Upon their petition to the Probate Court for the distribution of the estate, it was ordered that one half of the estate be distributed to the widow, for her interest in the common property, as the survivor of the community, and that of the remaining half of the estate, one half thereof should go to the widow and the other half to purchasers from the father of the deceased.

The petitioners appeal. For convenience of designation one half of the common property may be called the husband's half, and the other the wife's half. It is not doubted that the widow, as the survivor of the community, is entitled to her half of the community property, and the only question pre-

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sented on the appeal, is whether she takes any portion of the husband's half, under the Statute of Descents and Distributions, as amended in 1862.

The eleventh section of the Act of 1850, defining the right of husband and wife, as amended in 1861 (Statutes of 1861, p. 310) is as follows:

“SECTION 11. Upon the dissolution of the community by the death of the husband, one half of the common property shall go to the surviving wife and the other half to the descendants of the deceased husband, the whole being subject to the payment of his debts; upon the dissolution of the community by the death of the wife, the entire common property shall go to the surviving husband. In case of the death of the husband, if there be no descendants of the husband, one half of the common property may be subject to his testamentary disposition, and in the absence of any such disposition, shall be subject to distribution in the same manner as the separate property of the husband.”

The question is to be solved by ascertaining the meaning of the word “descendants” as employed in that section. Bouvier defines descendants as “those who have issued from an individual, and includes his children, grandchildren and their children to the remotest degree. The descendants form what is called the direct descending line. The term is opposed to that of ascendants.” Those who are denominated descendants do not comprise all of those who come to the title by descent. It is apparent, upon inspection of section eleven, above cited, that the term descendants does not include the ascending line. It is provided in the last clause of the section, that the husband's testamentary disposition of his half of the common property, shall be valid, if the husband shall die leaving no descendants, and that if such testamentary disposition shall not have been made, then it shall be distributed in the same manner as the separate property of the husband; that is to say, according to the Statute of Descents and Distributions.

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Previous to the amendment of 1861, it was provided, that upon the dissolution of the community by the death of the husband or the wife, one half of the common property should go to the survivor and the other half to the descendants of the deceased, and if there were no descendants of the deceased, then to the survivor. The amendment of 1861, not only gave the whole common property to the husband upon the death of the wife, whether she left descendants or not, but it limited the right of the surviving wife, growing out of the community relation, to her half, without regard to whether or not the deceased husband left descendants, and the husband's half, which would go to his descendants under the Act of 1850, would still go to them under the amendatory Act of 1861, but the amendatory Act, instead of giving the husband's half to the surviving wife upon the failure of descendants of the deceased husband, has in effect converted it into the separate estate of the husband, and as such has made it subject to his disposal by will, and in the absence of such disposition, directed it to be distributed according to the Statute of Descents and Distributions.

By adopting the construction of the appellants, that "descendants" are all those who may properly take by descent, we are led into this absurd construction of the section just cited. The husband would be authorized to make a testamentary disposition of his half of the common property, only in case there was no one entitled to take by descent; and if the husband has not made a testamentary disposition of it, and has left no descendants—that is, no persons entitled to take by descent—then it shall be distributed among his descendants.

We are clearly of the opinion that the husband's half of the common property, it not being disposed of by his will, and he leaving no descendants, must be distributed according to the provisions of the second clause of section one, of the Act to regulate descents and distributions, as amended in 1862, and that according to the rule in that clause, the surviving wife and the father of the deceased were each entitled to the

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one half of the husband's half of the common property. The purchasers from the father are of course entitled to his share.
Order affirmed.

WILLIAM BRYAN v. MATHEW MAUME AND JAMES B. McMINN.

STATEMENT ON APPEAL.—Neither the Court nor Judge has power to extend the time for appellant to make and file a statement on appeal from a judgment more than thirty days beyond the twenty days allowed by law, without the consent of the other party.

TIME TO FILE STATEMENT ON APPEAL.—An order extending the time for appellant to file a statement on appeal more than thirty days beyond the twenty days allowed by law, is good for the thirty days, without the consent of the other party.

WAIVER OF FAILURE TO MAKE STATEMENT IN TIME.—If a statement on appeal is not filed and served in time, the opposite party does not waive the default by not returning to appellant's attorney the copy of the statement served on him.

ORDER EXTENDING TIME TO MAKE STATEMENT.—If the appellant obtains an order extending the time to make a statement on appeal more than thirty days beyond the time allowed by law, the opposite party does not consent to such order by not making any objection thereto.

EVIDENCE AND PLEA OF TENDER.—In an action on a note and to foreclose a mortgage given to secure it, where the promisor and mortgagor is made defendant along with one claiming under the mortgagor by deed subsequent to the mortgage, the purchaser from the mortgagor cannot claim the benefit of nor offer testimony to show a tender of the amount due on the mortgage before suit brought, unless he pleads it. Such plea by the mortgagor will not avail the purchaser.

PLEA OF TENDER, AND KEEPING SAME GOOD.—It is a general rule that a defendant who pleads a tender to entitle himself to costs, must not only aver a tender, but that he has always been and is ready to pay the sum tendered and the money must be brought into Court.

NEW MATTER IN AN ANSWER.—Under the statute the affirmative allegations of an answer stand controverted by the plaintiff, and the burden is on the defendant to prove the truth of such allegations.

FINDINGS OF FACT—WHEN DEFICIENT.—If the findings of the Court are deficient, the appellant must except to them for that reason, or the presumption will be that the facts not found warranted the judgment.

MINGLING FINDINGS OF FACT WITH ARGUMENT.—The findings of fact should not be interblended with matter of argument or the conclusions of law: each should be embodied in a separate paper.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

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G. F. & W. H. Sharp, for Appellant.

The Courts have cheerfully extended the doctrine of acquiescence and waiver to great lengths. In the *Georgia Lumber Co. v. Strong*, 8 How. Pr. Rep. 246, the Court say: "The irregularity of the service of a paper is waived, if received and acted upon by the party upon whom it is served." In *Williams v. Gregory et al.*, 9 Cal. 76, the Court say: "The filing of a counter statement is a waiver of objections to want of notice of intention to move for a new trial." Also in *Dickinson v. Van Horn*, Id. 207, the Court say: "Where a party appears and argues a motion for a new trial, he cannot afterward object that the statement was not agreed to by him, and that it was not settled by the Judge."

Edward Tompkins, for Respondent.

By the Court, CURREY, J.

This action was commenced on the 14th of January, 1864, to recover the amount due from the defendant Maume, on a promissory note made in 1854, and which became due in 1855, and to foreclose a mortgage on certain real estate, executed to secure its payment. A judgment and decree was rendered in the case in favor of the plaintiff on the last day of May, 1864, and on the next day notice of the decision of the Court was served on the attorneys for the defendants. On the application of the defendant McMinn, the Court made an order on the 20th of June, 1864, that the time for preparing and filing the statement on appeal from judgment be extended twenty days. On the 7th of July, 1864, the same defendant filed his notice of appeal from the judgment to the Supreme Court, and served a copy of it on the plaintiff's attorney. This appeal was perfected on the eleventh of that month. On the ninth of the same month the Court, on the application of the defendant, McMinn, made another order of the same character, extending the time for twenty days more. The statement was prepared and filed on the 28th of the same July, and a copy of

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it was duly served. On the next day the plaintiff's attorney gave notice that he would move the Court on the 8th of August that this statement on appeal be stricken from the files of the Court, and that the same be disregarded, on the ground that it was not prepared and filed and a copy thereof served within the time allowed by law for such purpose, and on the same day the Court made an order granting to the plaintiff ten days after the decision of his motion within which to make amendments to the statement, in the event that the motion should be denied. The motion was made and denied, and amendments were accordingly prepared on behalf of the plaintiff to the statement, to which the defendant McMinn refused to agree, and therefore gave plaintiff notice of appearance before the Judge who tried the cause for settlement. The plaintiff's attorney admitted service of the notice, reserving at the same time the right to object that the statement was not filed in time and that the Judge had no right to settle the same. The statement was afterwards settled and filed.

The plaintiff, in due time after the cause was placed on the calendar of this Court for argument, objected to the transcript on the ground that the statement contained therein was not filed within the time allowed by law. This objection is first to be disposed of, and, if well taken, precludes an examination of the errors assigned, depending for determination upon the matters embodied in the statement.

The statute gives to the appellant twenty days after entry of judgment in which to prepare a statement of the case to be annexed to the record of the judgment. If he omits to do so within the time thus limited, he is deemed to have waived his right thereto. So the statute declares. (Practice Act, Sections 338, 339.) But the period prescribed may be extended, upon good cause shown, by the Court in which the action is pending, or the Judge thereof, or, in his absence, by the County Judge; but it is provided that such extension shall not exceed thirty days beyond the time prescribed by the sections of the Act referred to, without the consent of the adverse party. (Practice Act, Section 530.) Without the

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consent of the respondent, the appellant cannot have more than fifty days in which to prepare his statement of the case to be annexed to the record of the judgment. In this case the statement was not prepared and filed and a copy thereof served until more than fifty days had elapsed after the entry of the judgment and service of notice of the decision of the Court, and as a consequence the objection must prevail unless avoided by the consent of the respondent, or a waiver thereof on his part by some act equivalent to consent to an extension of time for performance beyond the fifty days.

It does not appear that the respondent's attorney consented in terms to extending the time prescribed by statute within which it was necessary to prepare the statement and to serve him with a copy of it. But it is claimed on behalf of appellant that no objection was interposed by respondent's attorney to the two orders extending the time, and his omission to do so was a waiver of any valid objection thereto, even if such an objection might properly have been made. The first order was clearly within the power granted to the Court by the statute, and the second was so to the extent of comprising the remainder of the thirty days which the Court was competent to grant, and hence, if objection had been made to either of such orders, it would have been unavailable. It is also claimed by the appellant that the failure of the plaintiff's attorney to return the copy of the statement served on him, and afterwards proposing amendments thereto, operated as a consent on his part to the extension granted by the Court. When the statement was filed, and a copy of it served, by judgment of the law, the appellant had waived his right to make it a matter of record, and a return of the copy could not have suggested to the appellant any course to be taken by him to rescue his case from the predicament of the waiver that already had accrued by his own *laches*. But it appears from the record that the plaintiff objected promptly, by giving notice on the following day of a motion for an order to strike the statement from the files of the Court, and that the same should be dis-

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regarded, because not prepared and filed in time; and though he obtained an order at the same time granting him ten days after an adverse decision upon his motion to reject the statement, in which to propose amendments thereto, and afterwards—his motion having been denied—did propose amendments to the statement, we do not think he thereby, notwithstanding his objection, can be deemed to have waived it. The objection was in its nature to the power of the Court to extend the time beyond the additional thirty days. This objection has been kept prominently on foot at every stage of the proceeding since it was made in the first instance. To hold that the plaintiff shall be deemed to have consented to an extension of time beyond the limit of the Court's jurisdiction in the premises is not warranted in our judgment by the circumstances of the case. We therefore hold the plaintiff's objection to be well taken. This excludes from consideration the statement improperly annexed to the judgment.

The appellant insists that upon the finding of the Court the judgment cannot be sustained. The Court found, first, that there was due from the defendant Maume, on the note described in the complaint, the principal sum of one thousand dollars, with interest thereon from the 7th of March, 1860, at the rate of two and one half per cent per month. Second, that at the commencement of the action, and when the same was tried, the plaintiff was the owner of the note and mortgage described in the complaint. Third, that at the time the defendant Maume mortgaged the premises described in the complaint, he was in the possession thereof, and on the 15th of January, 1859, conveyed the same to one Michael Dundon, who, on the 10th of May, 1861, conveyed the same to the defendant McMinn. Fourth, that the evidence did not support the plea of the Statute of Limitations pleaded.

The defendant, Maume, by his answer averred that on the 8th of November, 1861, McMinn tendered to the owner and holder of the note and mortgage the sum of eighteen hundred dollars in payment of the amount due, but that the money was not accepted, and he averred that the lien of the mort-

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gage on the premises, by reason of the tender, became forever released and discharged; and following this he alleged that he was willing, and thereby offered, to allow judgment to be entered against him on the note for such amount. The Court found that testimony of the tender by McMinn was offered at the trial, but excluded on the ground that the tender was not kept good, and therefore the proposed testimony was immaterial. The defendant Maume, who sought thus to support his answer, has not appealed. He does not complain of this ruling of the Court, and we do not see how the appellant can avail himself of any objection to it, as he did not plead a tender of the money.

It is alleged in the complaint that after the note and mortgage were executed, and during the same year, Maume departed from the State, and had remained absent therefrom to the time the action was commenced. This allegation is not controverted by either of the defendants. It is also averred by plaintiff that McMinn has or claims to have some interest or claim to the mortgaged premises or some part thereof as purchaser, mortgagee, judgment creditor or otherwise, subsequent to and subject to the lien of the plaintiff's mortgage. In his answer McMinn avers that on the 15th of January, 1859, the defendant Maume conveyed the premises by deed to Michael Dundon, and that such deed was duly recorded on the 20th of August of the same year; that Dundon went into the possession of the premises under this deed and continued in the occupation thereof to the 10th of May, 1861, when he conveyed the property to McMinn by deed of that date, which was duly recorded on the 21st of June of that year; that Dundon and McMinn respectively resided in the City and County of San Francisco from the 1st of May, 1859, to the time of the commencement of this action, and following this he pleaded that more than five years had elapsed since the conveyance executed by Maume to Dundon, and that the plaintiff's cause of action accrued as against the defendant McMinn's right, interest and estate in the premises described, more than four years next before the action was commenced,

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and he claims in substance that by reason of the conveyance by Maumé to Dundon and the lapse of four years therefrom before this action was commenced, the premises became discharged of the lien of the mortgage.

By the statute the affirmative allegations of the answer stood as controverted by the plaintiff without a replication (Practice Act, Sec. 65) and the burden was on the defendant to establish the truth of his defense, even if such defense would have availed anything, which it is unnecessary now to decide. But assuming it to be an available defense, it does not appear from the finding of the Court that Dundon and McMinn, or either of them, were in the State, as alleged in McMinn's answer. The Court states in the finding what each of the defendants sets up, but does not find whether the fact of the residence of Dundon and McMinn in the State during the time specified in McMinn's answer was true or otherwise. In this respect the finding was deficient, but the appellant omitted to take exception on account of it. It is therefore to be presumed the appellant failed to prove on the trial this allegation of his answer, or in case the fact stood as presumptively true, it does not appear but that it was overcome by evidence to the contrary. (Laws 1861, p. 589.)

The finding or decision of the Court consists in a great part of matter of discourse or argument, intermixed with a statement of what the respective defendants alleged in their answers. It would seem gratuitous, did not this case and many others before us indicate otherwise, to suggest the impropriety of interblending matter of argument with the finding of facts and conclusions of law upon which judgment is to be entered. If the Judge who may try and decide a cause desires to give his reasons for his judgment, they should be embodied in a separate opinion. A finding of what the defendant alleged in his answer, and what this or that witness testified to, and that, too, without stating whether or not such testimony was found to be true or untrue, can serve no useful purpose, but on the contrary encumbers the record with that which is properly no part of it. All that is required is a find-

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ing of the facts and a statement of the conclusions of law upon which final judgment must follow.

Even the want of a finding would not authorize the reversal of the judgment if no exception was taken for that reason at the proper time, and however defective the finding in this case nothing can be presumed against the judgment, but every reasonable intendment must be indulged in in order to uphold it. Judgment affirmed.

E. F. JONES AND H. H. HEWLETT v. JAMES FROST.

AVERMENT THAT NOTE HAS NOT BEEN PAID.—In an action on a promissory note an allegation in the complaint that “no part of said note, principal or interest, has been paid,” is a sufficient averment of a breach.

WAIVER OF RIGHT TO HAVE A CHANGE OF VENUE.—If a defendant, sued in a county where he does not reside, demurs to the complaint, and the demurrer is sustained, and he then demurs to an amended complaint before giving notice of a motion for a change of venue, he waives the right to have the case tried in the county where he resides.

AMENDED COMPLAINT.—The filing of a new complaint after a demurrer has been sustained is not the commencement of a new action.

ERROR IN ALLOWING COSTS.—If the Court adds to the judgment the costs of the prevailing party after the time for filing the same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The motion for a change of venue was based on affidavits. The Court overruled the motion and then overruled the second demurrer. No answer was filed. Plaintiffs recovered judgment, and defendant appealed from the judgment.

The other facts are stated in the opinion of the Court.

John B. Hall, for Appellant.

The breach assigned is, “*That no part of said note, principal or interest, has been paid.*” A traverse of this averment does not amount to a plea of payment of the *whole* debt, but only that *some part* has been paid. The allegation must be, “*that the debt or the note has not been paid,*” so that when denied an

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issue is created by which payment is affirmed on the one side and denied on the other, and the defense made as broad as the alleged cause of action. (See *Frisch v. Caler*, 21 Cal. 71.)

Tyler & Cobb, for Respondents.

By the Court, SHAFER, J.

This is an action on a promissory note.

First—The first error assigned is that the demurrer to the complaint was improperly overruled—the assignment of the breach being, as is contended, substantially defective. The breach assigned is: "That no part of said note, principal or interest, has been paid." We consider that there is no defect in this averment, either substantial or formal.

Second—It is further insisted that the Court erred in refusing to transfer the case for trial to the county of defendant's residence.

It appears from the record that the defendant demurred to the original complaint; that the demurrer was argued, submitted and sustained; that the plaintiff, by leave given, filed an amended complaint, to which the defendant, on the 6th of May, 1864, also demurred; and that on the eighteenth of that month he gave notice of his intention to move for a change of venue. The proceedings prior to the notice amounted to a waiver, on the part of the defendant, of his right to have the action tried in the county where he resided. (*Pearkes v. Freer*, 9 Cal. 649.) The appellant is mistaken in supposing that the filing of the amended complaint was the commencement of a new action. The new complaint doubtless superseded the original and destroyed its effect as a pleading, as was held in *Gilman & Co. v. Cosgrove*, 22 Cal. 356, but it did not go to the identity of the action.

Third—The third specification of error is: "That the Court had no power to add to the amount of the judgment a sum for costs, after time for filing a memorandum had expired, and after appeal perfected." The judgment was entered August

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6th, 1864, and the appeal therefrom was perfected on the tenth of that month, and on the twentieth the order for costs was applied for and granted. The order complained of was made ten days after the Court had lost jurisdiction of the case by the perfecting of the appeal, and the proper and only remedy for the defendants was by appeal from the order.

The judgment is affirmed.

IN THE MATTER OF EDWARD RING.

HABEAS CORPUS.—The doctrine of *res adjudicata* does not apply to proceedings on *habeas corpus*.

SECOND APPLICATION FOR HABEAS CORPUS.—The decision of one Court or Judge refusing to discharge a prisoner on *habeas corpus* is not a bar in another application for the same writ before another Judge or Court.

JUDGMENT IN A CRIMINAL CASE.—The judgment of the Court in a criminal case to be entered by the Clerk in the minutes of the Court is sufficient if it states of what offense the defendant was finally convicted, and the penalty imposed by the Court. Such judgment need not recite the facts contained in the other papers constituting the record in the action.

AUTHORITY TO DETAIN A PRISONER.—A certified copy of the judgment properly entered in a criminal action is sufficient authority in the hands of the Warden of the Prison for the detention of the defendant.

HEARING ON HABEAS CORPUS.—If, at the hearing on *habeas corpus*, the Warden of the Prison has not a certified copy of the judgment in a criminal action in his hands, and it appears that a judgment authorizing the detention of the defendant was entered, a copy of which can be procured, the Judge or Court will give a reasonable time to procure such copy, and if obtained, quash the writ.

THE petitioner, Edward Ring, was indicted in San Mateo County. The case was transferred to the District Court for trial. On the 23d of March, 1865, the defendant was found guilty by a jury of the crime of manslaughter. The next day he was sentenced by the Court to imprisonment in the State Prison for the term of three years. The Clerk entered in the minutes of the Court the judgment of the Court in the following form:

“*The People v. Edward Ring*, March term, 1865. The defendant, Edward Ring, having been convicted of the crime of manslaughter, and the hour having arrived for pronouncing

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judgment in this cause, and the defendant, with his counsel, being present in Court, and he having been informed by the Court of the nature of the indictment, of his plea thereto, and of the verdict, and the defendant having nothing further to say why judgment should not be pronounced, the Court proceeded to pronounce its judgment as follows: That the defendant, Edward Ring, be confined in the State Prison of the State of California for the term of three years, and ordered that judgment for costs be entered against him."

The Clerk also entered in the Civil Judgment Book the following judgment:

"*The People of the State of California v. Edward Ring*—No. 426. This cause came on regularly in its order for trial, upon an indictment found in the County Court of the County of San Mateo, for the crime of murder, and transmitted to this Court for trial.

"The defendant being present in person in Court was duly arraigned, and entered a plea of not guilty of the offense charged.

"Messrs. Scofield and Barnes appearing for plaintiff, and the defendant being present in person in Court, and being also represented by his attorneys, Messrs. Campbell, Fox & Campbell, the trial proceeded; a jury of twelve persons were regularly impanelled and sworn to try the cause; witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired, and subsequently returned into Court, and being called, answered to their names and said that they found a verdict of guilty of manslaughter against the defendant; and subsequently, on the 24th day of March, A. D. 1865, the defendant being present in person in Court, with his counsel, and the Court having previously informed him of the nature of the indictment and of his plea, and of the verdict, and asking him if he had any legal cause to show why judgment should not be pronounced against him, and said defendant answering and saying that he had nothing

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further to say — whereupon the Court rendered its judgment as follows:

“That he, the said defendant, Edward Ring, be confined in the State Prison of the State of California for the term of three years, and that a judgment for costs be entered against him.

“Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed, that the defendant, Edward Ring, be confined in the State Prison of the State of California for the term of three years; and that said plaintiff do have and recover of and from the said defendant his costs of this suit, amounting to the sum of one hundred and thirty-two dollars and thirty cents (\$132.30). Judgment rendered, March 24th, 1865.

“THOMAS H. NOBLE, Clerk.

“By John Ames, Deputy.”

A certified copy of the judgment entered in the Civil Judgment Book was delivered to the Sheriff who conveyed the prisoner to the Penitentiary, and handed the same to the Warden.

An application was then made to the District Judge for the discharge of the prisoner on *habeas corpus*. The Judge refused to grant the discharge.

Afterwards the prisoner applied to the Supreme Court to be discharged on *habeas corpus*. The Warden, by his return to the writ, stated that he held the petitioner in his custody in the State Prison by virtue of a judgment of the District Court in and for the County of San Mateo, at the March term, 1865, a certified copy of which judgment was attached to the return. The copy thus attached was a copy of the judgment entered in the Civil Judgment Book.

The Court holds that a certified copy of the judgment entered by the Clerk in his minutes would have been sufficient authority for the detention of the prisoner.

Argument for Petitioner.

Campbell, Fox & Campbell, for Petitioner.

The first objection to the alleged judgment is that it does not state "the offense for which the conviction has been had," as required by section four hundred and sixty-two, Criminal Practice Act. It is silent as to the party alleged to have been killed, as to the time, and as to the place. It merely states "that the jury said that they, the jury, found a verdict of manslaughter against the defendant." There is even no adjudication or judgment by the Court upon that verdict that he is so guilty.

It is claimed that there is a broad distinction between "the crime of which" and the offense for which (Crim. Prac. Act, Sec. 462) a conviction has been had; that while the former may be satisfied by the general allegation of "manslaughter," etc., the latter can only be satisfied by setting out the offense for which, etc., with sufficient particularity to designate the party killed, and the place, etc., so as to enable the Court to distinguish this particular offense on the judgment itself from any other offense, and to identify it in case the defendant should be again charged.

Sections two hundred thirty-eight and two hundred thirty-nine, Criminal Practice Act, show this distinction. By section two hundred thirty-eight, in the commencement of the indictment the defendant is "accused by the Grand Jury," etc., of the crime of "manslaughter," etc. By section two hundred thirty-nine, "the offense charged" has to be set out.

Should it be contended that the entry on the minutes is a judgment, and that the defendant should be remanded until a copy of that judgment can be delivered to the Warden, we reply, that the first elements of a judgment are wanting. It is the mere recital of those things which preceded the judgment, and is not an adjudication, consideration, or judgment of the Court on that recital. It is open to all the objections urged against the alleged return of the writ, and to the additional — and, we think, fatal one — that it contains no adjudication. It should have gone on to say, "wherefore it is by the

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Court here considered and adjudged that said Edward Ring is guilty," etc., and then the award of the punishment.

J. G. McCullough, Attorney-General, against the discharge, argued that the principle of *res adjudicata* was applicable to this proceeding, and cited *Lynde v. Noble*, 20 Johnson, 80; *Mercier v. The People*, 25 Wend. 64; and *De Costa's Case*, 1 Parker's Crim. Cases, 129.

As to the sufficiency of the warrant of commitment, the Attorney-General referred to *The People v. Cavanagh*, 2 Abbott's Prac. R. 84. He also insisted, that if at common law the judgment was not sufficiently technical, yet it was good under our Practice Act, and referred to *The People v. King*, 27 Cal. 507.

By the Court, SANDERSON, C. J.

Two questions are presented: First, is the principle of *res adjudicata* applicable to proceedings on *habeas corpus*; and, second, is the process or judgment under which the petitioner is held in custody so defective in some matter of substance required by law as to render it void?

I. Under the old Constitution it was held in *Ex parte Perkins*, 2 Cal. 429, that a decision upon a *habeas corpus* was not appealable or subject to review, and that the doctrine of *res adjudicata* has no application to such a case. The late amendments to the Constitution have made no change which affects this question, and the statute upon the subject of *habeas corpus* remains the same as it was at the time that decision was made. In that case it was held that a party in custody might apply in succession to every Judge of every Court of record in the State for his discharge on *habeas corpus* until the entire judicial power of the State was exhausted; but in this respect the new Constitution has made a change, and such party is now restricted to the Justices of this Court and the District and County Judges of the district or county in which he is restrained of his liberty.

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II. The four hundred and sixty-second section of the Criminal Practice Act requires the Clerk to enter every judgment rendered upon a conviction in the minutes, "stating briefly the offense for which the conviction has been had," and within five days thereafter annex together and file certain specified papers, "which shall constitute the record of the action." The record so made up contains, among other papers, the indictment and a copy of the minutes of the plea or demurrer, a copy of the minutes of the trial, and a copy of the minutes of the judgment. The several papers specified, when so annexed together and filed, are expressly declared to be the *record* of the action, and that is the record which would have to be produced in support of a plea of former conviction. That the several papers specified in the four hundred and sixty-second section enter into and become a part of the record must not be lost sight of when we come to determine what it is essential that the judgment itself should contain, for where several papers are thus united in chronological order and made one in legal intent, it cannot be claimed that the contents of one should be repeated in another. If they all, taken together, furnish facts sufficient to protect the defendant against another prosecution for the same offense, it cannot with any show of reason be claimed that the record is defective in any matter of substance. From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story—or rather, to relate its particular branch of the whole history. Thus the indictment states the jurisdictional facts, the nature of the offense and the facts and circumstances, so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely finishes the account by stating of what offense the defendant was finally convicted, and the penalty imposed by the Court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for in view of the fact that they go

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into the record and make a part of it, such repetition would be idle and serve no useful purpose.

Looking, then, at the judgment, as entered in the minutes, in the light of what has been already said, we think it is not defective in any matter of substance which the law, as we have expounded it, requires it to contain. The only material parts of a judgment, as we have seen, are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and therefore not necessary to be repeated, and the sentence of the Court. These material parts are both found in the judgment under consideration. It states the fact that the defendant had been convicted of the crime of manslaughter, and that the Court had sentenced him to a confinement in the State Prison for a term of three years. These facts, in connection with those detailed in the preceding papers, complete the history and render the record full as to every fact necessary or material for the protection of the defendant against a second prosecution for the same offense. (*People v. Cavanagh*, 2 Parker's Crim. Rep. 660.) Such being the case, a certified copy of the judgment, as entered in the minutes, should have been delivered to the Sheriff, and by him delivered with the person of the defendant to the Warden of the State Prison, and the same would have been a sufficient warrant in his hands for the detention of the defendant until the expiration of his term of imprisonment. (Crim. Prac. Act, Sec. 463.)

From what has been said, it follows that the defendant is not now in custody under the proper process, but he cannot for that reason be discharged, since it appears that a judgment of imprisonment, in the place where he is now confined, has been rendered against him in due form of law by a Court of competent jurisdiction, and that a certified copy thereof can be readily and speedily obtained. For this a reasonable time must be afforded. It is therefore ordered that the petitioner be remanded, and that fifteen days be allowed the Warden of the State Prison to obtain the proper process and make return

Argument for Appellant.

thereof to this Court, whereupon this writ will be quashed; otherwise the prisoner will be discharged from custody.

THE PEOPLE v. THE SAN FRANCISCO AND SAN JOSE RAILROAD COMPANY.

REPEAL OF A LAW.—The repeal of a law by implication is not favored.

SPECIAL SCHOOL TAX IN SAN MATEO COUNTY.—The thirty-seventh section of the Act of April 6th, 1863, authorizing a special tax for school purposes to be levied in any school district in this State, is not repealed as to the County of San Mateo by section nine of "An Act to define and limit the compensation of officers and reduce public expenses in the County of San Mateo," passed February 6th, 1864, nor by section twelve of "An Act to provide for the continuance and election of a Board of Supervisors in the County of San Mateo," etc., approved March 24th, 1864.

APPEAL from the District Court, Twelfth Judicial District, San Mateo County.

This was an action brought to recover judgment for the sum of six hundred and thirty-eight dollars and ninety-seven cents, being the amount of a special tax levied for school purposes on the property of the appellant, in District Number Four, in San Mateo County, in the summer of 1864.

The defendant demurred to the complaint, the demurrer was overruled, and judgment was rendered in favor of plaintiff. The defendant appealed from the judgment.

Charles N. Fox, for Appellant.

By the provisions of section nine of the "Act to define and limit the compensation of officers, and reduce public expenses and taxation in the County of San Mateo," approved February 6th, 1864, (Statutes 1864, p. 51,) the power of fixing the rate of and levying *all taxes*, except State taxes, in the County of San Mateo, is conferred upon the Board of Supervisors of said county.

The Act of 1863 gives the people the right to determine whether or not the taxes shall be levied, and the Trustees the power to fix the rate and levy the tax. The later Act of 1864,

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passed for the express purpose of *reducing taxation* in San Mateo County, confers all this power upon the Board of Supervisors, and upon no other body, officer, or organization whatever. Force and effect cannot be given to both these Acts in the County of San Mateo.

J. G. McCullough, Attorney-General, and H. A. Schofield, District Attorney of San Mateo, for Respondent.

Section nine of the Act of February 6th, 1864, distinctly provides that the school laws then in force shall not be considered as coming within the provisions of that Act.

The title of the Act of March 24th, 1864, is as follows: "An Act to provide for the continuance and election of a Board of Supervisors in and for the County of San Mateo, and to define and limit the powers of said Board in certain cases." Section twelve of said Act simply authorizes the Board of Supervisors to levy such taxes each year as they shall deem necessary to provide for all lawful county expenditures, not exceeding certain rates therein specified, among which is a school tax, twenty cents.

This district school tax is not a county tax in any sense.

By the Court, SAWYER, J.

This is an action to recover taxes levied for school district purposes in the County of San Mateo, in pursuance of the provisions of section thirty-seven of "An Act to provide for the maintenance and supervision of common schools," passed April 6th, 1863. (Laws 1863, p. 203.) The question is, whether said section thirty-seven is repealed by section nine of "An Act to define and limit the compensation of officers, and reduce public expenses in the County of San Mateo," passed February 6th, 1864, and section twelve of "An Act to provide for the continuance and election of a Board of Supervisors in the County of San Mateo, and to define and limit the powers and duties of said Board in certain cases," approved March 24th, 1864. (Laws 1864, pp. 51, 240.)

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There being no repeal in express terms, if any exists, it must result from an inconsistency in the provisions of the several Acts. Repeals by implication are not favored. The first Act relates to a particular subject, viz: the "maintenance and supervision of common schools." All of its provisions bear upon that subject.

Section thirty-seven of the Act of 1863 provides, that "the Board of Trustees of any school district may, when in their judgment it is advisable, call an election and submit to the qualified electors of the district the question whether a tax shall be raised to furnish additional school facilities for said district, or to keep any school or schools in such district open for a longer period than the ordinary funds will allow, or for building an additional school house or houses, or for any two or all of these purposes." It points out the mode of submitting the question to a vote of the people of the district, and in case the proposition is adopted, it further provides, that "The Trustees shall issue certificates of election, and the Assessor shall, on receiving his, forthwith ascertain and enroll, in the manner provided for County Assessors, all the taxable persons and property in the district, and within thirty days he shall return his roll, footed up, to the Trustees. The Trustees, upon receiving the roll, shall deduct fifteen per cent. therefrom for anticipated delinquencies, and then, by dividing the sum voted, together with the estimated cost of assessing and collecting added thereto, by the remainder of the roll, ascertain the rate per cent. required; and the rate so ascertained (using the full cent in place of any fraction) shall be and it is hereby levied and assessed to, on, or against the persons or property named or described in said roll, and it shall be a lien on all such property until the tax is paid; and said tax, if not paid within the time limited in the next succeeding section for its payment, shall be recovered by suit, in the same manner and with the same costs as delinquent State and county taxes." (Laws 1863, p. 203.)

This is a special local tax, levied not upon the property of the county at large, but confined to the school district, and

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depends upon the volition of a majority of the residents of the school district whether it shall be levied or not. When levied and collected, it does not go into the County School Fund, but belongs to the school district which raised it. The county, also, has a School Fund, separate and distinct from this, which is, or may be, derived from various sources. This Act provides for appropriating the School Fund in the State Treasury among the several counties, and for paying over to the Treasurer of each county the portion of funds so appropriated to it; which sum, when paid, goes into the County School Fund. In addition to the money thus received from the State, section sixty-three authorizes a special tax to be raised by each county for the benefit of the *County* School Fund. The section is as follows: "Sec. 63. Each and every county in this State is hereby empowered and authorized to raise annually, by special tax, (in the same manner that other county taxes shall be levied,) upon all the real estate and personal property within the county, an amount of money not exceeding twenty-five cents on each one hundred dollars of valuation, for the support of public schools therein, and providing suitable houses and purchasing libraries and apparatus for such schools." (Ib. 210.) This fund belongs to the county and is under its control. But the fund authorized by section thirty-seven is — so far as the school district is concerned — in addition to the fund provided for in section sixty-three, and belongs to, and is under the control of, the school district, and neither the county or Board of Supervisors have anything to do with it. These two provisions are certainly not inconsistent with each other. They are embraced in the same Act, and operate upon different subdivisions of the State. The subsequent Acts of 1864 relate entirely to matters pertaining to the county. Section nine of the Act of February 6th, 1864, provides as follows: "The Board of Supervisors of the County of San Mateo are hereby empowered to fix the rate and levy all taxes in said county (State taxes excepted) at any time within thirty-five days after the completion of the assessment roll by the County Assessor;

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the rates so fixed not to exceed the limits prescribed by law." (Laws 1864, p. 51.) This provision refers to county taxes, and is intended to modify the mode of assessing and collecting the taxes as prescribed in the Revenue Act of 1861 before applicable to the County of San Mateo. Section twelve of the Act of March 24th, 1864, provides that "The Board of Supervisors of San Mateo County shall have power to levy and collect, each year, to provide for all lawful *county* expenditures, such taxes as they may deem necessary, not exceeding the following rates on each one hundred dollars valuation of all property, real and personal, within the county not exempt from taxation, namely: For the School Fund, twenty cents; for the Hospital Fund, ten cents; for interest tax, forty cents; for the General Fund, twenty-five cents." This section also contains further provisions with reference to the management of the financial affairs of the county, and limits the amount of taxes to be raised "for all lawful *county* expenditures," and the limit for the School Fund is "twenty cents" on each one hundred dollars.

The Revenue Act of 1861, section one, before authorized the Board of Supervisors to levy "a tax for county expenditures not exceeding sixty cents on each one hundred dollars," and "such *additional special* taxes as the law of the State may authorize or require." One of those special taxes subsequently authorized by the Act of 1863 was the county school tax, provided for in section sixty-three, before referred to. But section twelve of the Act of 1864, just cited, has been substituted for all these provisions, and doubtless limits the tax for the *County* School Fund to twenty cents on the hundred dollars, instead of twenty-five, the limit prescribed by section sixty-three of the Act of 1863. It is inconsistent in this respect with said section sixty-three, and as that section refers to matters pertaining to the county under the control of the Supervisors, it is to that extent, doubtless, repealed. But with the *special school district* tax, authorized by section thirty-seven, the Board of Supervisors have nothing more to do now, than they had before the passage of the several Acts of

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1864. The latter Acts operate upon a different subject matter, and section thirty-seven is no more inconsistent with those provisions, than it is with section sixty-three of the Act of 1863. They can all stand and operate together. We think said section thirty-seven not repealed by the subsequent Acts.

The judgment for the taxes levied under it must therefore be affirmed, and it is so ordered.

THOMAS JONES v. WELLS, FARGO & CO.

LIABILITY OF COMMON CARRIER.—If a common carrier undertakes to carry and deliver a draft, he becomes charged on his contract as a common carrier immediately upon his failure to carry and deliver as agreed, and this liability is primary and not secondary to that of the drawer of the draft.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The Court charged the jury, at defendants' request, that the fact that the draft was lost did not destroy the drawer's liability for the money.

The Court, also, at its own instance, charged the jury that if they found that the draft was delivered to defendants to carry and deliver, and defendants knew of its value at the time, and they failed to deliver it, they should find for plaintiff.

To this the defendants excepted.

Plaintiff had judgment, and the defendants appealed from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the Court.

John H. Saunders, for Appellant, contended that the plaintiff should have applied to Jackson for a duplicate of the draft, and if Jackson had refused to give a duplicate, he should have sued him for money had and received.

Jo. Hamilton, for Respondent, argued that appellants were liable in the first instance, regardless of Jackson's liability.

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By the Court, SHAFTEE, J.

The complaint alleges that defendants are common carriers. That the plaintiff delivered to them at their office in Auburn, on the 19th of October, 1861, a package containing a draft for seven hundred dollars, drawn by J. Q. Jackson on Wells, Fargo & Co. at San Francisco, and payable to William Williams or order. That the defendants had notice of the character and value of the contents of the package; that they were paid by the plaintiff to carry and deliver the same, with reasonable dispatch, to Williams at Camptonville to whom the package was directed, and that the defendants undertook and promised to do so. That the draft belonged to the plaintiff and was sent by him to pay for a mining claim which the plaintiff had purchased. That the defendants neglected to carry and deliver the package as agreed, and that they have converted it and its contents to their own use. That at the time the package was delivered to the defendants, Jackson, the drawer of the draft, had funds sufficient in the hands of the drawees to meet the same if it had been presented within a reasonable time. That Jackson was then solvent, and if the defendants had done as they agreed the draft would not have been lost to the plaintiff. That Jackson, since the neglect and conversion aforesaid, has withdrawn his funds from the hands of the drawees—has become wholly insolvent, and has left the country, and if said draft were now delivered or returned, the same would be utterly valueless to the plaintiff.

All the allegations of the complaint were denied, except the averments that the draft was the property of the plaintiff, and that the defendants were common carriers. The cause was tried by a jury, who returned a verdict for the plaintiff.

First—It is insisted for the appellants that their motion for a nonsuit, made at the trial, after the plaintiff had rested, was improperly overruled, and on the ground that there was no evidence tending to prove that Jones was the owner of the draft.

It was distinctly alleged in the complaint that the draft was

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the property of Jones, and the averment was not denied in the answer. Aside from that, the plaintiff put in testimony upon the point before resting, fully explaining the grounds of his alleged ownership.

Second—It is further insisted that there is error in the charge.

We have considered the objection to the instructions on which the appellants rely in argument, and we are satisfied that the objection is not well taken. The liability of the defendants is primary, and not secondary to that of the drawer of the draft. The defendants undertook to carry and deliver the draft to Williams at Camptonville, and became charged on their contract as common carriers, immediately upon their failure to carry and deliver as agreed. But if the charge was erroneous in the particular complained of, the error would not be available to the defendants, inasmuch as it is not put in the statement on motion for new trial, as one of the "particular errors upon which the party will rely." (Practice Act, Section 195; *Hutton v. Reed*, 25 Cal. 478.)

Judgment affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

WILLIAM KAVANAGH, MARY ANN KAVANAGH,
AND JULIA TOBIN v. MATHEW MAUS.

STATEMENT ON APPEAL TO BE SERVED.—If the statement on appeal from a judgment is not served on the respondent's attorney until more than twenty days after the rendition of judgment, and no extension of time is obtained, a statement is waived, and the appellate Court cannot review any alleged errors, except such as appear in the judgment roll.

STATEMENT ON APPEAL TO BE AUTHENTICATED.—If no amendments to a statement on appeal are served on the appellant, it may be settled by the Judge without notice to the respondent, but it should be authenticated either by the certificate of the Judge or by the stipulation of the parties.

'APPEAL from the District Court, Fourteenth Judicial District, Placer County.

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Defendant had judgment in the Court below, and plaintiffs appealed from the judgment.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellants.

Charles A. Tuttle, for Respondent.

By the Court, SAWYER, J.

The appeal being from the judgment, a statement is necessary to enable this Court to review any error not appearing upon the judgment roll. The cause was tried and judgment rendered February 8th, 1865. The document in the record relied on by appellant as a statement on appeal appears to have been served on respondent's attorney March 30th, 1865, fifty days after the rendition of the judgment; and it does not appear that any extension of time was obtained. The law allows but twenty days, unless an extension be granted, within which to prepare and serve a statement on appeal; and provides, that "if a party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto." (Prac. Act, Sections 338, 339.) It was, therefore, not served in time. (*Harper v. Minor*, 27 Cal. 107.)

No amendments appear to have been served. Section three hundred and thirty-eight, as amended in 1863, provides that "if no amendments are served, the statement may be presented to the Judge for settlement without notice to the respondent," and when settled, section three hundred and forty-one prescribes the mode of authenticating the statement by the Judge, or by the parties. In this case it does not appear that the proposed statement was ever presented to the Judge for settlement, nor is it in any manner authenticated either by the Judge or the parties. Nor does the stipulation certifying the transcript, in terms or by implication, embrace the statement. For all of these reasons respondent insists, and we think correctly, that there is no statement on appeal of which the Court can take notice. The only errors discussed arise

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upon rulings of the Court in the progress of the trial, excluding testimony, and as these rulings do not appear upon the judgment roll we cannot review them. Had the exceptions been settled during the progress of the trial, as provided in section one hundred eighty-eight, one hundred eighty-nine, and one hundred ninety, they would have been annexed to, and have formed a part of the judgment roll, and could thus have been reviewed on appeal from the judgment without a statement. But not having been so settled and filed, it was necessary to have them settled in a statement on motion for a new trial, or a statement on appeal. No error appearing on the judgment roll, the judgment must be affirmed, and it is so ordered.

W. F. ZEIGLER v. WELLS, FARGO & CO.

IRRELEVANT TESTIMONY.—If there is uncontradicted testimony sufficient to warrant the verdict of a jury, the judgment will not be reversed because there was some irrelevant testimony admitted upon the point in issue.

COMMON CARRIER.—In an action against a common carrier for failure to comply with a contract to carry and deliver a draft, if the defendant knew of the draft when it was delivered to him, the admission of irrelevant testimony as to his being afterwards informed of the draft, will not reverse the judgment.

VARIANCE BETWEEN PROOF AND COMPLAINT.—In an action against a common carrier for not complying with a contract to carry and deliver a draft, the complaint alleged that it was signed "John Q. Jackson;" the proof showed that it was signed "John Q. Jackson, Agent." *Held*, that the variance was immaterial.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

Plaintiff recovered judgment in the Court below and defendants appealed.

The other facts are stated in the opinion of the Court.

John H. Saunders, for Appellant.

When this case was in this Court before, it was decided that "the defendants were entitled to such a description as would identify the draft in question." (23 Cal. 180.) This is the law of this case. No averment could be more important in

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order to identify the draft than the one which stated who was the drawer.

Jo. Hamilton, for Respondent.

By the Court, SHAFER, J.

This action was brought to recover the value of a draft drawn on the defendants by John Q. Jackson in favor of Sloss & Co. and delivered by the plaintiff (to whom the draft in fact belonged) to the defendants at Auburn, to be carried and delivered by them, as common carriers, to the payees at Sacramento. All the allegations of the complaint are denied, save the averment that the draft was the property of the plaintiff, and the averment that the defendants are common carriers.

First — The plaintiff offered to prove at the trial that about one month after the delivery of the draft to the defendants at Auburn, he called at the office of the defendants in San Francisco, and was informed by a man who was acting apparently as one of the clerks, that "Wells, Fargo & Co. had been advised of the draft mentioned in the complaint." The testimony was objected to, but the objection was overruled and the testimony went in. To this ruling the defendants excepted, and the question of the correctness of the ruling is therefore properly raised in the record.

We shall assume that the testimony was inadmissible, and on the ground of irrelevancy; but we consider that its admission could not have affected any substantial right of the defendants. The defendants were fully "advised" of the draft as common carriers when it was delivered to them as such at Auburn on the 21st of October, 1861. The fact of that delivery and advice was sworn to by the plaintiff directly, and there was no opposing evidence before the jury. The intendment is a fair one that the jury passed upon the question in the light of that testimony, and without appreciable reference to the clerk's acknowledgment a month later, made at San Francisco.

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Second — It is insisted that the Court erred in denying the defendants' motion for a nonsuit.

It was alleged in the complaint that the draft was signed "John Q. Jackson"—the proof was that it was signed "John Q. Jackson, Agent." This action is not founded upon the draft, with a view to charge the defendants as parties to it, but upon their contract as common carriers to carry it and deliver it to Sloss & Co. at Sacramento. The variance relied upon is an immaterial one, and would be so regarded in an action upon the draft against the drawer. That point is settled by *Haskell v. Cornish*, 13 Cal. 45. The variance goes merely to the identity of the paper or document which it is alleged the defendants undertook to carry. The draft alleged, and the draft proved, are identical in legal effect; and they were also circumstantially identical, except in the matter of the word "agent." We cannot consider that the absence of that particle in the allegations and its presence in the proof, could have affected any substantial rights of the defendants. (Prac. Act, Sec. 71.)

Third—As to "errors of the Court in its charge to the jury." There are none specified in the statement. (*Hutton v. Reed*, 25 Cal. 478.)

Fourth—It is claimed that the verdict is not supported by the evidence. There was testimony tending to prove all of the plaintiff's averments, and this is very far from being one of the extreme cases in which we are permitted to go behind the verdict of the jury.

Judgment affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

PEOPLE v. CHARLES KING.

REFUSAL TO PLEAD TO AN INDICTMENT.—If the defendant in a criminal action demurs to the indictment, and the demurrer is overruled, and he then declines to plead, and demands that the Court shall pronounce judgment

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against him, a verdict and judgment against him will not be reversed because the Court directs a plea of not guilty to be entered and a trial to be had before a jury.

JUDGMENT IN CRIMINAL ACTION WHEN DEFENDANT DECLINES TO PLEAD.—If a demurrer to the indictment is overruled, and the defendant then refuses to plead is not a violation of defendant's constitutional right to a trial by jury for the Court to pronounce judgment against him as upon a plea of guilty, and this is the proper course for the Court to pursue.

A DEFENDANT MAY VOLUNTARILY TESTIFY BEFORE A GRAND JURY.—It is neither illegal nor a ground for setting aside the indictment for the defendant therein to voluntarily give his testimony before the Grand Jury when the case is examined before them.

MOTION TO SET ASIDE AN INDICTMENT.—A motion to set aside the indictment because the names of all the witnesses who testified before the Grand Jury are not indorsed upon it, must be made before demurrer or plea.

JUDGMENT IN A CRIMINAL ACTION.—A judgment "that the defendant be imprisoned in the State Prison for the term of three years from the date of his incarceration" is not void for uncertainty.

ERRONEOUS REFERENCE IN AN ACT.—If a section in an amendatory or supplementary Act refers to a section of the Act amended or supplemented by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section.

CRIMINAL PRACTICE ACT.—The fourteenth section of the Act of April 24, 1862, amendatory of and supplementary to the Criminal Practice Act, refers to the two hundred and ninety-sixth, instead of the two hundred and ninety-third section of the Criminal Practice Act.

APPEAL from the County Court of San Joaquin County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Tyler & Cobb, for Appellant.

The Criminal Practice Act, section two hundred and thirty-five, provides that "all the forms of pleading in criminal actions shall be those prescribed by this Act." It will thus be seen that we cannot go to the common law for aid in this matter, for we are expressly prohibited so to do by the statute. Whether the Court could legally enter such a plea for defendant or not must be determined by the provisions of the Criminal Practice Act. Section two hundred and ninety-six of the Criminal Practice Act provides: "If the demurrer (of defendant) be disallowed, the Court shall permit the defendant, *at his election*, to plead, which he must do forthwith, or at such time as the Court may allow; if he do not plead, *judgment*

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shall be pronounced against him." The statute has provided what the Court must do in a case of this kind, and "*expressio unius est exclusio alterius*" ought to have as much force in a criminal as in a civil case. Section three hundred and eight provides the only way in which the Court is authorized to enter a plea for the defendant:

"SEC. 308. If the defendant refuse to answer the indictment by demurrer or plea, a plea of not guilty shall be entered."

But in this case the defendant did not refuse to answer the indictment. He answered it in one of the two ways pointed out by the statute, and it is only when he refuses to answer the indictment in one or the other—that is, by demurrer or plea—that the Court is allowed to have a plea of not guilty entered for defendant.

J. G. McCullough, Attorney-General, for the People.

The Court was right in ordering the plea of not guilty to be entered for the defendant.

Section three hundred and eight of the Criminal Practice Act authorizes this proceeding. The construction of it is that if the defendant refuse to answer the indictment by demurrer, and if that be overruled, by a plea, then the Court should enter a plea of not guilty.

If section two hundred and ninety-six be unconstitutional, as appellant's counsel seem to think, on the ground, doubtless, that the defendant is entitled to a trial by jury, and that standing mute is not a confession of guilt, (as to which point see the case of *United States v. Hare*, 2 Wheeler's Crim. Cases, 299,) then it is the duty of that Court to pass upon the question of constitutionality, and if it decided rightly, it is not making a law, but declaring what the law is. Suppose the Court below had passed judgment as on a plea of guilty upon the overruling of the demurrer, and the defendant had appealed, and the Supreme Court had decided that that section was

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unconstitutional in not giving the defendant a trial by jury, then upon a new trial of the case the defendant should still stand mute, is there no provision anywhere that he may be tried at all? The legitimate result of such a construction would be that every defendant who thought that the Commonwealth could show him to be guilty, would simply demur to the indictment on some frivolous ground, and the demurrer being overruled, would refuse to plead.

The Criminal Practice Act can receive no such absurd construction; and if the defendant is to be tried at all, he could not be tried upon a more favorable plea than that of not guilty, (see Sec. 303 of the Crim. Prac. Act,) and therefore the defendant could not have been prejudiced in any substantial right by the action of the Court below. (Crim. Prac. Act, Sections 247, 601.)

By the Court, SANDERSON, C. J.

I. The defendant was indicted for the crime of grand larceny. A demurrer was interposed to the indictment which was overruled by the Court. Thereafter, when called upon to plead to the indictment the defendant, acting under the advice of his counsel, declined to do so, and refused to put in any plea whatever. Thereupon the Court, of its own motion, ordered the Clerk to enter a plea of not guilty, to which counsel for the defendant objected and demanded that the Court should proceed in the manner designated in the two hundred and ninety-sixth section of the Criminal Practice Act and pronounce judgment against the defendant. This the Court declined to do, and directed the plea of not guilty to be entered, upon which the defendant was thereafter tried and convicted. This action and ruling of the Court is assigned as error.

The two hundred and ninety-sixth section is in these words: "If the demurrer be disallowed the Court shall permit the defendant at his election to plead, which he must do forth-

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with, or at such times as the Court may allow; if he do not plead, judgment shall be pronounced against him."

It is presumed that the course taken by counsel was adopted under the notion that the foregoing section in some way interfered with the right of trial by jury guaranteed to the defendant by the Constitution, and was therefore void. Otherwise he would hardly have failed to have availed himself of the chances for his client's escape afforded by that uncertainty which is sometimes supposed to attend the verdict of a jury. The Court below seems to have come to the conclusion that the question was at least doubtful, and therefore gave the defendant the benefit of the doubt and afforded him an opportunity to enjoy his constitutional right of trial by jury, notwithstanding the earnest protest of counsel.

It is insisted on behalf of defendant that the constitutionality of section two hundred and ninety-six is not involved in this case, and counsel decline to argue it, claiming that it will be in time to discuss that question when we meet with a judgment which has been rendered in accordance with its provisions, and that the only question presented by the record in this case arises upon the power of the Court to enter a plea of not guilty, under section three hundred and eight. But the point made, in our judgment, does not involve a discussion of that section. The two hundred and ninety-sixth and the three hundred and eighth sections both relate to the same subject matter, and are to be read together. The latter section provides that: "If the defendant refuses to answer the indictment by demurrer or plea, a plea of not guilty shall be entered." Reading it, therefore, in connection with the former section, we have a complete rule for every case where the defendant when called upon to plead stands mute, or, as in the present case, orally refuses to plead. If, when arraigned, he stands mute or refuses to demur or plead to the indictment, a plea of not guilty is to be entered for him; but if he demurs and his demurrer is disallowed, he may plead or not, at his option, and if he stands mute or fail or refuse to plead, the Court is to proceed as upon a conviction or a plea of guilty

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and pronounce its judgment accordingly. Such is the plain rule of conduct as prescribed by the statute. Is there any constitutional objection to it? By such a rule is the defendant denied any constitutional right or privilege? If so, we have been unable to discover it, and counsel for appellant has failed to suggest wherein the statute conflicts with the Constitution. The only clause of the Constitution to which it can be claimed that the rule of the statute is repugnant is that which provides that "The right of trial by jury shall be secured to all, and remain inviolate forever." This provision is designed for the protection and security of the citizen in his life, liberty and property, and to protect all three against the exercise of arbitrary power. Of the right thus solemnly secured to him he cannot be deprived by any power under the Government. He may claim his right at all times and under all circumstances. But while the Legislature cannot destroy or in any degree impair his right, that body may provide the mode and manner of its enjoyment so far as the same may be done without prejudice to a fair and impartial trial in the manner pointed out and secured to him by the Constitution. The criminal law of the land must be enforced, or civil government is a failure, and the law of force becomes the rule of conduct. The intent of the Constitution is to secure every person charged with crime a fair and impartial trial by jury, but not to place it in his power to evade a trial altogether by standing mute and refusing to participate in it. In order that there may be a trial there must be an issue. If, by refusing to join issue, the accused may avoid a trial, he is thereby enabled to pervert a constitutional provision solely designed to secure to him a fair trial by a particular mode, but not to enable him by his own act to obstruct the course of justice and escape a trial altogether, into a shield against punishment for any crime which he may have committed.

It is within the constitutional power of the Legislature to provide that the Court shall enter a plea for the defendant when he stands mute, or that such standing mute shall be taken as a confession of the truth of the indictment, and equiv-

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alent to a plea of guilty. Such a provision in no way deprives the defendant or tends to deprive him of his constitutional right to a trial by jury. If, in the case provided for in section two hundred and ninety-six, no trial takes place, and the defendant is adjudged guilty without the verdict of a jury to that effect, and punished, such result is not attributable to the law, but to the wilful obstinacy of the defendant. That section affords him an opportunity to be tried by jury, which is all that the Constitution exacts from the Legislature. If he chooses to stand upon his demurrer and fails or refuses to plead, he is no more entitled to a trial than he would be upon a plea of guilty; and it is presumed that no one will contend that the law providing for a plea of guilty is repugnant to the constitutional provision in question.

From what has been said it follows that the Court could have lawfully pronounced judgment in the case as provided in the two hundred and ninety-sixth section, and ought to have done so, and that the Court erred in adopting the course which it did. But the consequence for which counsel for the defendant contends does not follow. This Court is not allowed to reverse a judgment where it is manifest that the error alleged has in no manner operated to the legal prejudice of the defendant. The defendant has been deprived of no right, nor has he been placed in any worse position by the error of the Court in giving him a fair trial by jury notwithstanding his confession of guilt. The trial was a mere idle ceremony, which did him no legal harm, and therefore affords no ground for a reversal of the judgment.

II. When the case was called for trial and before the examination of the jurors was commenced, counsel for defendant asked leave to withdraw the plea and to move to quash the indictment, because the names of all the witnesses who were examined before the Grand Jury was not indorsed upon it, and upon the further ground that the defendant himself had been examined before the Grand Jury touching the offense therein charged. It appears from the affidavits offered in support of this motion, that the defendant and one Louis Bergler,

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jointly indicted with him, were examined before the Grand Jury and their names were not indorsed upon the indictment. The motion was denied, and it is claimed that such denial was error.

So far as the motion was based upon the ground that the defendant had testified against himself before the Grand Jury is concerned, it is only necessary to say that we know of no rule of law which made it illegal for him to testify if he felt inclined to do so, nor do we know of any rule of law which makes the voluntary testimony of the defendant before the Grand Jury a ground for setting aside the indictment.

So far as the other ground is concerned, the motion came too late, as has been repeatedly decided. A motion to set aside an indictment upon this ground must be made before demurrer or plea (Criminal Practice Act, Sections 277, 278), and if not so made, the defendant is precluded from afterwards taking the objection (Section 280.) (*People v. Freeland*, 6 Cal. 98; *People v. Lawrence*, 21 Cal. 368; *People v. Lopez*, 26 Cal. 112.)

III. It is lastly contended that the judgment is void for uncertainty. The judgment is, "that the defendant be imprisoned in the State Prison for the term of three years from the date of his incarceration," and it is claimed to be fatally uncertain as to the time when the term commences.

It is true, as contended by counsel, that the judgment ought to be certain, both as to the commencement of the term and as to its termination, but this rule does not require greater certainty than is possible under the circumstances, and we think the judgment in this case is quite as certain as it can be made. The punishment is imprisonment in the State Prison for the term of three years. It is very clear that the term cannot commence until the defendant arrives at that place, and that it cannot end until three years thereafter. When he will arrive at the State Prison is certainly more or less uncertain, but that is not the fault of the judgment, and as the Court has no means by which it can ascertain with certainty the precise moment at which that event will happen, it would

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be asking more than the Court could perform to require it to fix the exact day, and more than any rule of law to which our attention has been called makes necessary.

Judgment affirmed.

By the Court, SHAFER, J., on petition for rehearing.

Petition for rehearing. The counsel for the defendant admits the constitutionality of the two hundred and ninety-sixth section of the Criminal Practice Act; and further admits that the conviction would be well supported by the provisions of that section were the section now on foot. But it is claimed, in effect, that section two hundred and ninety-six is repealed by the Act of 1863.

It is provided by that Act as follows: "No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court; or upon a plea of guilty; or upon judgment against him upon a demurrer to the indictment *in the case mentioned in section two hundred and ninety-three.*"

It is insisted by counsel that this amendment to the Criminal Practice Act purports, on its face, to be a statement of the instances, and all of the instances, in which a person accused of crime can be said to have been "convicted;" and it must be admitted that the point is well taken. It is further urged that it follows from the views maintained in the opinion, that the judgment below is not supported upon the first ground named in the amendment, for the opinion holds the verdict to be null and void. It is further urged that the judgment cannot be supported on the second ground, for it appears that there was no plea of guilty entered in fact; and it is claimed, finally, that the judgment cannot be maintained upon the third and last ground named in the amendment, for the reason that section two hundred and ninety-three, to which the amendment refers, states a case where a judgment is to be entered *for the accused*, and not against him.

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Section two hundred and ninety-three is as follows: "If the demurrer be allowed, the judgment shall be final upon the indictment demurred to, and shall be a bar to another prosecution of the same offense," etc. All the grounds of judgment, named in the amendment, failing, it is claimed that the judgment entered below must be held to be erroneous. We do not, however, consider the third ground named in the amendment to have failed.

The reference to section two hundred and ninety-three does not express the legislative intent. That intent finds expression only in section two hundred and ninety-six; and the amendment must be read as though the reference were to the latter section instead of the former. But it is urged that to strike out the word "three" and insert the word "six," would be to amend the amendment, and not to construe it; and the point, considered abstractly, must be admitted to be well taken; but when considered on what may be called the facts of the question, and in view of the settled rules of construction, it is manifest to us that the objection is fallacious.

First—It must be assumed that the Legislature, in undertaking to state a third method, or instance, of conviction, intended to do it; but if it used the number two hundred and ninety-three advisedly, it neither accomplished, nor intended to accomplish, the object stated, nor any other, and the last clause of the amendment is not only a nullity, but was intended to be a nullity. But we are forbidden so to hold. (Smith's Com., Sections 488, 527.)

Second—We have a voluminous Act upon the subject of Crimes and Punishments—and we have also Courts of criminal jurisdiction. From the constitutional and legislative provisions upon the subject of crimes and criminal Courts, there can be no doubt that it is and always has been the policy of the State, that the guilty should not go unpunished. But if it should be held that the reference to section two hundred and ninety-three expresses the true intent of the Legislature, then the whole of our criminal system is virtually overthrown, and every grade of crime may be committed with impunity;

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so that, persons accused, shall have the art to put in demurrers to valid indictments, to begin with. The fallacious demurrer being overruled, the accused would refuse to plead. The Court could not direct a plea of not guilty to be entered, for the reasons stated in the opinion, nor could the Court, under the views of counsel, order judgment upon the demurrer, as provided in section two hundred and ninety-six; that is to say, judgment would be forever impossible. But all this is "absurd;" and, therefore, the views that lead to such result must be unsound, and must be discarded. (Smith's Com., Secs. 517, 575, 725, 726.)

Assuming, then, that the Legislature, by the last clause of the amendment, meant something, and something sensible—that is, something in harmony with the general purpose with a view to which our criminal system was got up and is now kept on foot, we are satisfied that it was intended to enact the third ground, or instance, of conviction set forth in section two hundred and ninety-six, but the Legislature applied to the section in which it is contained a wrong number. This view does not lie in assumption. It was the purpose of the amendment to state the cases in which a person, accused of crime, could be considered as "convicted" to a legal intent, and to limit them to three. The amendment states two, and, so far as expression goes, it states a third. We must presume, to start with, that a third has been efficiently enacted, and we cannot conclude to the contrary, until the whole of the written law upon the subject of crimes and punishments, and criminal practice, has been examined and exhausted. We look to section two hundred and ninety-three, directly referred to in the amendment, but that section does not state a case of "conviction," but of "acquittal" instead; but on looking through the whole body of the statutes we find one section, and but one, that is responsive to what may be called the governing call of the last clause of the amendment, to wit: a third instance in which a person accused shall be considered as convicted for the purposes of judgment; and we must, therefore, consider that to be the provision which the Legis-

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lature had in mind. Both the question and the reasoning are familiar. The question is one of "false demonstration," and the solution is the one commonly used in such cases. We have treated the question in the same manner, that we should have dealt with it, if the third clause of the amendment had set forth the third alternative conviction, in the language used in section two hundred and ninety-six, and then added: "As set forth in section two hundred and ninety-three." The questions are substantially the same.

Petition denied.

CHARLES SPENCER, JOHN A. REICHERT, AND
JOHN R. JARBOE v. E. H. PRINDLE.

LEGAL TENDER NOTES AND COIN.—In an action to recover the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt Treasury notes, made by Act of Congress a legal tender in the payment of debts, as the standard of value, the verdict will not be set aside on that ground.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Defendant appealed from the judgment and from the order denying a new trial.

The other facts are stated in the opinion of the Court.

A. M. Heslep, for Appellant.

Seldon S. Wright, for Respondents.

By the Court, SAWYER, J.

The plaintiffs — being attorneys at law — sued Prindle for professional services. The services were admitted on the trial, and the only issue was as to their value. William H. Patterson, an attorney, having been asked the general question, as to the reasonable value of the services of plaintiffs, without any reference in the question to any particular kind of money to be taken as the standard of value, answered, "that the ser-

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vices were worth one thousand dollars in greenbacks, or five hundred dollars in coin." The other witnesses all made similar answers to similar questions. No objection being taken in any form to any portion of the testimony.

On this testimony the defendant asked the Court to give to the jury the following instruction:

"The jury, in assessing the damages, are not at liberty to take into consideration the difference in value of the currency of the country, but will find a verdict without reference thereto."

The Court refused to give the instruction, as asked, but did give it with the following addition, "except so far as testified to by witnesses and admitted to go to you as testimony in the case." Defendant excepted to the refusal and modification. A verdict was returned in favor of plaintiff for the sum of eight hundred and eighty-nine dollars and twenty-five cents, the amount claimed in the complaint. No particular kind of money was specified in the verdict, or judgment. The ruling of the Court upon the foregoing charge is the error relied on, on the motion for new trial, and on appeal.

The term, "greenback," as used in the testimony, is of course, intended to designate treasury notes of the United States, made by Act of Congress a legal tender in payment of debts; and the term, "coin," to signify the coin of the United States, also made a legal tender. The plaintiff's instruction assumes, that, in legal contemplation, a dollar in one of these kinds of money is equivalent to a dollar in the other—that a dollar in gold is of no more value than a dollar in "greenbacks," and a dollar in "greenbacks" of no less value than a dollar in gold. Conceding this to be so, the most that the defendant can complain of is, that the jury found the value of the services in greenbacks. But this value is, upon the hypothesis assumed, equal to the same number of dollars in gold. The defendants, therefore, could not have been injured.

But conceding, that, while in legal contemplation there is no difference in value between the different kinds of lawful

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money, there is a difference, in fact, recognized in the commercial world, and in the ordinary business transactions of the country; how will it affect the question under consideration? We then have two kinds of lawful money, both a legal tender in payment of all debts, within the meaning of the term debts, as used in the various Acts of Congress upon the subject, and, therefore, in legal contemplation, of equal value, but, in fact, recognized in all commercial and business transactions as having different values. All business transactions between man and man would ordinarily be made with reference to this difference in value. If a contract is made, as for instance for a sale of goods, or for services to be performed, for a stipulated price, without naming any particular kind of money in which it is to be paid, the party to make the payment may, at his option pay it in any kind of money made a legal tender that suits his interest, convenience or caprice, and the other party must receive that or none. The presumption is, that the contract is made and the price fixed with reference to this right of the debtor. If the party who is to make the payment fails to meet his engagements, the other party may bring his suit to enforce the payment. In this case there are so many dollars due according to the sum stipulated. On the trial the Court can only ascertain the number of dollars due by the terms of the agreement, and render judgment for the amount, and there can be no inquiry as to whether a dollar of one kind is equivalent to a dollar of another. And the same would, doubtless, be true in case of a contract to pay in any specific kind of money. For the inquiry in such a case would be reduced to a comparison of values between two or more dollars of different kinds of money, which in contemplation of law are of equal value.

But in a contract for goods sold, or for services performed, without any stipulated price, a promise is implied to pay what they are reasonably worth. When this question comes to be litigated, the question is, not whether a dollar in greenbacks is worth more or less than a dollar in gold, but what are the goods, or services worth? The dollar is to be the unit of

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value, but the Court can no more say that the value of a gold dollar in the commercial world shall be taken as the standard of value, than that the value of a "greenback" dollar shall be the standard. The Court cannot say in which kind the payment shall be made—that is left to the option of the debtor; and for the same reason, it cannot say that the money of the greater value shall be taken as the measure of value. The debtor may pay whichever he chooses—and when there is any considerable difference in the value, it may safely be presumed that he will pay in that which will be most conducive to his interest; and that would of course be the kind which is of the least value. If he does not do so, it is simply because he does not choose to do it. He has the option if he chooses to exercise it. "Greenbacks" are lawful money—they are a legal tender for all debts—and are therefore necessarily a legal standard for the measurement of values—not of other lawful money, but of all commodities bought and sold, services rendered, etc. In all States of the Union—unless California is an exception—they actually are the standard by which values are estimated in legal investigations, as well as in business transactions. There must be some standard by which values must be determined. And we see no reason, why that kind of money may not be taken, which the law makes a standard, and which must be accepted in satisfaction of the judgment in case it should be tendered by the judgment debtor, whether the creditor is willing or not. If paid in that kind of money, the debtor pays no more than he ought—no more than the actual value of the property purchased, measured by lawful standard; and if he does not so pay it, he can blame no one but himself. In this case, had the instruction been given as asked, there would have been, in view of the evidence, no standard of value by which the jury could have been guided. For the testimony introduced without objection—as it necessarily, either tacitly or avowedly, must have done—all referred the value of the services either to coin or "greenbacks," and there would have been at least no greater propriety in taking coin as the measure than greenbacks. The instruction, as

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modified and given, does not submit any very distinct proposition to the jury; but the jurors were substantially told that they were to determine the value of the services upon the evidence before them. The instruction, if it meant anything, amounted to this. The worst view the jury could have taken for defendant, under the instruction, was to take "greenbacks" as the standard of value; and this, as we have seen, is a recognized legal standard. Admitting that they did so, the defendant could at once have paid the judgment in "greenbacks"—the standard by which the value was measured—and by so doing he would have paid no more than the actual value of the services. He was therefore not injured by the instruction as modified, or by the refusal of the instruction as asked.

We think the order denying a new trial should be affirmed. And it is so ordered.

Mr. Justice CURREY delivered the following dissenting opinion, in which Mr. Justice RHODES concurred:

The Court instructed the jury as follows: "The jury in assessing the damages are not at liberty to take into consideration the difference in the value of the currency of the country, but will find a verdict without reference thereto except so far as testified to by witnesses and admitted to go to you as testimony in the case."

This instruction assumes that at the time of the trial there was a difference in the value of the several kinds of money of the country; and the instruction is in effect that the jury could take into consideration the difference as far as and to the extent specified or indicated by the witnesses in their testimony. The testimony of several witnesses was given which was in exact agreement, and was in substance that the services for which the action was brought were, if estimated in United States notes, made lawful money and a legal tender in the payment of debts by Act of Congress, of the value of one thousand dollars; or, if estimated in gold coin of the United States, of the value of five hundred dollars. Thus the instruction was

Points decided.

that the jury could consider and determine that one of the kinds of money mentioned was worth just double the other, and that they could, according to such estimate and determination, render their verdict.

We are of the opinion the instruction was erroneous and that the judgment should be reversed.

E. McCOMB AND ZACCHEUS BEATTY v. WILLIAM J. REED, SETH KINMAN, JOHN QUICK, J. P. ALBEE, R. M. WILLIAMS, AND WILLIAM TAYLOR.

ATTACHMENT — WHEN NOT VOID.—An attachment, regular upon its face, is not void because the complaint does not set up a cause of action which would warrant the issuance of an attachment.

WHEN A DEFENSE MUST BE SPECIALLY PLEADED.—In an action against a Sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating as a dissolution of the same, such matters must be specially pleaded.

JUDGMENT MUST FOLLOW ISSUES JOINED.—If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the facts in relation to it by the Court.

SHERIFF'S DUTY AS TO ATTACHMENTS.—A Sheriff who receives an attachment, regular upon its face, cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue.

HOW SHERIFF SHOULD APPLY MONEY ON ATTACHMENTS.—When a Sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. The Sheriff has no right to go back of the process and raise the question as to the validity of the attachments.

FIRST AND SECOND ATTACHING CREDITORS.—*Query:* Where two attachments have been levied on the same property, can the junior attaching creditor successfully attack the validity of the first on the ground that the complaint did not contain a cause of action upon a contract express or implied for the direct payment of money?

JUDGMENT PAYABLE IN GOLD COIN.—A party cannot recover against another a judgment payable in gold or silver coin, on the ground that the other received it for him, in trust, in that form, unless the kind of money received is specially averred in the complaint.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

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July 19th, 1856, the plaintiffs' attachment was issued out of the Superior Court of the City and County of San Francisco, and on the 22d day of July, 1856, it was placed in the hands of the Sheriff and a levy made. The next day an attachment was issued out of the District Court in Humboldt County, against Ross & McLean, at the suit of Henry Fleishman, which was placed in the hands of the Sheriff and levied on the same property the day it was issued. The Sheriff paid the money realized from the sale of the property to Fleishman. The plaintiffs recovered judgment in the Court below, and the defendants appealed.

The other facts are stated in the opinion of the Court.

Delos Lake, and *Robert F. Morrison*, for Appellants, argued that the attachment at the suit of McComb & Co. was void as against the other attaching creditors, because the complaint contained a count which did not justify the issuing thereof, and referred to *McGovern v. Payne*, 23 Barbour, 90.

James C. Cary, for Respondents, argued that, admitting the attachment was improperly issued, the Sheriff could not question it: 1st. Because this defense was not pleaded. 2d. That even if pleaded, the Sheriff could not make this defense; and cited *The People v. Dunning*, 1 Wend. 17; *Stever v. Sanberger*, 24 Wend. 275, 276; *Hagart v. Morgan*, 1 Selden, 428, 459; *Gregory v. Levy*, 12 Barbour, 611, 612; and *Dixey v. Polack*, 8 Cal. 573.

By the Court, SHAFER, J.

This is an action on a Sheriff's bond, given by defendant Reed, Sheriff of the County of Humboldt, and executed by the other defendants as his sureties.

The complaint alleges that the plaintiffs, in the year 1856, brought an action in the Superior Court of the City of San Francisco against Ross and McLean for three thousand dollars then due and owing from the defendants to the plaintiffs. That having filed an affidavit and given the necessary bonds,

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an attachment issued for the sum of sixteen hundred and thirty-two dollars and eight cents, directed to the Sheriff of the County of Humboldt, which writ was thereafter delivered to Reed as such Sheriff for service, and that he thereafter and by virtue of the process attached property of Ross and McLean more than sufficient to satisfy the attachment and the costs of serving the same. That the Sheriff thereafter sold the property under the attachment and that the proceeds were more than sufficient to satisfy the plaintiffs' claim and the Sheriff's fees and charges. That the plaintiffs thereafter recovered judgment in said action for the sum of sixteen hundred and thirty-two dollars and eight cents and fifty dollars and fifty cents costs, which judgment remains in full force and unsatisfied. That Reed thereafter, in derogation of the plaintiffs' rights, paid the money in his hands to junior attaching creditors of Ross and McLean under pretense that the attachment of the plaintiffs was a nullity. That the plaintiffs thereafter sued out an execution on their judgment and delivered it to the Sheriff, who returned it *nulla bona*. The complaint then proceeds to set forth the Sheriff's bond and to assign the breach on which the plaintiffs rely, viz: the misapplication of the funds as before stated.

The answer contains a general denial of all the plaintiffs' allegations, and a special defense that "the cause and causes of action stated and set forth in the complaint in the Superior Court in the City of San Francisco, by the said plaintiffs, against Charles S. Ross and Hector H. McLean, was not, and were not, as set forth in said complaint, upon contract or contracts, express or implied, for the direct payment of money; and that the attachment issued in said action was invalid, illegal and void." There are two other special defenses stated in the answer but no question is made upon either.

There were in fact two complaints filed in the action — one original and the other amended; and it does not appear, precisely, whether the complaint referred to in the first special answer named is the original or the amended complaint; nor

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does it make any difference, in the view that we take of the case, whether the reference is to the one or the other.

The case was tried by the Court. The findings are contained in the record, and the appeal is from the judgment entered thereon in favor of the plaintiffs.

First — The Court has found that the attachment issued, in fact, upon the original complaint; and that the complaint was thereafter amended by the introduction of new counts, which, as is apparent, set up causes of action not within the purview of the original complaint; and it is insisted that these amendments operated as a dissolution of the attachment. It appears, also, that the fourth count was demurred to specially, and that the count was adjudged to be insufficient; and it is claimed that the attachment was thereby dissolved. But the demurrer and the decision upon it — the fact of the amendments — the nature of them — and the fact that they were made subsequent to the attachment — are all new matter. They are reconcilable with the truth of every averment in the complaint, and if they could have any operation it would be by way of avoidance. The question of their legal effect cannot be gone into on this appeal, for they were not specially pleaded. The circumstance that the facts have been found by the Court, and upon evidence to the introduction of which it does not appear that the respondents objected, is of no avail. The case must be determined upon the facts as related to the issues joined. (*Smith v. Owens*, 21 Cal. 12.)

Second — The Court has found the allegations of the complaint to be true; and, under the issues taken on the first special answer, the finding is that the original complaint contained four counts: The first for goods sold and delivered: the second for money paid, laid out and expended; the third on an account stated, and the fourth on a special contract made between the parties on the 10th day of April, 1856, whereby the plaintiffs agreed to purchase and consign groceries to the amount of two thousand dollars, to Ross and McLean, for sale on joint account. The plaintiffs were to receive interest at the rate of one per cent per month, two

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and one half per cent commission for purchasing, and seven and one half per cent of the net profits. The defendants were to render an account quarterly. The goods when shipped, "were to be regarded and held as consignments from said McComb & Co." It was further averred: "That in pursuance of said contract, they (the plaintiffs) from time to time consigned to the defendants goods and merchandise to the value of thirty-five hundred dollars, at cost prices, for cash; which goods and merchandise were received by said defendants; under and in pursuance of said contract, to be held and accounted for by said defendants as consigned goods. And the plaintiffs aver that the said defendants have in no manner accounted to the plaintiffs for said merchandise, or the proceeds thereof, nor for any part of the same, but have converted and disposed thereof to their own use; and have wholly neglected and failed to render to the plaintiffs any account of sales of said goods notwithstanding more than three months have elapsed since the said goods and merchandise were consigned to and received by said defendants as aforesaid. And the plaintiffs aver, that although often requested, the defendants have not paid to the plaintiffs the several sums of money aforesaid or any part thereof. Wherefore they pray judgment for three thousand dollars."

(1.) It is claimed for the appellants, that the action, in so far as the fourth count is concerned, is not based "upon a contract expressed or implied, for the direct payment of money." The respondents controvert this proposition, but they insist, primarily, that neither the Sheriff nor his sureties can raise the question; and we think the point well taken.

Conceding for the purposes of argument, that the fourth count sounds in damages, still the attachment was not void. The writ was regular on its face, and therefore was good as a protection to the officer. The attachment would have held, as between the parties to the action, in the event of a failure on the part of the defendants to raise the objection. It was held in *Bacon v. Cropsey*, 3 Sel. 195, that where, under the provisions of a statute, an execution might issue thirty days

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after the entry of a judgment, "the fact that it was issued within a shorter period was not a defense to a Sheriff in an action against him for false return;" and "that an execution so issued was not void, but voidable." The Court, in the case at bar, had jurisdiction of the action, and therefore had jurisdiction over the question of the attachment. (*Cruyt v. Philips*, 7 Ab. 209.) And it appears, further, that the validity of the attachment was in fact passed upon by the Court, on a motion to dissolve made by the parties defendant, and that the motion was overruled. This decision, if objectionable at all, was erroneous at the worst and not *coram non judice*. No appeal was taken from the judgment subsequently rendered, and the interlocutory order is now *res judicata* as between the parties to the record. It follows that if no attachment but the plaintiffs' had been put upon the property, and the defendant had failed to pay over the proceeds on execution, the objection now urged to the validity of the attachment would not have availed the Sheriff as a defense. This conclusion is further sustained by 1 Cow. 309; 4 Cow. 158; 3 Barb. 17. *Buffandeau v. Edmondson*, 17 Cal. 441, was trespass against a Sheriff for five thousand dollars damages, for proceeding to sell the plaintiff's property under execution after service of an injunction restraining such sale. The defense went upon the ground, in part, that the plaintiff had no right to an injunction—that is, upon the ground that the Court erred in granting the injunction. The Court say: "It is unnecessary to consider whether the bill of complaint showed a proper case for an injunction or whether the injunction was regularly granted or not. It was enough for the Sheriff that a Court of competent jurisdiction had made the order, and then it became his duty to obey it. It is no part of the Sheriff's duty to sit in judgment upon official acts and reform the errors or revise the orders of a Judge." *McGovern v. Payn*, 32 Barb. 84, cited for the appellants, is not in point. There the order of arrest was examined on the motion of the defendant made by him in the action.

The subsequent attachment of Fleishman varied neither the

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rights nor the duties of the Sheriff, as above stated. He was but a ministerial officer before the second attachment was made, and the making of it did not vary the extent nor the quality of his powers. The plaintiff's attachment and execution were all final documents as to the Sheriff. He had no right when he received Fleishman's attachment to go back of that process and raise the question of its validity upon the pleadings in the action in which it was issued, nor was he at liberty to concern himself with that question when he received Fleishman's execution. The rule of official duty in the matter of the plaintiff's process was the same. When the Sheriff received the respective executions, it was his duty to apply the money in the order of the attachments as required by law. Had he done so, his ministerial duties would have been fulfilled, and he would have been protected against all attacks that might have been made upon him at the suit of Fleishman. If Fleishman had the better right, it was his business to move in the matter in person, and in one of the alternative modes pointed out in *Speyer v. Ihmels*, 21 Cal. 287. Or, if the execution creditors were respectively pushing the Sheriff at law, and he did not care to solve the question of his own duty, he might under proper proceedings have obtained judicial direction. But, as a Sheriff can under no circumstances go back on an execution and disobey its expressed mandate on the ground that the judgment upon which it issued was erroneous in fact or in his opinion, so he cannot under any circumstances, go back of a writ of attachment valid on its face, and adjudge the question of the party's right to it upon the pleadings, and certainly not in a case where the precise point has been raised and determined by the Court in advance. (*Crocker on Sheriffs*, Sec. 844; *Dixey v. Pollock*, 8 Cal. 573.)

Further, it may well be doubted whether Fleishman could have established a better right in himself to the funds in the Sheriff's hands by force of the alleged error if he had moved directly in the matter. (*Patrick v. Montader et als.*, 13 Cal. 434; *Fridenberg v. Pierson*, 18 Cal. 152; *Drake on Att.*, Chap.

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39.) But that is a question which it is not necessary for us to decide.

The judgment, in so far as it provides for a recovery in United States coin, is erroneous. The complaint does not make a case within the Specific Contract Act. The allegation is that "the said Reed, Sheriff, as aforesaid, sold the said property and converted the same into *cash*, and received as the proceeds of such sale more *money* than was sufficient to satisfy the plaintiffs' said demand, and all the lawful fees and charges of the said Reed in that behalf." The right to the relief given is peculiar and exceptional, and if a party would recover money in the form of gold or silver of one who received it for him in that form, the form or kind of money received should be specially averred. (Acts 1863, p. 687.) There are other grounds on which the validity of the judgment in this particular may be questioned, but inasmuch as it is not necessary to pass upon them we forbear to discuss them.

The Court below is directed to modify the judgment by striking out that portion of it which requires that the sum recovered should be paid in gold or silver coin of the United States. The judgment as so modified to stand as the judgment in the case.

E. LANE v. JOSEPH GLUCKAUF.

CASE AFFIRMED.—The case of *Carpentier v. Atherton*, 25 Cal. 564, affirmed.

CONTRACT TO PAY IN GOLD OR LEGAL TENDER NOTES AT GOLD VALUE.—A contract agreeing to pay a specific sum in gold coin, or, upon failure thereof, to pay such further sum as may be equal to the difference in value between gold coin and legal tender notes, belongs to the class of contracts provided for in the so-called Specific Contract Act, and may be enforced according to its meaning.

SAME.—CONSTRUCTION OF.—The meaning of such contract is that the maker will pay in gold coin, or, if he does not do so, in legal tender notes at their gold value.

JUDGMENT ON SUCH CONTRACT.—A judgment may be rendered on such contract payable in gold coin alone.

OBJECT OF SPECIFIC CONTRACT ACT.—The Specific Contract Act was not intended to legalize contracts which without it were illegal, but to provide a remedy for enforcing certain contracts, if held to be legal.

JUDGMENT WHEN THERE IS A TRIAL.—If in an action on a promissory note a trial is had, the Court may render judgment for the amount of the note and

Statement of Facts.

Interest, and make the judgment bear the same rate of interest as the contract, although the complaint only prays for judgment for the face of the note.

JUDGMENT ON NOTE PAYABLE IN GOLD OR GREENBACKS.—If a note is made payable in the alternative, either in gold or legal tender notes, a judgment rendered on it may also be in the alternative.

APPEAL from the District Court, Second Judicial District, Butte County.

This action was brought upon a written contract, of which the following is a copy:

“OREVILLE, August 4, 1863.

“\$2,843.

“Six months after date, without grace, for value received, I promise to pay to the order of George C. Perkins the sum of \$2,843 in gold coin of the standard value of 1860 of the United States of America, with interest at one and one half per cent per month till paid. And if said principal and interest is not paid in gold coin, as above stated, then, for value received I promise to pay to the order of said G. Perkins, in addition thereto, and as damages, such further amount and percentage as may be equal to the difference in value in the San Francisco market between such gold coin and paper evidence of indebtedness of the States or the United States, that are or may hereafter be made a legal tender in payment of debts by the laws of this State or the United States.

“JOSEPH GLUCKAUF.”

After setting out the contract, the complaint avers that the same has been assigned by the payee thereof to the plaintiff, and that there is due thereon a certain sum, to wit: two thousand eight hundred and fifty-six dollars and sixty-two cents in gold coin, or a certain other sum in legal tender notes, to be ascertained by adding to the former the difference in value between gold and legal tender notes in the San Francisco market, adding that at the date of the complaint the latter were worth in that market only fifty cents on the dollar in gold coin.

The complaint concludes with a prayer for a judgment for

Argument for Appellant.

the sum of two thousand eight hundred and fifty-six dollars and sixty-two cents in gold coin of the United States, and in case the same is paid in legal tender notes, that the amount to be paid shall be made equal in value to that sum, to be ascertained at the time of payment from the prices current of the San Francisco market as to the value in gold of said notes.

The defendant first demurred, and then answered, his demurrer having been overruled. The Court found the facts substantially as stated in the complaint, and rendered a judgment in favor of the plaintiff, payable in gold coin, for two thousand nine hundred and forty dollars and twenty-two cents, the amount of principal and interest found due on the contract, with a direction in the judgment that it bear the same rate of interest as the contract. The defendant appealed.

Jos. E. N. Lewis, for Appellant.

By the terms of the instrument this defendant had the right to make default in payment of the gold, which default annulled the contract as to the payment of gold, and plaintiff's pretended cause of action, if any, was upon the second contract.

The agreement to depreciate the currency of the United States, known as the treasury notes, by paying them on said demand at their supposed market value in San Francisco, is likewise null and void, for the reason that said agreement is wholly without any consideration and in contravention of the laws of Congress as applied to the currency of the United States. And in contemplation of law, as one dollar in coin is not of more value than one in United States treasury notes, by the nonpayment of coin, as contradistinguished from said notes, the plaintiff would sustain no damage.

It is a self-evident proposition that the maker of the instrument set forth by copy in the complaint, secured to himself the privilege of paying the amount due thereon in any one of the currencies contemplated by the instrument. The choice of the currency was with the maker, and not with the owner of the instrument.

The contract does not set forth an agreement to pay in any

Argument for Respondent.

particular kind of money, but is an agreement to pay in one of two kinds of money, to wit: gold coin, or United States legal tender notes. An agreement to pay in one of two currencies is not an agreement to pay in any one specified currency, in the meaning of the Act, that would justify the Court in rendering a judgment directing its payment in one currency, as contradistinguished from the other currency designated by the contract set forth in the note. (Statutes of 1863, p. 687.)

George Cadwalader, for Respondent.

If words can ever be called the representatives of ideas—certainly in this note they express as the most prominent idea of both maker and taker that the note was to be paid in gold coin: “I promise (says Gluckauf) to pay to the order of George C. Perkins the sum of \$2,843 in gold coin of the standard value of 1860 of the United States of America.”

The addenda to the note is surplusage, and may be stricken out, leaving the full contract to stand—and which is enforceable under the two hundredth section of the Practice Act. (*Carpen v. Atherton*, 25 Cal. 564.)

The last clause in the note, when considered in the light of the pleadings, shows that a performance of it would be as damaging to respondent as the judgment rendered—for by it he agrees to pay by way of damages the quantity of paper that it takes to buy the agreed value in gold coin. The effect of this clause is, however, considered by appellant to waive a liquidated claim in favor of an unliquidated one, and thus by reason of a violation of an agreement to pay a sum certain in a given time he would gain an advantage that a performance according to agreement would not have given. The law, however, confers no such reward as a breach of contract—no such immunity nor premium is given to a wrongdoer; but, on the contrary, the law strives by its machinery to give that which was promised, as well as costs by way of damages. The right of election is not given to the party in default. The last clause in the note gives damages as a penalty result-

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ing from the non-observance of the first clause. To this penalty we are not necessarily obliged to have recourse, for the two hundredth section of the Practice Act gives us the right to have the contract specifically performed.

By the Court, SANDERSON, C. J.

All the points made by counsel for appellant relating to the constitutionality of the so-called Specific Contract Act of 1863 we pass without further notice. So far as this Court is concerned, that question has been put at rest (*Carpentier v. Ather-ton*, 25 Cal. 564,) and contracts made under that Act must be held valid.

But it is claimed that the contract in this case is not within the meaning of that Act, and in support of that proposition the case of *Lamping v. Hyatt et al.*, 27 Cal. 99, is cited. That case, however, does not sustain the proposition. We there held that the contract sued on was not a gold contract and did not therefore support the judgment, which required satisfaction in gold. There is an obvious difference between the terms of the contract in that case and the contract in this.

The Specific Contract Act (so called) did not propose to make contracts legal which otherwise were illegal, but to extend to certain contracts assumed to be legal the equitable remedy of specific performance. It was matter of doubt whether, assuming those contracts to be legal and not repugnant to the legislation of Congress upon the subject of legal tender, the Courts had the power to enforce their performance in such a manner as to secure all the benefits intended thereby, or, in other words, whether the Courts would or could, without the aid of legislation, extend to such contracts the remedy of specific performance. To remove that doubt, and for no other purpose, the Act in question was passed. If the Courts should determine that contracts of the character contemplated by the Act were illegal and void on account of some repugnancy to all or either of the laws of Congress providing what shall be legal tender in payment of debts, the Act would have

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no office to perform and become harmless because inoperative. If, on the contrary, such contracts should be held valid, a remedy in case of their nonperformance, about which there could be no controversy, would be provided, and any inconvenience which might result on account of any real or supposed uncertainty as to the remedy would be obviated. Such was the object of the Act in question, and it had no other purpose. It was not intended to operate in hostility to any of the laws of Congress, but to secure on the part of all citizens an honest observance of the terms of their contracts and to prevent them, so far as it could be lawfully done, from availing themselves of a legal measure of public necessity to work a moral and private wrong.

The contract in suit, in our judgment, belongs to the class mentioned in the Act in question. Counsel do not agree as to its meaning. We shall first assume for the purposes of this opinion the one adopted by counsel for the appellant. It is then an alternative contract and provides for payment in either of two kinds of money, at the election of defendant, both of which are therein specified. The precise amount to be paid, if paid in one kind is fixed; if paid in the other kind the mode by which the amount is to be ascertained is clearly defined, and by that mode can be readily determined with certainty. Such being the case the judgment by the terms of the Act in question ought ordinarily to follow the contract and fix the amount to be paid if paid in gold and the amount to be paid if paid in legal tender notes. The defendant could then have paid it off in either kind of money. If he did not pay voluntarily the execution would have followed the judgment and alternatively directed the Sheriff to collect in either kind of money. At the sale the defendant could have directed the Sheriff to sell for gold or legal tender notes at his option. If he did not so direct, the plaintiff or the Sheriff could have elected. So there is no good reason why this contract may not be held to be within the Act even when construed as contended for by counsel for the appellant.

But there is another interpretation of this contract which

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was adopted by the Court below and which we think is the right construction. To interpret a contract is to ascertain the true intent of the contracting parties, and when that has been done it is the duty of the Court (unless the intent be an illegal one) to carry it out and to render that form of judgment which will be most effectual for that purpose.

No one can read the contract in question without the conviction that it was made to take on its peculiar form solely for the purpose of affording security and protection to the payee and not to secure to the maker a privilege or an advantage. It is manifest that it was the first intention of the payee to secure a payment in gold if such payment could be lawfully enforced; and secondly, if that could not be done, payment in legal tender notes at their value in the San Francisco market when converted into gold. It was not the intention of the parties to the contract to give the maker the benefit of an alternative, but to compel payment in gold, which is especially evident from the fact that the alternative claimed to have been stipulated for could not possibly, if the contract should be performed in that way, secure any advantage or benefit to him, for in either way he agrees to pay the same value, and the Court in decreeing specific performance by exacting payment in gold has not gone beyond nor stopped short of the intention of the parties.

It is next claimed that the relief granted exceeds that prayed for in the complaint. This point is based upon the fact that the complaint does not ask for accruing interest, and that the judgment be made to draw interest at the same rate as the contract, whereas the Court allowed accruing interest and framed the judgment so as to make it draw the same rate of interest as the contract. In support of this point *Lamping & Co. v. Hyatt et al.*, *supra*, is cited. But that was a case of default. Where judgment is by default, the Court cannot grant greater relief than is demanded in the complaint; but where there is a trial, the Court may grant any relief consistent with the case made in the complaint and embraced within the issue. (Prac. Act, Sec. 147.) The contract is set

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out in the complaint, and accruing interest and interest on the judgment are embraced within the issue, notwithstanding they are not included in the prayer.

Judgment affirmed.

SAWYER, J., concurring specially.

I concur on the second ground stated in the opinion.

CURREY, J., concurring specially.

I concur in the judgment.

HENRY J. ABBOTT v. C. D. DOUGLASS.

REVIEW OF INTERLOCUTORY ORDERS—Interlocutory orders made in the progress of a trial will not be reviewed in the appellate Court unless they are embodied in a statement or bill of exceptions.

ORDERS STRIKING OUT ANSWER AFTER TRIAL.—If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the Court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.

AN ANSWER STRICKEN OUT.—An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll.

APPEAL from the District Court, Seventh Judicial District, Mendocino County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Delos Lake, and *Robert F. Morrison*, for Appellant.

The only ground which the record discloses for the action of the Court was the *plaintiff's motion*, and we are left to search in vain for any *legal* reason why the answer of the defendant should have been thus unceremoniously stricken out, and thereupon a judgment passed against him by default.

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P. L. Edwards, for Respondent.

All legal intendments are in favor of the judgment. It is to be presumed that there was a proper inquiry of damages, if in fact any was necessary, and that the judgment for want of an answer was properly taken. (*Johnson v. Sepulveda*, 5 Cal. 149; *Grewell v. Henderson*, 7 Cal. 290.)

By the Court, SHAFER, J.

This is an action for false imprisonment. The defendant in his answer denies the allegations of the complaint *serialim*, and states a special defense by way of justification. Both the complaint and the answer are verified. The defendant was defaulted, and thereupon judgment was rendered against him for three thousand dollars—the full amount claimed in the complaint.

There is a diversity of interlocutory orders and other entries in the transcript, showing in detail the movement of the cause in the Court below, and on which the appellant relies, in the main, to make out that the judgment is erroneous. But inasmuch as these entries are not embodied in a statement, they were, for that reason, improperly inserted in the transcript, and the respondent therefore very properly insists that the question of error is to be treated on the judgment roll alone. (*Magee v. The Mokelumne Hill Company*, 5 Cal. 258; *Hutton v. Reed*, 25 Cal. 478.)

The judgment is as follows: "In this case witnesses were sworn and examined for plaintiff and defendants. The Court, after due consideration, and being fully advised in the premises, ordered that the answer of C. D. Douglass, one of the defendants herein, be, and the same is hereby, stricken out; and that thereupon the default of said Douglass be entered; and the plaintiff, H. J. Abbott, have judgment against said defendant C. D. Douglass for the sum of three thousand dollars and his costs of suit as prayed for in the complaint."

The judgment then was upon default; and it appears by the

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recitals that the case was prepared for an entry of a default by an order striking out the answer, actually filed. (*Drum v. Whitney*, 9 Cal. 422.) The question, then, comes upon the validity of that intermediate order. (Practice Act, Sec. 344.)

The grounds of the order are not disclosed in the judgment roll, nor do they appear anywhere in the miscellaneous matter contained in the transcript. But it appears from the recitals in the judgment: First, that witnesses were sworn and examined in the case for both parties, and that the Court after due consideration ordered the answer to be struck out. From the fact that witnesses were so sworn and examined, it is to be presumed that the case was being tried upon the merits; for under no possible state of facts would it be proper for a Court to permit witnesses to be sworn and examined in connection with a motion to strike out a pleading. Furthermore, the intendment that the question was raised on the trial of the action is fortified by the direct statement in the judgment that "witnesses were sworn and examined in the case." Now, upon what ground, if any, could the order have properly been made during the progress of the trial? If there be any, lying within the scope of legal conjecture, the order must be considered as having been properly made. It could not have been so made on the ground that the answer was not filed within the time limited by law, for if such was the fact, the plaintiff waived the objection by going to trial upon the merits. And, for the same reason, it could not have been properly made on the ground that the answer was not duly verified. And, furthermore, the verification appears to us to be free from objection. Neither can the order be vindicated on the ground that the answer was a "sham," or that it was frivolous, irrelevant, redundant or immaterial. The traverse which it contained of all the plaintiff's allegations is conclusive upon that question, and relieves us from the necessity of looking into the special defense. The grounds upon which an answer may be struck out are mainly defined in section fifty of the Practice Act, and we have already more than exhausted them.

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It may be added, that if the Court in the course of the trial became satisfied that the order was fallacious as matter of law, or found, on the testimony adduced, that the allegations of the complaint were true and that the justification stated in the answer was false, the proper sequence, in either event, was not an order striking out the answer, but a judgment in chief for the plaintiff based upon a finding in his favor.

It is suggested for the respondent that the answer may have been stricken out on the ground that the plaintiff neglected to appear and testify in disobedience to a subpoena served upon him; or, that being called upon, he refused to be sworn; or, that being sworn, he refused to answer; or on the ground that being required to subscribe an affidavit or deposition, he refused to do so. (Practice Act, Sec. 409.) The answer is obvious. The statement in the judgment that "witnesses were sworn and examined in the case for both parties," and that "the Court, after due consideration and being fully advised in the premises, ordered," etc., excludes the idea that the order striking out the defendant's answer was made on the score of any personal neglect or any personal contumacy on his part. It appears by the record that the order was upon "consideration," and that the consideration was limited to the testimony adduced.

In discussing the question presented, we have referred familiarly to the answer. The answer, notwithstanding the order striking it out, is entitled to its position in the judgment roll. The phrase "struck out," as applied to a pleading, is figurative only. An order sustaining a demurrer to a pleading defeats or suspends for the time being its legal effect in the action, and a successful motion to strike out an answer does no more. In either event the pleading, as a document, remains in official custody, and, among others, for the purpose of ulterior proceedings in the Court that made the order, or for the purpose of handy review in the Court of errors. Further, the Practice Act requires peremptorily that whenever an answer has been put in that it shall constitute a part of the judgment roll, no matter how the Court may deal with it on

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demurrer or on motion to strike out, or find, on trial, as to the truth of its averments.

The conclusion is that the judgment is erroneous; and for the reason that the order striking out the answer of the appellant cannot be right by any known legal possibility.

Judgment reversed and new trial ordered.

Mr. Justice SAWYER delivered the following dissenting opinion, in which Mr. Chief Justice SANDERSON concurred.

The appeal is from the judgment. There is no statement on appeal, and none of the grounds relied on by appellant to reverse the judgment are disclosed by the judgment roll. The answer of defendant, Douglass, having been stricken out by the Court, the Judgment roll—in our opinion—consists of the complaint, the summons, proof of service, the entry of default, and a copy of the judgment. The other orders embraced in the transcript form no part of the judgment roll, and cannot be reviewed on this appeal. There is nothing to show upon what any of them were based, or the circumstances under which they were made. They properly constitute no part of the record on appeal. If the appellant desired to have any of these orders reviewed, he should have introduced them into the record on appeal by a statement, together with such other matters constituting a part of the proceedings as would enable this Court to determine whether there was error or not. (*Harper v. Minor*, 27 Cal. 107.) Had he made a statement, and omitted anything necessary to a full understanding of the grounds upon which the orders were made, the respondent would have had an opportunity to supply the defect by amendment. He has had no such opportunity. The order striking out the answer, and the grounds of the motion to strike out, should have been brought to the attention of the Court in the same manner. After the answer was stricken out, the document remained on the files as a part of the history of the case, but it was no longer, in legal contemplation, a pleading in the cause. There is nothing in the record

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which shows the grounds upon which the order was made, and we cannot tell whether it was properly made or not. It may be that it was struck out under section four hundred and twenty of the Practice Act, for a refusal by defendant to attend and testify at the trial. The presumptions are all in favor of the correct action of the Court. The striking out of the answer, default and judgment were entered by the order of the Court, and the judgment recites that "witnesses were sworn and examined by plaintiff and defendants;" so there must have been in fact some kind of trial. But this is not inconsistent with the idea that the answer was properly struck out. The course of proceedings on the trial may well have been as follows: The plaintiff may have introduced testimony proving his case and rested; the defendant have presented his evidence and rested; then plaintiff may have called the defendant as a witness on his behalf in rebuttal, and the defendant having failed, or refused to appear and testify, plaintiff may have produced his subpoena, proved due service, and upon the failure or refusal of defendant to appear and testify in pursuance of the command of the writ, have moved the Court to strike out his answer and enter judgment in his favor on that ground, which motion the Court may have granted. If this was in fact the course of proceeding, there was no error. And there is nothing in the recitals of the judgment, or in the judgment roll—whether the answer is regarded as a part of the roll or not—inconsistent with such a course of proceeding. If this was not the course of proceeding, or if there was in fact any error, there were three ways of bringing the error to the notice of this Court for review. The party might, at the time of the trial, have drawn up a bill of exceptions, stating that an answer had been filed; the proceedings on the trial; the circumstances attending, and the grounds of the motion; the ruling of the Court striking out the answer and his exception, and had it settled, signed by the Judge, and filed it in the cause. The bill of exceptions embracing the answer by reference or otherwise, would thus, under the provisions of the Practice Act, have become a part of the judgment roll, and

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would have presented the question. Or, after the trial, appellant might have set out the same matter in a statement on motion for new trial, or a statement on appeal. In either of these modes, the other party would have had an opportunity to introduce any matter favorable to himself, and had all the facts necessary to a correct adjudication of the question presented. But, as the case now stands, the respondent has had no opportunity whatever to show that there was no error. And the facts necessary to enable us to determine whether there was error or not, are not before us. In our opinion, the record — whether the answer is regarded as a part of the judgment roll or not — does not present the question sought to be raised, or affirmatively disclose error, and all presumptions are in favor of the ruling of the Court.

We see no error upon the judgment roll, and if there was any error in the proceedings, the appellant has failed to present it in such a form that we can review it.

There would seem to have been some negligence on the part of appellant. The order in the transcript — though not properly in the record — appears on its face to have been entered at the July term, 1864, and it expressly gave appellant leave to move to restore the answer upon good cause shown, and stayed all proceedings till the next term to enable him to do so. The next term was in November. No motion appears to have been made, no statement on appeal prepared, and no action of any kind taken till January 17th of the next year, when this appeal was taken.

We think the judgment should be affirmed.

C. G. HIDDEN v. DANIEL M. JORDAN.

NEW TRIAL AFTER REVERSAL OF JUDGMENT.— When a judgment is reversed and a new trial granted in general terms, the case goes back for trial upon all the issues of fact raised by the pleadings.

PRESUMPTION THAT STATEMENT CONTAINS ALL THE EVIDENCE.— If the statement on motion for a new trial specifies certain particulars, in relation to which it is claimed a finding of fact is unsupported by the evidence, the pre-

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- sumption will be that all the evidence upon the point specified is contained in the statement, although the record does not show affirmatively that such was the case. (*Owen v. Morton*, 24 Cal. 375, as to this point, overruled.)
- EXCEPTIONS TO FINDINGS UNDER ACT OF 1861.**—If the Judge neglects to find the facts, or if he omits to find upon any issue essential to the determination of the case, an exception may be taken, under the Act of 1861, to the want of a finding in the former case, or for a defect in the latter, but the exception for a defective finding must point out wherein the defect consists.
- MANNER OF FINDING FACTS.**—A finding should consist of a concise, distinct, pointed, and separate statement of each essential fact established by the evidence, in the proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found. An opinion is not a finding. The latter forms a part of the judgment roll; the former does not.
- GENERAL AND SPECIFIC FINDING OF FACTS.**—If a discrepancy exists between a general finding and the more specific findings of particular facts, the specific findings must control.
- REFERENCE TO TAKE AN ACCOUNT.**—Where the taking of an account is required, it is in the discretion of the Court to take the account, or to refer it to a Commissioner or referee to state it.
- MORTGAGEE IN POSSESSION.**—A mortgagee in possession is accountable for the actual receipts of the net rents and profits after deducting necessary expenses of managing the property.
- SAME.**—Taxes paid, and necessary repairs made by the mortgagee in possession, are included in necessary expenses.
- SAME.**—New and permanent improvements in fences made by a mortgagee in possession are not necessary expenses for which he can recover, unless the fences were necessary for the protection of the crops. But if the value of the rents and profits are enhanced by the fences made, the mortgagee cannot be charged with such enhanced value unless an allowance is also made for the value of such fence.
- SAME.**—A mortgagee in possession is not bound to work the land himself if he can rent it for its full value.
- INTEREST.**—Circumstances under which a parol contract for a larger rate of interest than ten per cent per annum will be enforced.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Plaintiff recovered judgment in the Court below and defendant appealed.

The other facts are stated in the opinion of the Court.

Thomas M. Swan, for Appellant.

M. A. Wheaton, for Respondent.

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By the Court, SAWYER, J.

This cause was before the late Supreme Court. The principles of law applicable to the case were then declared, and the cause remanded for a new trial. (21 Cal. 92.) The appellants insist, that, so far as anything is shown to the contrary by the record, on the second trial the Court and counsel proceeded on the theory that the facts as well as the law had been settled, and that only an account remained to be taken; that no evidence on the other issues in the case appears to have been introduced, and that the main issues formed by the pleadings do not appear to have been tried or determined. The respondent's counsel, on the contrary, avers, that all the issues were in fact tried, notwithstanding the fact that the record does not affirmatively show it. On the former appeal a new trial was ordered in general terms, and the case undoubtedly went back for trial upon all the issues of fact raised by the pleadings. It does not affirmatively appear in the record whether testimony was introduced on all of the issues referred to by counsel for appellant or not. The record does not purport to contain all the evidence. The statement on motion for new trial designates the grounds of the motion, and, as required by section one hundred ninety-five of the Practice Act, specifies certain particulars, in respect to which the appellant would claim the findings to be unsupported by the evidence, all of which relate to questions affecting the state of the account between the parties. The statute requires the testimony in the statement to be confined to those particulars. If any testimony in favor of plaintiff bearing upon the points specified was omitted by defendant, it was the duty of plaintiff's counsel to see that it was supplied by amendments. But he was not only not required to introduce any testimony not bearing upon other points, but it would have been improper for him to do so. The presumption, therefore, is, that the statement does not contain all of the testimony, or any testimony upon the points not specified. Under the statute, as it now stands, it must be presumed that the verdict

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or decision is sustained by the evidence in all respects, except in those particulars in which the statement specifies the evidence to be insufficient. For these reasons we can only consider the particulars thus specified.

Exceptions were taken to the findings as being defective in several particulars, in pursuance of the Act of 1861 (Laws 1861, p. 589), and defendant moved to vacate them on that ground. The facts were not so fully stated in the findings as is desirable in cases of the character under consideration. In most of the material particulars sufficiently designated in the exceptions, the defects were subsequently supplied by amendments filed by the Judge. In some of the exceptions the respondent not only designated the point upon which he desired a finding, but also designated how he desired the Court to find upon the point, and excepted to the refusal to find in the way designated. We have often seen similar exceptions in other cases. There seems to be on the part of many, a misapprehension as to the character of the exception to be taken under the Act of 1861. These exceptions are not—as seems to be supposed—to be taken to the finding, on the ground that a fact is erroneously found. Errors in the finding are not to be corrected in this mode. Nor is there any such practice provided for in this Act as vacating findings on the ground that they are defective. The design of the statute is to enable the Court, at the instance of the party, to supply defects, as where there is an omission to make any finding at all, or to find on any issue of fact essential to the determination of the rights of the parties. A party is entitled to a finding, and he is also entitled to have a finding upon every issue raised, which is essential to the determination of the case. If the Judge neglects to file his decision in writing, stating the facts found, and his conclusions of law, or if he omits to find upon any issue essential to the determination of the case, the party desiring a finding may except for the want of a finding in the former case, or for a defect in the latter; but when he excepts for defects, the “particular defects shall be specifically and particularly designated”—that is to say,

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he must specify, particularly, the point or issue upon which he requires the Court to state the fact found, but he is not authorized to dictate how the Court shall find. That question must be determined by the Court from the evidence in the case. If the Judge errs in his findings, the remedy for the error is by motion for a new trial. The exception as above stated is the only exception contemplated by the Act of 1861. But the exceptions contemplated by the Act must be filed within five days after the making of the finding or decision, and must be brought to the notice of the Judge, in order that he may have an opportunity to supply the defects complained of.

While on this subject—although the finding in this case is not objectionable on that ground—we desire to suggest to District Judges another fault of frequent occurrence in the cases appealed to this Court. In many instances the finding is an *opinion* rather than a *finding of facts and conclusions of law*. In it the facts found, a rehearsal of evidence, without stating the fact supposed to be proven by it, conclusions of law and argument, are all mixed up in such a way that it is difficult, if not impossible, to tell what the ascertained facts of the case are. The finding of facts and conclusions of law contemplated by the statute is something different from an opinion. The finding should consist of a concise, distinct, pointed and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found. This is the finding contemplated by the statute, which is to be annexed to and form a part of the judgment roll. If an opinion is written—and we are always glad to find one in the transcript—it should be entirely separate from the finding, and filed among the papers in the case. The Practice Act recognizes an opinion as something different from a finding. (Sections 180, 203, 346.)

Upon comparing the fourth original and very general finding, to the effect that the rents and profits have fully repaid

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to defendant the four thousand dollars and interest thereon, and all expenditures upon the land, with the several more specific findings in the amendments, we are unable to harmonize them. If a discrepancy exists, the more specific findings of particular facts must control. According to both the fourth original finding, and the first amendment the principal sum to be paid is four thousand dollars; and according to the said amendment the rate of interest is "two and a half per cent per month, payable monthly; and if not so paid, a new note was to be given therefor, itself drawing two per cent per month." And on January 4th, 1859, the amount of interest then unpaid was one thousand two hundred and fifty-eight dollars and eighty-six cents. According to the third amendment the full amount of interest then due had been at that time rendered and rejected, and the interest then due thereby ceased to draw interest. But the tender of four thousand dollars on the 4th was held — and we think correctly — not to be a good tender, because it was insufficient to pay the principal and interest. The one thousand five hundred dollars tendered on the 3d for interest undoubtedly formed a part of the four thousand dollars tendered for principal on the 4th, and was made to perform double duty, and the tender was evidently not made in good faith. The tender on the 4th being bad, the interest on the four thousand dollars continued to run against the plaintiff. The Court does not find, nor does the evidence show at what time in the fall of 1859 defendant realized his money from the products of the premises. But he rented them about the first of November, at which time a new farming year commenced, and, this being the end of the farming year, is probably, under the ordinary rules for making rests in such cases, the earliest moment at which the plaintiff would be entitled to charge the profits of the year against defendant. Charging them at this time, the four thousand dollars principal had run at interest, in round numbers, ten months, since the 4th of January, 1859, which at two and one half per cent on the principal, and two per cent on each monthly installment of one hundred dollars interest, from the date it fell due,

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would, on the 4th of November, 1859, amount to five thousand and ninety dollars. The Court also found that the defendant had paid six hundred and five dollars and sixty-four cents taxes, "a portion being paid each year," without stating what portion, and that, during the time he was in possession, he built stone wall fencing of the value of one thousand two hundred dollars, without stating in what years. As to the taxes, the several amounts, and the times at which they were paid, are admitted in the record. On the 1st of November, 1858, the amount of taxes paid was ninety-six dollars and thirty-nine cents; and on the 15th of October, 1859, the further sum of ninety-eight dollars and seventy cents was paid. Allowing one year's interest at the legal rates on the first sum, we have a credit for taxes in favor of defendant, in round numbers, of two hundred and four dollars, which, added to five thousand and ninety dollars, gives the sum of five thousand two hundred and ninety-four dollars due defendant, November 4th, 1859. The Court found the rents and profits of that year to be three thousand seven hundred and thirty-one dollars. Charging this sum against defendant on that day, and deducting it from the said amount due him, there would remain — if we have made no mistake in the computation — a balance in his favor of one thousand five hundred and sixty-three dollars. The Court found the yearly value of the rents and profits for the next three succeeding years at one thousand one hundred dollars, and that defendant received five hundred dollars for the year 1863. Regarding them as chargeable against the defendant at the end of each year, say on the 4th of November, and casting the interest on the above balance and accruing monthly interest to November, 1860, adding the taxes paid that year, and deducting the one thousand one hundred dollars profits of the year, taking this balance for a new principal, and so continuing to the end, regarding the five hundred dollars for 1863 as paid in November, 1862, and deducting it at the same time as the last one thousand one hundred dollars, it will be found that on the 4th of November, 1862, the four thousand dollars an interest accruing subsequent to January 4th, 1859, together

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with the taxes have been paid, and a balance left of something over seven hundred dollars in favor of the plaintiff. But the one thousand two hundred and fifty-eight dollars and eighty-six cents, interest, which accrued in favor of defendant prior to January 4th, 1859, upon which interest was stopped by the tender, has not yet been disposed of. Deducting the balance in favor of plaintiff at the close of 1862, after satisfying the principal, interest, and taxes accrued subsequent to January 4th, 1859, from said item of one thousand two hundred and fifty-eight dollars and eighty-six cents, interest accrued before that time, and all of the rents and profits found by the Court to be chargeable against defendant, will have been absorbed and a balance of more than four hundred dollars will be left in favor of defendant. To this balance the one thousand two hundred dollars paid for fencing, of which no account has yet been taken in our computation, is still to be added. The Court allowed this sum for fencing as one of the expenditures, and it must therefore be presumed that it was found to be necessary, there being no finding on that point, and no exception for defect in this particular. The mode suggested of computing the interest and stating the account upon the particular facts found, is the most favorable one to the respondent that can be adopted. If we are anywhere near right in our computations, it seems impossible to harmonize the specific findings in the amendments with the fourth original finding, for by the former there was really a very considerable balance still due the defendant. And if so the judgment is necessarily erroneous and a new accounting must be had.

Appellant insists that the Court erred in refusing to make an interlocutory order settling the principles upon which the accounting was to be had, and to refer it to a Commissioner or referee to state the account. The Judge is at liberty to state the account between the parties and determine all the questions in the case himself, if he chooses to do so. But in a case like this, where his time is limited, it would be very inconvenient, if not almost impossible, to do it. It would be singular, indeed; if, in the ordinary hurry of a trial by the

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Court, some error should not occur. Unquestionably, the better and safer practice would be, in such a case, to refer it to some competent person to state the account. But the Court can pursue such course as it may deem advisable.

A mortgagee in possession "will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his wilful default or gross negligence. By taking possession he imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would by reasonable diligence have received." (4 Kent's Com. 166.) This is the rule applicable to the present case. During the year 1859, when the defendant worked the premises himself, he is bound to account for the net proceeds of the farm after paying all the necessary expenses of carrying it on. He is entitled to deduct the taxes paid and necessary repairs. As a general rule, the cost of new and permanent improvements cannot be allowed. There may, however, be special circumstances which would justify a Judge in making the allowance. In this case the value of the fencing cannot be allowed unless the fence constructed was necessary to the protection of the crops. But if the value of the rents and profits were enhanced in consequence of the building of the fence, defendant cannot be charged with such enhanced value, unless an allowance is also made to him for the value of the fence. Although the defendant was chargeable for the actual net profits while he carried on the farm, he was not bound to work it himself, provided he could rent for the full yearly value of the premises to suitable parties, who would manage it in a husbandlike manner. And while he thus rented it at its full value, he was only chargeable for such value. Of course he would be chargeable for all the rents received, after deducting necessary expenses, during the years the premises were rented. The evidence, therefore, should be directed to the value of the premises and the rents received, and not to the actual amount of the products raised by the tenant, and the net amount such tenant was enabled to realize. The tenant took the risk of a favorable or unfavor-

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able season. He might pay more as rents than he could actually realize in any given year, and he might pay less. As to the crops on the premises, when they were purchased they belonged to the real purchaser, and not the party standing in the position of mortgagee, and if they were turned over to the defendant for the purpose of making the last payment on the purchase money out of the net proceeds derived from them, or were taken by defendant and devoted to that purpose independent of any express agreement in regard to the crops between plaintiff and defendant, then they stand in the same position as other rents and profits, and a payment out of them upon the purchase money must inure to the benefit of the plaintiff, and be regarded as a payment by him. Of course, if they were purchased of plaintiff and paid for by defendant they belonged to the purchaser. The defendant is entitled to have the taxes and the ordinary necessary expenses and necessary repairs deducted from the receipts of the year in which they were respectively paid.

After an attentive examination of the transcript and briefs of counsel, we are forced to the conclusion that the judgment should be reversed, and that so much of the finding as relates to the accounting should be vacated, and to that extent a new trial and a re-accounting between the parties on the principles herein indicated be had. And it is so ordered.

Mr. Justice CURREY expressed no opinion.

By the Court, SAWYER, J., on petition for rehearing.

The conclusions announced in our opinion before filed were not adopted without an anxious and thorough investigation of the case presented by the record. There are, however, some portions of the opinion referred to in the petition for rehearing that require further explanation, and, perhaps, ought not to be applied to this case; and some new points presented that we do not feel at liberty to pass over without notice.

It is first insisted that in respect to the points wherein the

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evidence was held to be insufficient to sustain the findings, the Court applied a different rule from that followed in *Owen v. Morton*, 24 Cal. 376. In that case it was said, substantially, that where the record fails to negative the fact, that there was other proof upon the point in question, when it appears that there was other evidence in the case, the finding of the Court below would be presumed to have been supported by the evidence omitted. The portion complained of as being inconsistent with the rule thus stated, is the last paragraph of the following passage: "The statement on motion for a new trial designates the grounds of the motion, and as required by section one hundred ninety-five of the Practice Act, specifies certain particulars in respect to which the appellant would claim the findings to be unsupported by the evidence, all of which relate to questions affecting the state of the accounts between the parties. The statute requires the testimony in the statement to be confined to those particulars. *If any testimony in favor of plaintiff bearing upon the points specified was omitted by defendant it was the duty of plaintiff's counsel to see that it was supplied by amendments.*" This was said *arguendo* in discussing a point decided by us in favor of the respondent, but it turns out to be applicable to other points decided against him. Neither the case of *Owen v. Morton*, nor any other upon this point, was called to our attention by counsel. Upon examination of the case, however, it is evident that the propositions announced in the two cases are inconsistent, and it becomes necessary to determine which is right, and to establish the rule upon the point by which we shall in all cases hereafter be governed. In the case of *Owen v. Morton*, the point was not made or discussed by counsel, and we followed, without questioning its correctness, the rule as announced in *Dawley v. Horvius*, 23 Cal. 104, and in some previous decisions, also, apparently adopted without discussion. And we may have followed the same rule in subsequent cases. But since the decision in *Owen v. Morton*, and since the submission of this cause, the question has been fully discussed by counsel in another case, in which it is claimed that, if the

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rule ever was correct under the provisions of our Practice Act, it ought not to be applied to statements prepared under the very specific provisions of section one hundred ninety-five as it now stands. And, after a careful examination of the question, we are satisfied that the rule as announced in the opinion in this case harmonizes with the general theory of the other provisions of the section as construed by us, and is the proper rule to be adopted. The section provides that, "When the notice designates as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient." * * * "The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points thus specified and no more." The point wherein the defect of evidence is claimed to exist must, then, be specified, and so much of the evidence as is necessary to explain it must be introduced, and no more. The attention of the other party is thus directed to the weak point in his evidence, and if anything has been omitted which would tend to strengthen the case on that point, he has an opportunity afforded to supply it by amendment, and it is his duty to do so. And, in practice, we have no doubt that this is in all cases done. It is for this purpose, in part, that a party is authorized to have a defective or erroneous statement settled by the Judge. When the statement has been filed, and the opposite party has had an opportunity to suggest the necessary amendments, and the statement has been thereupon agreed to, or settled by the Judge, we think he must be regarded as being estopped from averring that there may be other testimony upon the point. As to all other points not specified in the statement the presumption would be that the evidence sustains the verdict, and no question can be made upon it. This view is sustained by the principles announced in the decision of *Ringgold v. Haven*, 1 Cal. 116. After stating instances in which the presumptions as to the sufficiency of the evidence would be in favor of the correct ruling of the

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Court, Mr. Justice Bennett says: "But it is not properly applicable to what is denominated a *case*, the very scope and object of which is to bring up the entire testimony and proceedings which may be deemed of importance to either party." The "*case*" referred to here we understand to be just such a case as is contemplated by our present statutes, denominated a "*statement*," or something analogous to it, and governed by the same principles. (See *Grah. Pr.* 290.) Without any expressed intention to overrule this decision, there seems to have been a subsequent, though perhaps inconsiderate departure from it. At all events, we think the rule as now stated by us should be applied to statements hereafter prepared under the Act as it now stands. When the rule is once understood, to require a certificate that the record contains all the evidence introduced on each point specified would only be to add so much useless matter. We shall, therefore, follow this rule in all cases where the statements are prepared after the publication of this opinion.

The statement in this case was made up since the decision in *Owen v. Morton*, and the parties may have relied upon that case and the others referred to. We should for this reason feel bound to grant a rehearing, if we deemed it necessary to determine the cause upon the question as to the sufficiency of the evidence to support the findings. But in our opinion it is not, as will be seen hereafter.

"Another question," says the petition, "which has not attracted the attention of the Court is this: Can Jordan, without express contract in writing, collect more than ten per cent per annum upon his four thousand dollars?" The question was not noticed by the Court because no such point was made by counsel. "Every question of law," says counsel, "was decided in the Court below as this Court decides it, and the computation made in the same way." Yet we hear no complaint as to the rate of interest allowed in the computation, either in the Court below or in this Court, until it is made in the petition for rehearing, after a decision against the respon-

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dent upon the points raised and discussed. We should not deem it necessary to refer to this point at all, raised as it is, for the first time, at this stage of the proceedings, were it not for the fact that the case goes back for a re-accounting, and the question may be made again on the further proceedings in the Court below. We shall also notice some other matters that we should not have thought it necessary to discuss had there been nothing else in the petition requiring further observation.

This is not a suit by Jordan to "collect" either principal or interest. It is a suit in equity by Hidden against Jordan to establish a contract, and then enforce it. The complaint was filed in November, 1858. It alleges substantially that plaintiff purchased certain tracts of land from third parties; that he borrowed from Jordan four thousand dollars with which to make payment in part; that he agreed to pay interest thereon monthly, at two and a half per cent per month, and if the interest should not be paid to pay interest on each instalment thereof from the time it should fall due, at two per cent per month and to give his notes therefor; that it was agreed between him and Jordan that the lands purchased should be conveyed by the vendor to Jordan, and that Jordan should hold the title in trust for the plaintiff, and to secure the amount loaned and interest, and upon payment thereof according to the terms of the agreement to convey to plaintiff; that the purchase was made, the money advanced, and the lands conveyed to Jordan in pursuance of this agreement, without the same having been reduced to writing; that afterward the plaintiff caused a contract to be drawn up in writing (a copy of which — Exhibit "B" — is attached to and made a part of the complaint) and presented to defendant for execution; that defendant suggested certain amendments of which he made a memorandum in writing (which is also annexed as Exhibit "C," and made a part of the complaint,) and directed them to be incorporated into the said draft of agreement, and that he approved of and agreed to the terms of the agreement as thus amended; and said defendant then and there agreed to sign.

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execute and deliver to said plaintiff the instrument thus completed; that he subsequently refused to execute the agreement as amended, and denied the contract altogether, at the same time claiming that he had purchased the land on his own account. Plaintiff prays that the conveyance to defendant may be adjudged to be a mortgage to secure the payment of said four thousand dollars "in accordance with the agreements contained in Exhibit 'B' and 'C;'" "that said defendant be decreed to enter into, execute, acknowledge and deliver to plaintiff his agreement in terms as expressed in said exhibit," and for general relief. In 1859, a supplemental complaint was filed in which plaintiff alleges, that since the commencement of the action, he has tendered to defendant the full amount due upon said contract for principal and interest, and demanded a conveyance in pursuance of said agreement, and that defendant refused to accept the money, or make the conveyance. He then asks to be permitted to pay the money into Court; that an account may be taken, and the amount due ascertained, and that defendant be decreed to convey in accordance with the terms of said contract. In 1863 plaintiff filed a second supplemental complaint in which he alleges that defendant entered into possession of the premises in 1858, in the manner stated in the original complaint, and that he has been in possession and taken the rents and profits ever since, and in so doing has made himself plaintiff's trustee for the same, and that he is bound to account for the proceeds, etc., and prays, among other things, that defendant be required to account for the same, "and for such other and further relief in addition to that prayed for in this and his former complaints as to the Court may seem just and proper." Upon issues joined, the Court found the contract to be as alleged, including the rate of interest, but found against the tender of the full amount due, and made the accounting upon that basis. Now this is the very contract which plaintiff alleges, and which he asks this Court to enforce according to its terms. He sets out the very contract in *hæc verba* drawn up in writing which, he says, was entered into and finally approved, and substantially asks,

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firstly, that it be established; secondly, that "defendant be decreed to enter into, execute, acknowledge and deliver to plaintiff his agreement in terms as expressed in said exhibits;" and lastly, after it shall be established and actually executed and delivered, that it be carried into execution by taking an account between the parties and decreeing a conveyance of the land, upon its appearing that the amount due has been paid. He has had the contract set up, established, and the trust arising under it enforced according to the terms alleged, and according to the prayer of the complaint. Can the plaintiff complain that his relief has been meted out to him by the standard which he himself has set up as the measure of his right? We think not. Should the contract in writing in fact be first executed under a decree of the Court, as prayed in the complaint—and on this point, for the purpose of the relief granted, the Court will consider that as done which ought to be done—the question now raised could not arise, for there would then be a contract in writing for interest at the prescribed rate to be enforced. We think upon the case presented by the record that interest should be allowed in the accounting at the rate agreed upon in the contract sought to be enforced, according to its terms. Had this been a suit at law by Jordan upon the parol agreement to recover the money due, the question would have been a very different one.

Another point made in the petition for the first time is the Statute of Limitations. It is sufficient on this point to say, without further discussion, that the record presents no case for the application of the bar of the statute.

In considering the question as to whether the amended and more specific findings of the District Court are in harmony with its general finding upon the state of the account between the parties, we assumed, in our opinion, that the District Judge allowed the item of twelve hundred dollars expended in the construction of a stone wall fence on the premises. It is now, for the first time, very positively asserted, that there was "*no allowance made by the Court on account of the stone wall to Jordan.*" Upon this point there is, on the part of

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counsel, a palpable "change of base"—a course of proceedings too frequent in petitions for rehearing. In the *brief* filed in the case, respondent's counsel complained because it *was* allowed, and on the ground that there was no testimony to show "that it was necessary to the preservation of the estate or the crops, and without such proof the Court ought not to allow anything;" that "a trustee has no right to put improvements upon an estate, unless they are necessary to its preservation or to save the crops;" that the stone wall was an evident attempt to "improve the plaintiff out of the property." He also complained that, according to the evidence, the estimate adopted by the Court of the length of the wall was too great, and the price too high, and then adds: "*Yet the Court allowed one thousand two hundred dollars for the wall—one hundred and twenty dollars more than the highest value of the wall—although about eighty rods of it was inside the line, causing a loss of a strip of land ten to fifteen feet wide,*" etc.; and again: "*The allowance for the stone wall, one thousand two hundred dollars, and one half of the proceeds for eighteen hundred and fifty-nine, three thousand seven hundred and thirty-one dollars, making four thousand nine hundred and thirty-one dollars, was a clear gift to the defendant, to which he was not entitled.*" When counsel make in their printed arguments a formal admission of a fact, or a principle of law which bears against themselves, it cannot be expected that this Court will be very particular in ascertaining whether the admission is correct or not, and counsel, upon reflection, cannot well fail to perceive that to make such an admission, and then, after the Court has acted upon it as correct, without offering any sort of excuse for such action, apply for rehearing upon the ground that the decision is based upon an erroneous hypothesis, is—whether intended or not—but trifling with the Court. In this case, although the finding does not state in express terms that the item for the wall was allowed, yet we think the plain inference from the record is, that it was; and we cannot suppose that respondent's counsel would have made such strenuous efforts in his briefs to show that it was improperly allowed,

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or if not, that it was allowed at too great a sum, unless it had been understood by all parties that *it was in fact allowed*. It is still insisted in the petition, that, if allowed, it was erroneously done, for the reason, that there is no finding, and no evidence in the record to support such a finding, that the wall was necessary for the protection of the crops. There is no express finding on that point one way or the other, and, as there is no exception for defect in that particular, the item having been allowed, the presumption is, under the statute of 1861, in favor of its correct allowance; and as no point is specified in the statement as to the sufficiency of the evidence to sustain a finding that the wall was necessary, we could not expect to find any evidence on the point in a statement properly prepared. The statute expressly forbids its introduction. These very principles were invoked by respondent upon other points made against him in this case, and enforced in his favor in our former opinion. Respondent certainly cannot expect us to apply one rule to his points, and another to the appellant's. We have admitted that, in view of the former action of the Court, we may have done the respondent injustice by applying to the statement the rule announced in this case, as to the sufficiency of the evidence to sustain certain findings, and, for this reason, we lay the sufficiency of the evidence out of the case, and it will be unnecessary to discuss it further. Our former opinion will also be modified by omitting that portion relating to the sufficiency of the evidence to sustain the findings.

This brings us to the question, whether the amended and specific findings are in harmony with the original and more general finding — the point upon which the decision was mainly rested before. Upon this branch of the case but one or two points besides those already noticed are made in the petition. It is claimed that, because a balance of twelve hundred and fifty-eight dollars and eighty-six cents interest was found to be due January 4th, 1859, in striking this balance, the Court must have included the item of ninety-six dollars and thirty-nine cents, taxes paid prior to that date, viz: November 1st,

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1858. But we do not so understand the record. This tax was evidently regarded as an independent item, as no reference is made to any other item or payment allowed prior to that date. The finding simply gives us the balance of interest unpaid then ascertained, without any reference to the preceding state of the account. And this item of taxes is included in the finding with the several other items of taxes allowed, which were paid subsequent to the striking of the balance, in the gross sum of six hundred and five dollars and sixty-four cents, and it is only by reference to the admitted facts upon which the finding is based, that we ascertain the dates at which the several items of taxes which make up the gross amount were paid. We have no doubt, from the record, that this item was allowed to defendant in the computation, in addition to the balance of interest. Taxes paid are a part of the expenses of the year in which they are paid. To ascertain the net profits of the year, the taxes paid are properly deducted from the gross proceeds. This is simply what was done in our computation. For the purpose of the computation, we took the month of November, because that appeared to be the end of the year—the period ordinarily adopted for making rests in such cases—and the 4th, instead of the 1st, for the convenience of round numbers, this being sufficiently accurate for the purpose of our argument. But, taking October 1st—the precise time for making the rests adopted by respondent in his computation—and allowing interest at the agreed rate, it is not pretended, as we understand counsel, that the special findings can be made to harmonize with the general finding, or that upon the special findings the whole amount due has been paid by the rents and profits, unless we throw out of the account the first item of taxes and the item of one thousand two hundred dollars allowed for the wall. But these items, as we have shown, cannot be disregarded upon the case as now presented by the record. We cannot, of course, tell how the case may appear after the new accounting. But even if the one thousand two hundred dollars allowed for the wall be rejected, and the 1st of October taken as the time for making

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the rests, there would still be a balance due defendant, if we are not mistaken in our computation. We do not understand that the accuracy of our computation is questioned, provided the first item of taxes be allowed, and deducted from the gross proceeds of the year, and the agreed rate of interest be adopted.

The specific findings must control; and, after a thorough examination of the case, we do not see how those findings can be made to support the judgment. The respondent's counsel insists, with no little warmth, that his client has been grievously wronged, and that a large balance ought in fact to have been found in his favor, but much that is said is based upon matter outside the record. If he is correct, upon a re-accounting he will doubtless be able to show it, and to recover the large balance due him. At all events, we are unable to find anything in the record, or the argument based on it, that would justify a rehearing.

Rehearing denied.

Mr. Justice CURREY expressed no opinion.

HORACE GATES v. FRANCIS SALMON *et al.*

APPEAL IN ACTION FOR PARTITION.—An appeal does not lie from an interlocutory judgment, rendered in an action for partition, determining the interest of the several parties and appointing a referee to make a partition and report the same to the Court.

RETROACTIVE EFFECT OF ACT ALLOWING APPEALS.—The Act of March 23d, 1864, allowing an appeal from a judgment in cases of partition, "which determines the right of the several parties and directs partition to be made," is not retroactive so as to apply to such judgments which had already been entered.

STATUTORY CONSTRUCTION.—Statutes should not be so construed as to give them a retroactive operation unless it is clearly apparent that such was the intention.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

F. D. Colton, for Appellants.

J. McM. Shafter, and N. Bennett, for Respondents.

By the Court, SAWYER, J.

This is an appeal from an interlocutory judgment, entered February 26th, 1864, determining the interest of the several parties, settling the principle upon which a partition is to be made, and appointing referees to make a partition, and report the same to the Court. There are two appeals. The first was taken March 30th, and the second May 27th, 1864. The respondents moved to dismiss the several appeals, on the ground that no appeal lies from the judgment. The question must be determined upon the provisions of the Practice Act. We have carefully examined the points made by the light of the arguments of counsel, and without discussing the questions here, we are satisfied that, under the provisions of the Practice Act relating to partitions, the judgment appealed from is not a "final judgment in an action or special proceeding," within the meaning of the provisions of section three hundred and forty-seven, prescribing the cases in which appeals to this Court may be taken. The judgment is merely interlocutory, and not final. After the report of the referees is made and confirmed, the Court renders its judgment thereon, and this becomes the final judgment from which an appeal can be taken by any party to the suit who is aggrieved; and on such appeal "any intermediate order involving the merits and necessarily affecting the judgment may be reviewed."

On the 23d of March, 1864 — about a month after the entry of the interlocutory judgment appealed from — the Legislature passed an Act authorizing an appeal to "be taken from a judgment or decree of the Court in cases of partition, which determines the right of the several parties and directs a partition to be made" — which Act took effect sixty days after its passage. Soon after this Act took effect, the appellants took the second appeal, for the purpose of availing themselves of its provisions in case it should be held that the first appeal would not lie. This Act contains no provision making it retroactive,

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so as to apply to such interlocutory judgments as had already been entered. To give it such an effect might produce great confusion and injustice. If it would apply to this case, it would also embrace all cases already in judgment, no matter how long since the judgment was entered; for there is no limitation as to time. Besides, a party entitled to appeal is entitled to annex a statement to the record, provided it is prepared within twenty days. But there is no provision for preparing statements in those cases wherein more than twenty days had elapsed since the entry of the judgment appealed from, and in such cases the parties might not be able, for this reason, to present the full merits of their case. This case itself would furnish an illustration of the inconvenience that might accrue. At the time the interlocutory judgment was entered, and for more than twenty days thereafter, no appeal could be taken, as we have just held. Until after the twenty days expired, therefore, the appellant was not entitled, under section three hundred and thirty-eight, to make any statement at all; for he was only entitled to annex a statement to an appealable order or judgment. In this case, however, the appellant, acting upon the hypothesis that an appeal would lie, prepared and served a statement, but only two or three out of the upwards of a hundred and sixty parties paid any attention to it, and it may be for that reason, that they regarded it as a nullity, as it undoubtedly was. If this statement could be used on an appeal authorized after the time for filing statement had elapsed, it might be greatly to the disadvantage of those parties who took no part in making it up. It is altogether probable that the Legislature, if it had intended to make the law operate upon past judgments, would have provided some mode for making up statements. We cannot think so important a provision would have been omitted, and this omission appears to us to afford a good illustration of the wisdom of the rules of construction which require statutes to be so construed, as not to give them retroactive operation unless it is clearly apparent that such was the intention. No

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such intention is manifest in this Act. We are, therefore, of the opinion that the appeal must be dismissed.

We have come to this conclusion with great reluctance; for it is quite obvious, that the ends of justice would be greatly promoted by allowing appeals from these interlocutory orders, before great expense has been incurred in making partitions of large ranchos—like the one now in question—held by a great number of tenants in common. But we must administer the law as we find it, notwithstanding the fact, that this course, may, in some instances, result in great inconvenience. If, however, the partition is finally made in pursuance of the directions of the order appealed from, the appellants may, after all, obtain the lands they seek to have set off to them.

Appeal dismissed.

Mr. Justice SHAFER, having been of counsel, did not sit on the hearing of this cause.

Mr. Justice CURREY expressed no opinion.

JULY TERM, 1865.

REPORTS OF CASES
DETERMINED BY
THE SUPREME COURT
JULY TERM, 1865.

E. C. BELL *v.* J. D. CRIPPEN.

JURISDICTION OF DISTRICT COURTS IN TAX CASES.—The District Courts have no jurisdiction of an action to recover judgment for a tax where the amount sued for is less than three hundred dollars, and the complaint contains no prayer for the foreclosure of the tax lien.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa County.

On the 18th day of January, 1865, an action was commenced against plaintiff in the District Court for Mariposa County, to recover the sum of thirty dollars and sixty cents for taxes assessed against plaintiff's property in said county for the year 1864. The complaint contained the usual prayer for a money judgment. Judgment by default was rendered against defendant, February 17th, 1865, with a direction that the Sheriff sell the real property, or sufficient thereof to satisfy the judgment and costs. An order of sale was issued on the

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judgment, and the defendant, who was Sheriff of Mariposa County, was proceeding to sell under the order when this action was commenced to enjoin the sale on the ground that the Court had no jurisdiction to render the judgment. An application was made to the District Judge for an injunction, and was by him denied. Plaintiff appealed from the order denying the injunction.

Alexander Deering, and B. McCaffrey, for Appellant.

By the Court, SANDERSON, C. J.

By stipulation between the parties the only question submitted to us relates to the jurisdiction of the District Court in the suit against the present plaintiff for taxes. In that case, the amount of the taxes sued for was less than three hundred dollars. There was no prayer for a foreclosure of the tax lien, and the judgment was by default.

In *The People v. Mier*, 24 Cal. 61, we held that in actions to recover taxes (under the somewhat anomalous condition in which the law now stands), the character of the action (as to whether it is a case at law or in equity) must be determined by the relief sought in the prayer of the complaint; and that where the amount of the taxes sued for is less than three hundred dollars, and there is no prayer for the foreclosure of the tax lien, order of sale, etc., the District Courts have no jurisdiction. We still adhere to the views expressed in that case.

Reversed and remanded.

PEOPLE v. JAMES CORBETT.

TRIAL IN CRIMINAL CASE WITHOUT ARRAIGNMENT.—A verdict in a criminal case where there has been no arraignment nor plea is a nullity, and no valid judgment can be rendered thereon.

WAIVER OF ARRAIGNMENT AND PLEA.—The defendant in a criminal case does not waive an arraignment and plea by submitting to a trial, introducing witnesses on his behalf, and allowing the case to be argued on his behalf to the jury.

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APPEAL from the County Court, City and County of San Francisco.

The People appealed from an order of the County Court granting a new trial.

The other facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for the People.

The State was put to the proof of the whole offense. (Wood's Digest, p. 293, Secs. 303, 304; *People v. Thompson*, 4 Cal. 241.)

At common law the defendant might waive an arraignment, and it is hard to see under the liberal provisions of our statute why the formal plea may not also be waived. (See especially on Waiver, 1 Bish. Crim. Law, § 672 *a*, and authorities.) The decision in 3 Wisconsin was doubtless made on common law principles. But sections two hundred and forty-seven and six hundred one of our Criminal Practice Act provide that no defect or imperfection in matters of form that does not tend to the prejudice of the defendant shall in any matter affect the trial, judgment, or other proceedings, and that no departure from the form or mode prescribed by the Act in respect to any pleadings or proceedings, and no error or mistake therein shall render the same invalid, unless it have prejudiced or tended to prejudice the defendant in respect to a substantial right. Now, what substantial right of the defendant was affected? If he had formally pleaded, he could not have obtained any greater latitude than he did in his defense.

Wm. M. Zabriskie, for Respondent.

By the Court, SHAFER, J.

The respondent was tried and convicted of the crime of grand larceny. A new trial was awarded on the ground that the defendant had never been arraigned, and had never pleaded, nor had an opportunity to plead to the indictment.

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According to the record: "The defendant being present in Court (December 31st, 1864,) *Thomas Bestop, Esq.*, appearing for the District Attorney, the defendant was called by name by the Clerk, for arraignment; when the defendant was informed that he was indicted for the crime of grand larceny, under the names of James Corbett, and was asked if that was his real name, to which he answered, yes; when the said James Corbett stated that he was not then prepared to plead, owing to the absence of his counsel, Mr. Zabriskie; and the Court thereupon suggested to the defendant that he could plead not guilty and if his counsel desired at any time before the trial to withdraw the plea, he would be allowed to do so; and the said James Corbett still asked for further time to plead; whereupon his case was continued until January 4th, 1865." It seems to be admitted that nothing was done on that day, and that the trial was the next step taken in the course of the proceedings. The trial occurred on the 16th of January. It appears that the defendant when brought into Court, accompanied by his counsel, moved for a separate trial, the indictment being against the defendant and two others. The motion was granted. Thereupon a jury was impanelled. Witnesses were introduced by the defendant. The case was argued by his counsel, and the jury, having been charged by the Court, after deliberation, returned a verdict of guilty.

On this statement there was manifestly no arraignment. The indictment was not read to the defendant; a copy of it, with the indorsements, was neither delivered nor tendered to him; nor was he either then, or thereafter, asked whether he would plead guilty or not guilty to the indictment. (Wood's Dig. p. 291, Sec. 272.) If the defendant had at any time, anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured, on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury — nor did all of them combined — cure the want of a plea. There was not only no arraignment, but over

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and beyond that, there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statute opportunity for pleading was never extended to him he was never under any obligation to plead. A verdict, in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon. (*Douglass v. State*, 3 Wisconsin, 830; 1 Whar. Sec. 530.) And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob. (*McQuillen v. State*, 8 S. & M. 587.)

Section six hundred one of the Criminal Practice Act does not extend to the case of a verdict where there is a plea but no indictment, nor does it reach the case of a verdict where there is an indictment but no plea. Where either of the two are wanting, it is as fatal as though both were wanting. The presence of both is essential to an issue, and where there is no issue an oath administered to the jury would impose no obligation, nor would false swearing on the part of witnesses amount to perjury. That a trial so conducted "would tend to prejudice the defendant in respect to a substantial right" (Criminal Practice Act, Sec. 601) is too plain for argument.

Order affirmed.

HENRY S. HAWXHURST AND FRANCIS SOMERS v.
C. W. LANDER, E. C. CLARK, HENRY T. ALLEN,
AND J. M. JOHNSON.

POSSESSION OF REAL ESTATE.—One in the actual possession of real estate may rely on his possession alone until the opposite party shows a better right.

POSSESSORY ACT OF 1852.—If there is a defect in the affidavit taken to claim land under the Possessory Act of the Legislature, passed in 1852, the defect cannot be cured by an affidavit subsequently taken under the same Act to correct the same. Such subsequent affidavit, if it amounts to anything, must be regarded as an original proceeding.

CLAIM UNDER POSSESSORY ACT AS AGAINST PRIOR POSSESSOR.—The survey of land, and making an affidavit and recording the same, in accordance with the Possessory Act of 1852, does not invest the claimant with the right to recover the possession of the land from one who was before them in the actual possession of it.

Opinion of the Court.

APPEAL from the District Court, Fifteenth Judicial District, Contra Costa County.

Plaintiff appealed from an order granting a new trial.

The affidavit made by appellant in 1860, under the Possessory Act, described the boundaries of a tract of land commencing at a given point, and running thence west forty chains, thence north forty chains, thence east forty chains, and thence south forty chains to the place of beginning. Appellant was residing on the land, and continued to reside there, and made valuable improvements on the same.

The affidavit made in 1863 changed the boundaries of the land so as to include the twenty-seven acres in controversy. Appellant never lived on this twenty-seven acres.

Appellant claimed that there were certain stakes and monuments marking the boundary of the land he intended to claim by the affidavit of 1860, but that by mistake the lines therein described did not follow the monuments, and that the affidavit of 1863 corrected the mistake.

The other facts are stated in the opinion of the Court.

Selden S. Wright, for Appellant.

M. S. Chase, for Respondent.

By the Court, CURREY, J.

Ejectment for a parcel of land in the coal district in Contra Costa County. The land in controversy consists of about twenty-seven acres. The plaintiff claims it by virtue of proceedings taken under the Act of the Legislature entitled "An Act prescribing the mode of maintaining and defending possessory actions on public lands in this State," passed in 1852. (Laws 1852, p. 158.) The cause was tried by the Court, a jury having been waived, and judgment was rendered for the plaintiffs, which was subsequently set aside, and a new trial granted. The Court is asked to reverse the order granting a new trial.

Opinion of the Court.

The defendants being in possession of the premises, demanded at the time this action was commenced, that possession must be presumed to have been rightful until overcome by evidence to the contrary. In *Hill v. Draper*, 10 Barb. 458, the Court say: "The defendants in possession of disputed premises are presumed to have a valid title thereto, and the plaintiffs, to entitle themselves to recover, must overcome that presumption by proving title out of the defendants and in themselves. They must recover, if at all, on the strength of their own title, and not on the defects in that of their adversary. The possession of real estate is *prima facie* evidence of the highest estate in the property, to wit: a seizin in fee." It is a well settled doctrine that a party in the actual possession of real estate is in the first instance to be deemed to hold the same by title or in subordination to the title, in whomsoever it may be. Therefore it is not necessary to inquire by what right the defendants have and hold possession of the disputed premises, until it is ascertained whether the plaintiffs have a better right.

On the 13th of August, 1860, Hawxhurst, one of the plaintiffs, made an affidavit with the view of securing a possessory right to a certain piece of land therein described. The parcel of land described consisted of one hundred and sixty acres. This affidavit was filed with the Recorder of the county on the same day, and was recorded. On the 7th of March, 1863, Hawxhurst made another affidavit, having for its object the securing of a possessory right to public land under the Act of 1852, which purports to be in aid of his first affidavit and to enable him to comply with the provisions of the statute, and "to make a claim to the land" therein described, "if the former one did not." This affidavit was filed for record, and recorded in the Recorder's office of the county on the day of its date. The particular piece of land in controversy was not included by the description contained in the affidavit first made by Hawxhurst. The statute provides the mode by which a right under the statute to the possession of public land may be acquired, and if the right sought to be acquired fails because

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of a substantial defect in the proceeding taken, we do not understand that the party himself can by a proceeding subsequent cure the defect. If the subsequent proceeding amounts to anything it must be as an original proceeding. So that, if Hawxhurst acquired any right to the land described in his second affidavit by the steps which he took in March, 1863, such right had its origin at that time. The plaintiff's counsel admit in argument that, upon the affidavit of March, 1863, the plaintiff's whole case rests. If the plaintiff's reliance is on this affidavit, he must be limited to its date, at least, as the commencement of his right under the statute.

From the evidence in the case it would seem that for some time before March, 1863, the defendants had been in possession of the particular premises in controversy, extracting from the same large quantities of coal, and were prosecuting the work of mining for coal when Hawxhurst made his second affidavit. It does not appear that at the time Hawxhurst was settled upon and occupying the land in controversy, or that he thereafter before this action was commenced, occupied or was settled upon it "for the purpose of cultivating or grazing the same," or for any other purpose. The mere making of an affidavit in conformity with the provisions of the statute, and procuring the same to be duly recorded, and causing the land described to be surveyed by the County Surveyor, would not invest the affiant with the right to recover the possession of the property, as against a person who was there, and before then, in the actual possession of it.

What may be the merits of plaintiff's claim to the possession of the twenty-seven acres in controversy we do not undertake to say, because the question is not in a condition to be fully passed on by this Court; but we are clear that the plaintiffs cannot depend for the right which they claim, on the proceeding taken by Hawxhurst in August, 1860, under the Act of the Legislature already referred to, and also on the proceeding taken by him in March, 1863, under the same Act. Without passing directly upon the particular points which induced the

Argument for Appellant.

Court below to grant a new trial, we are satisfied the order appealed from should not be disturbed.

Order affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

EMILY CASEMENT v. WALTER RINGGOLD AND STANGER TATE.

VACATION OF JUDGMENT AFTER ADJOURNMENT OF TERM.—Where a plaintiff fails to appear when a cause is regularly called for trial, and at defendant's request the trial proceeds, and judgment is rendered for defendant, the Court has no power to relieve the plaintiff from the judgment under the sixty-eighth section of the Practice Act, on the ground of mistake, inadvertence, surprise, or excusable neglect, on a motion made after the adjournment of the term at which the judgment was rendered.

SAME.—If relief can be obtained in such cases, it must be by a motion for a new trial, on the ground of accident or surprise, which ordinary prudence could not have guarded against.

CLERK MAY ENTER JUDGMENT IN VACATION.—If the judgment has been pronounced by the Court, drawn up in writing in the form intended to be entered, signed by the Judge, and filed with the Clerk before the adjournment of the term, it has become the judgment of the Court of the term at which it was rendered, and the Clerk may perform the ministerial act of entering it in the Judgment Book in vacation without further direction.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John Satterlee, for Appellant, argued that the judgment was not perfected at the term when pronounced, because not entered up by the Clerk until after the adjournment, and referred to Practice Act, Secs. 201, 203, 204, 205, 206; New York Code, Secs. 279, 280, 281, 282; *Schenectady and Sar. Plank Road Company v. Thatcher*, 6 Howard Pr. Rep. 226; *Lentilhon v. Mayor, etc., of New York*, 3 Sandford's Superior Court Rep. 72. He also contended that section sixty-eight of the Practice Act contained no limitation of the time within which application for relief might be made under its provi-

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sions, and that in England and New York, both before and since the code, such motions were allowed under a proper state of facts, without reference to lapse of time, and referred to Tidd's Practice, Inquisition, Inquiry, Chap. 38, Secs. 2, 3; Graham's Practice; Burrill's Practice; 6 Howard U. S. Rep. 39, and cases there cited; *Thorpe v. Fowler*, 5 Cowen, 446; *Church v. Rhodes*, 6 Howard's Pr. Rep. 285; 3 John. Ch. 415; 7 Paige, 509; 8 Paige, 176; and 3 Abbott's Pr. Rep. 446.

Patterson, Wallace & Stow, for Respondent, contended that it was a judgment of the term when pronounced by the Court, notwithstanding the failure of the Clerk to enter it in the Judgment Book and make up the judgment roll until after the adjournment of the term, and referred to 9 Howard's P. R. 86; 2 Sandford, 645; 2 Code Reporter, 125.

By the Court, SAWYER, J.

When this cause was called for trial in the Court below, plaintiff's counsel was absent, and defendants' counsel insisted upon proceeding with the case. A trial having been had in the absence of the plaintiff, the Court found the facts and rendered judgment in favor of defendants. The Court soon after, on the same day, adjourned for the term. Within a few days, but not till after the adjournment of the term, the plaintiff's counsel filed affidavits showing, among other things, that the plaintiff was at the time of the trial absent from the State, and that her counsel, who had the entire charge of the case, was absent from Court in consequence of severe illness, by which he was confined to his bed, and utterly incapable of doing any business. Upon these affidavits he moved the Court to vacate the judgment, on the ground that it was obtained through accident, surprise and excusable neglect on her part.

The Court denied the motion on the ground that it had lost jurisdiction to grant the relief asked, in consequence of the adjournment of the term; and plaintiff appealed from the judgment and order.

Opinion of the Court.

Appellant insists that the Court has the jurisdiction to grant the relief, notwithstanding the adjournment of the term, under the provisions of section sixty-eight of the Practice Act authorizing the Court to relieve a party from a judgment, etc., "taken against him through his mistake, inadvertence, surprise, or excusable neglect." And if the question were new much might be said in favor of this position. But unfortunately for the argument the decisions have been the other way almost from the organization of the State Government (beginning with *Baldwin v. Kramer*, 2 Cal. 582,) down to the present time. The cases of *Bidleman v. Kewen*, 2 Cal. 248, and *People v. Lafarge*, 3 Cal. 133, supposed by appellant's counsel to support his view, and to be in conflict with the other cases are shown in *Robb v. Robb*, 6 Cal. 22, not to have involved the question, and this leaves the line of decisions unbroken. The question as to the power of Courts over their judgments after the adjournment of the term, has arisen in this State many times, and in various forms. In *Carpentier v. Hart*, 5 Cal. 406, as appears from an examination of the record, the question was presented in precisely the same form as in this case. A judgment had been rendered against defendant, Hart, a minor, through a mistake of his guardian *ad litem*. Upon a satisfactory showing made at the next term upon proceedings promptly taken after the discovery that judgment had been entered, the District Court vacated the judgment. On appeal, the order was reversed, the decision being put expressly on the ground that the District Court loses all power over its judgments after the adjournment of the term, unless its jurisdiction is saved by some motion or proceeding pending at the time. So also, in *Shaw v. McGregor*, 8 Cal. 521, the question was presented in a similar manner. The suit had been commenced and summons served, after which the plaintiff and defendant therein had a settlement of all matters in difference, including the suit pending, the plaintiff agreeing to dismiss the suit. The defendant paid to plaintiff the sum of money agreed upon and took from him a written discharge,

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under seal, for all sums due, and all matters in dispute, whether in suit or otherwise. The defendant, relying upon this settlement and agreement, and supposing that the suit would in good faith be dismissed, paid no further attention to it. Nevertheless, the plaintiff, when the time for answering expired, entered judgment by default for a large amount, and as soon as the term was adjourned issued execution. The defendant first learned that judgment had been taken when the officer appeared to levy on his property. On application of defendant, promptly made, the Court vacated the judgment. One would suppose that this cause presented a pretty strong case of surprise or excusable neglect on the part of defendant. On appeal, the order vacating the judgment was reversed, the Court expressly putting its decision upon the ground that the District Court had no power to vacate its judgment upon proceedings instituted after the adjournment of the term at which the judgment was recovered. In *Lattimer v. Ryan*, 20 Cal. 632, the ground upon which the District Court set aside the judgment must also have been that it was taken through the inadvertence or excusable neglect of the defendant. The order was reversed on appeal. Mr. Justice Norton, in delivering the opinion of the Court, said: "According to the repeated decisions of this Court, jurisdiction to set aside the first judgment had been lost to the District Court upon the adjournment of the term at which it was rendered." (See, also, *Morrison v. Dapman*, 3 Cal. 255; *Suydam v. Pitcher*, 4 Cal. 280; *Robb v. Robb*, 6 Cal. 21; *Branger v. Chevalier*, 9 Cal. 172; *Swain v. Naglee*, 19 Cal. 127; *Bell v. Thompson*, 19 Cal. 708; *Lewis v. Rigney*, 21 Cal. 273; *De Castro v. Richardson*, 25 Cal. 51.)

In *Roland v. Kreyenhagen*, 18 Cal. 456, the motion to vacate was made before the adjournment of the term.

The result of the numerous decisions, therefore, is, that the party must take the initiatory steps to obtain the relief authorized by section sixty-eight of the Practice Act before the expiration of the term at which final judgment is rendered, in all cases except those in which the defendant has not been personally served with process; in which cases the Court may,

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on such terms as may be just, allow a defendant to answer to the merits at any time within six months after the rendition of the judgment. If any point can be considered as settled by judicial decision, it would seem that the question now made ought to be regarded as no longer open to doubt in this State. If erroneously settled, the remedy must now be sought in legislative action. The inconvenience of the rule is to some extent, though, perhaps, not entirely obviated by the third clause of section one hundred and ninety-three, which authorizes a new trial on the ground of "accident or surprise which ordinary prudence could not have guarded against." This ground would probably ordinarily cover most of the cases of a judgment recovered through "mistake, inadvertence, surprise or excusable neglect," mentioned in section sixty-eight. And when the case is tried by the Court—as in this instance—the party has ten days after the judgment is brought to his attention by "receiving written notice of the rendering of the decision by the Judge," within which to give notice of his intention to move for a new trial on affidavits setting forth the accident or surprise.

The only remaining point is, that there was no judgment in fact entered until after the application to vacate was made, and for this reason the case is not within the principle established by the decisions. It appears from the record "that the findings of fact and conclusions of law were signed by the Judge and filed on the 24th day of September, 1864, and that formal judgment was signed by the Judge on said day, and that the same was filed with and by the Clerk "of the Court before the final adjournment, but that the Clerk did not enter the judgment in the judgment book or make up the judgment roll till after the adjournment, and till action to vacate the judgment had been taken. The proceedings, it is true, might not have been so far perfected as to authorize the issuing of execution, or to make the judgment a lien upon the lands; but the rights of the parties were fully ascertained and determined, the precise terms of the judgment settled, and the judgment not only finally pronounced from the Bench but

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actually formally drawn up as it was intended to be entered, signed by the Judge and filed by the Clerk in the case. It had become the final determination of the Court. Nothing remained to be done but the mere ministerial duty to be performed by the Clerk, of copying it into the Judgment Book; and this ministerial act might have been performed by him without further direction in vacation, after the adjournment of the term. Such seems to be the effect of the decisions in *McMillan v. Richards*, 12 Cal. 467, and *Hutchinson v. Bours*, 13 Cal. 52, with reference to the time of the performance of the ministerial duty of the Clerk. But whether copied into the Judgment Book during the term or in vacation it was a judgment of the term at which it was rendered. If the Clerk should neglect to enter the judgment rendered, the Court could undoubtedly direct him to do it. The record shows what the judgment was, and the Court could not modify or vacate it.

The judgment and order appealed from must therefore be affirmed, and it is so ordered.

CURREY, J., dissenting.

I dissent.

NICHOLA FERREA v. MARK KNIPE.

RIGHTS OF RIPARIAN PROPRIETORS.—The riparian proprietor to whom water first comes has not the right to erect dams across the stream and spread out the water, so that it is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor as it would have done but for the dams.

REASONABLE USE OF WATER.—It is not a reasonable use of water for a riparian proprietor, who desires to use the same for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Statement of Facts.

The plaintiff commenced his action on the 18th day of June, 1864, alleging that for eight years then immediately preceding he had been in the possession of a parcel of land consisting of twenty-five acres, through which runs the Sulphur Spring Creek in Solano County, which he had used during that time as a garden for raising vegetables for market. That in May, 1856, he constructed a dam upon his land across the creek, and since then had appropriated without hindrance to his own exclusive use for irrigating his garden, all the waters of the stream; and he claimed that by reason of his long continued exclusive use of the water he had acquired a right by prescription to the use thereof to the extent and for the purpose of its original appropriation, and then had the right to the flow of the entire water of the creek without obstruction, into the reservoir created by his dam, for the benefit of his land, as a right and privilege appurtenant thereto. He then claims that in 1863 the defendant erected a dam across the stream above the plaintiff's dam by which a part of the water was prevented from running down the course of the creek to the plaintiff's land. That in April, 1864, the defendant constructed other dams across the same stream, and that, by reason of the obstruction and diversion of the water by these dams the plaintiff was deprived of his accustomed use of it, to the great injury of his business and to his great damage, and he then alleges the insolvency of the defendant, and also that if the wrongs of which he complains are continued his business and trade will be wholly ruined.

The object of the action was, first, to recover damages for the injury already sustained; second, to abate the defendant's dams; and third, to obtain an injunction restraining the defendant from obstructing, diminishing, or diverting the waters of the creek from flowing to the plaintiff's dam.

The defendant answered the complaint. The issue joined was referred to a Court Commissioner, with directions "to report the facts and law." Testimony was taken in the case, and the referee found and reported the facts and his conclusions of law in favor of the defendant. This report, as to the facts,

Argument for Respondent.

was set aside by the Court on the plaintiff's motion, and a finding of facts, prepared in part by the plaintiff's counsel, and in part by the defendant's counsel, was substituted, which, with the conclusions of law drawn by the referee, was adopted by the Court, and judgment was thereupon entered in the defendant's favor. The plaintiff moved for a new trial. The motion was denied. From this decision and the judgment the plaintiff appealed.

Wm. S. Wells, for Appellant.

The cases in this State have fully settled and affirmed the doctrine of appropriation of water by the erection of a dam and its subsequent use, as establishing a prior right. (*Hill v. Smith*, 27 Cal. 476; *Yankee Jim Water Company v. Crary* 25 Cal. 504.)

It is certainly immaterial what was the purpose or object with which defendant invaded our right. It is no answer to say, as he does really say, that though he injured us in May, yet when the suit was tried no water was running. It must be obvious from the facts in the complaint the injury for an entire year might be done within the term of a few weeks. Our right was to have the water flow, if flow it would, unobstructed at any and all times. Diversion or obstruction, if wilful, imports damage, and against actual, threatened, or possible injury this action lies. (Angell on Watercourses, Section 135, and cases cited; same, Sections 449, 450.)

M. A. Wheaton, for Respondent.

Merely using the water of a stream for irrigation by a riparian proprietor is but the exercise of a *natural right*, and the plaintiff in so doing *could not affect the natural rights of other riparian proprietors* either above or below him. (*Sampson v. Hoddinott*, 1 C. B. N. S. 590.)

Washburn on Easements and Servitudes, 235; *ibid*, 271. 216, 217, 250, 251, 252, and 253, the last referring to the case of *Thurber v. Martin*, 2 Gray, 394, where it was held

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that *sixty years* use of a stream for mill purposes did not affect the natural right of an upper riparian proprietor to erect another mill. In this case Ferrea did not use the water *adversely to any one*, because he did not infringe upon the rights of any one. His right to so use the water came, not by prior occupancy, but as an incident to his land through which the stream run. The defendant, as an upper riparian proprietor, had a right to stop and use the whole of the stream, if necessary, for watering his stock (Washburn on Easements, 223, 224.)

By the Court, CURREY, J.

In 1863, as appears by the finding, the defendant erected a dam across the creek above the plaintiff's dam, by which the natural flow of the stream was obstructed. In April, 1864, he erected two other dams across the same creek above the plaintiff's dam, by means of which several dams the water of the stream was entirely obstructed and prevented from flowing to the dam of the plaintiff, whereby the plaintiff was wholly deprived of the waters of the stream, and his vegetables and fruit growing at the time of the erection and continuance of these dams were injured to his damage in the sum of two hundred dollars. It further appears by the finding that the object of the defendant in erecting his dams was only to detain sufficient water for his stock, and that he used the same for no other purpose, and that when the action was brought there was not water enough in the creek to flow to the plaintiff's reservoir if no dams had been erected above it.

The evidence in the case shows that the last named year was one of extreme drought, and that at the time this action was commenced the water of the creek was so reduced in quantity at the place where the defendant had erected his dams (which were more than a mile from the plaintiff's land) as to be insufficient to flow over such dams. Every proprietor of lands through or adjoining which a watercourse passes has a right to a reasonable use of the water; but he has no

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right to so appropriate it as to unnecessarily diminish the quantity in its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though by reason of such diminution a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But while admitting that a riparian owner to whom the water first comes in its flow, has the right to use it for domestic purposes, and for watering his cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run. The maxim of the law which he is bound to respect while availing himself of his right is, *sic utere tuo ut alienum non laedas*. (3 Kent, 440; Angell on Watercourses, Section 195; *Tyler v. Wilkinson*, 4 Mason, 440.)

The Court found that by reason of the dams erected by the defendant "the flow of the stream was wholly obstructed, and the waters detained were prevented from flowing to the dam of the plaintiff, and that he was thereby deprived of the use of the same, prior to the commencement of this suit," and "that the plaintiff has sustained damages, by reason of said acts of defendant, in the sum of two hundred dollars." The Court also found that the defendant was insolvent and unable to respond to any judgment that might be recovered against him. The Court further found that the defendant erected the dams "only to gather sufficient water for watering his stock, and used it for no other purpose," and "that at the time his suit was commenced there was not water enough to flow to the plaintiff's pond, had no dams been built."

The fact that the water was so reduced in quantity at the time the action was commenced as to be insufficient to flow to the plaintiff's premises, had the same been unobstructed, was not a circumstance decisive of the case. If before then the creek was wholly obstructed by the defendant, and the water

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of the stream was prevented by him from flowing to the plaintiff's land, by reason whereof he was deprived of the use of the water, and thus suffered damages, he had just cause of complaint, and was entitled to relief and to the remedy which he sought to prevent the continuance of the injury. Though the defendant had the right to use the stream for watering his cattle and for household purposes, he had not the right under the circumstances to dam up the creek and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises, as it would have done had it not been for the defendant's dams. It cannot be held in this case that the obstruction and diversion of the water of the creek was necessary to the proper and beneficial use of the stream by the defendant, and that as a consequence the injury sustained by the plaintiff was *damnum absque injuria*. The facts found by the Court preclude such a conclusion. From the facts found the plaintiff was entitled to judgment, on the ground that he had the right to the water of the creek in the natural flow, subject only to the use thereof by the defendant in a reasonable manner, without unnecessary obstruction or diminution. (Angell on Watercourses, Chapter 4, and the authorities therein cited.)

The judgment must be and is hereby reversed, and the cause remanded to the Court below with directions to enter judgment for plaintiff.

Neither Mr. Chief Justice SANDERSON nor Mr. Justice SAWYER expressed an opinion.

J. S. EMERY v. THE SAN FRANCISCO GAS COMPANY.

PROPERTY SUBJECT TO RIGHT OF EMINENT DOMAIN.—The property referred to in that clause of the Constitution which declares that private property shall not be taken for public use without just compensation, is other kinds of property than money, and the compensation referred to is a compensation to be made in money.

Statement of Facts.

ASSESSMENT ON LOTS TO GRADE STREET, A TAX.—An assessment upon the different lots fronting on a street in a city in proportion to the number of feet frontage of each, for the purpose of raising money to pay the expenses of grading the street, is an exercise of the sovereign right of taxation, and not of the power to appropriate private property to public use under the right of eminent domain.

MEANING OF TAXATION.—The words "taxation" and "taxed," in section thirteen of Article XI of the Constitution, relates to such general taxes upon all property as are levied to defray the ordinary expenses of the State, county, town, and municipal governments, and not to assessments levied on the lots fronting on a street in a city to pay the expenses of their improvements.

ASSESSMENTS ON LOTS FOR IMPROVING STREETS.—The Constitution does not prohibit the Legislature, or municipal authorities acting under authority of law, from imposing assessments upon lots in a city fronting on a street to defray the expenses of improvements of the street in the nature of grading and planking.

APPORTIONMENT OF SUCH ASSESSMENTS.—It rests in the discretion of the Legislature to say upon what principle the assessment on lots fronting on a street, to pay for improvements on the street, shall be apportioned among the lots.

IMPROVING STREETS IN SAN FRANCISCO.—A resolution of the Board of Supervisors of San Francisco, declaring an intention to improve a street, may include a declaration of intention to both grade and macadamise. Such resolution sufficiently describes the work to be done if it declares that the street will be graded and macadamized from one designated point to another.

CONTRACT TO GRADE A STREET IN SAN FRANCISCO.—A contract to macadamise a street in San Francisco, made with the Superintendent of Streets, binds the party to use such materials as are required by the Superintendent if it provides that the work shall be performed according to specifications annexed and such specifications made by the Superintendent name the material to be used.

VARIANCE BETWEEN RESOLUTION AND CONTRACT.—A resolution declaring an intention to improve a street in San Francisco is not vitiated because it states an intention to grade and macadamise from Mission to Howard street, while the contract executed under the resolution calls for grading and macadamising that portion of the street "except where done."

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The respondent, Emery, entered into a contract with the Superintendent of Streets in San Francisco on the 25th day of September, 1862, to grade and macadamize Fremont street from Howard to Mission. The contract was completed January 17th, 1863. The appellant was the owner of a lot fronting on Fremont street, between Mission and Howard. This action was brought to recover the amount assessed on appellant's lot for the work. Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Argument for Appellant.

Wm. M. Pierson, for appellant, argued that the Board of Supervisors had no power under the statute of 1862 to declare their intention to grade *and also to macadamize* a street in the same notice or resolution; and that the resolution did not describe the work to be done, as required by statute. He contended that the resolution of intention was the primary step in the whole proceeding; the one on which all the subsequent proceedings rested. It was jurisdictional in its nature, declared so by the fourth section of the statute, and if all the requirements of the law were not strictly complied with, it was a vain act, endowing the subsequent proceedings with no vitality, and creating no obligation on the part of the property owner.

He referred to the third section of the Act, and argued that the Board might order either the grading or the macadamizing of a street, but could not order the two conjunctively, and referred to Blackwell on Tax Titles, 64. He also insisted that the contract was void, because it varied from the resolution declaratory of intention to do the work and order to do it, as the resolution and order gave notice and required Fremont street to be graded and macadamized from Mission to Howard, while the contract was for grading and macadamizing except where done.

H. H. Haight, also for appellant, argued that the facts stated in the complaint were not sufficient to constitute a cause of action, for the reason that the Act of 1862, under which the proceedings were taken, was unconstitutional and void, and referred to *Creighton v. Manson*, 27 Cal. 613. He contended that as the Act could not be sustained as an exercise of the taxing power, and as it contained no provision for compensation under the exercise of the right of eminent domain, it must fall.

D. P. & A. Barstow, for respondent, confined their argument to the technical objections to the proceedings made by Mr. Pierson.

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By the Court, SAWYER, J.

This is an action brought in pursuance of the Act of 1862, relating to the City of San Francisco, to recover a sum of money assessed upon property fronting on a certain street in that city, in proportion to its frontage, to pay the expenses of grading said street. It presents some of the much vexed questions arising under statutes relating to this class of burden imposed upon property holders in towns and cities. As usual in such cases, it is claimed, firstly, that the law under which the assessment is made is unconstitutional; secondly, if constitutional, that there are such irregularities in the proceedings as to vitiate the assessment. The recent case of *Creighton v. Manson*, decided by this Court (27 Cal. 614) is relied on by appellant as settling the principles that must govern this case. In that case, although all the Justices concurred in the judgment, there was not an entire concurrence in all the views expressed in the opinion, or in the grounds upon which the decision rested. Constitutional questions were discussed in the case, but the only points decided were—firstly, that the defendant was not personally liable, for the reason that no personal liability was imposed by the Act of 1859; and secondly, that there was no lien on the defendant's lot, for the reason that the work had never been ordered by the Board of Supervisors in the mode prescribed by law. It is but just to the Court to say, that neither in that case, nor in this, nor in either of the other cases now before us involving the same questions, have we received any aid from counsel, whose interest it was to support the constitutionality of the law, and not only was there no argument upon this important point on that side, but there was no reference to more than one or two decisions bearing upon it. Since the decision of *Creighton v. Manson*, notwithstanding the pressure of the business of the Court, we have assumed the duties of counsel, as well as of the Court, and explored the numerous volumes of reports of decisions in our sister States for authorities upon the point, and as the result of these labors have found many recent well considered

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cases, in which the provisions of the several State Constitutions bearing upon the subject have been analyzed with great severity, and the questions arising discussed and illustrated with marked ability. After a more thorough investigation of the question, and a full consideration of the recent cases, we are free to confess that our own views have been somewhat modified. For these reasons, among others, we shall proceed to the discussion of the subject as if the questions were new in this State, without further reference to *Creighton v. Manson*.

The improvement of a public street in a city, to be thereafter used and controlled by the public, is undoubtedly a public work. But it is equally clear, as a general proposition, that the improvement of a street is more beneficial to the local public, or the immediate district in which it is located, than to the whole city, as the improvement of the streets of a city is more beneficial to the city in which they are located than to the State at large. But this fact renders the work no less one of a public character. The work of improving streets being one of a public character, it is insisted by appellant, that the power of the Legislature to pass a law imposing the burden of paying the expenses of the improvement upon the property of the citizen, if it exists at all, must be deduced from one of two sources.

Firstly—The right of eminent domain under which private property may be taken for public use; or,

Secondly—The sovereign right of taxation. And in this he is undoubtedly correct. It is further insisted, that if the power is referable to the former—the right of eminent domain—the law in question directing the assessment to be made according to frontage—by the front foot—is repugnant to section eight of Article I of the Constitution, which contains the provision, “nor shall private property be taken for public use without just compensation.” If referable to the latter—the sovereign right of taxation—that the assessment is unequal, and not levied in proportion to the value of the property, and that the law, for this reason, is repugnant to the provisions of section thirteen, Article XI of the Constitution,

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which says, that "taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained by law."

It is plain that a determination, at the threshold of the discussion, of the question, as to which of these sources of sovereign power, the authority of the Legislature over the subject must be referred, is essential to an intelligent consideration of the propositions submitted. Were it not for the fact, that, in some of the earlier cases, there are some loose expressions and dicta which give countenance to the opposite opinion, it would seem to be clear, that assessments for improvements, upon whatever principle distributed, are not taking private property for public use, within the meaning of these terms as used in the Constitution. In these cases money, and money only is taken. In a certain sense money is property. But it might just as well be said, that money taken by general taxation for the ordinary purposes of State revenue is property within the meaning of the Constitution, and cannot be taken without compensation. The theory of all taxation is, doubtless, in a general sense, that there is compensation for the taxes taken in the protection and security to life, liberty and property afforded by the Government supported by the money raised. But this, manifestly, is not the compensation to be made for property taken for public use, within the meaning of the terms as used in the section of the Constitution cited. The property referred to in the Constitution for which special compensation must be made, is something other than money, as where land is taken to be used as a street, and the like, and the compensation referred to, doubtless, means a compensation in money, the only medium by which special compensation can be accurately measured and adjusted; and to make such compensation in the case of assessments to raise money for the purpose of paying for grading streets, would be to take the money from the property holder with one hand and return it with the other; and this would leave nothing for the purposes required.

The difference in the operation of these two sovereign powers

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is stated with great clearness and precision in the very able and satisfactory opinion of Mr. Justice Ruggles, in *The People v. Mayor of Brooklyn*, 4 Comst. 420. He says (pp. 423, 424:) "I perceive no great difficulty in pointing out the distinction between these two powers. Taxation exacts money or services from individuals as, and for, their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the Government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals. Keeping these distinctions in mind, it will never be difficult to determine which of the two powers is exerted in any given case."

"It may be proper here, although not strictly necessary, to express the opinion that money cannot be exacted by the Government by the right of eminent domain, excepting, perhaps, for the direct use of the State at large, and when the State at large is to make the compensation. The exigencies of a State Government can seldom require the taking of money by virtue of this power, even in time of war, and never in time of peace. The framers of the Constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands cannot; and therefore lands may be taken by right of eminent domain, but money may not. The seventh section of Article I of the Constitution confirms this construction of the power. It directs the compensation for private property so taken to be ascertained by a jury or by commissioners. This is an appro-

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priate mode when lands or goods are taken, because their value is uncertain; but not when money is taken, because its value is already fixed. The validity of the assessment in question, therefore, cannot be maintained as an exercise of the power of eminent domain; and it cannot be maintained at all unless it be a legitimate mode of taxation."

Whatever uncertainty there may have been found in the prior decisions as to the true source of the power of the Legislature to impose this class of burdens upon the citizen, there has been no doubt upon that point expressed since the promulgation of the decision in *People v. Mayor of Brooklyn*. In every decision we have met within our researches rendered since that time, the opinion in that case has been recognized as a correct exposition of the law upon this point. (*Brewster v. City of Syracuse*, 19 N. Y. 118; *Scoville v. City of Cleveland*, 1 Ohio St. R. 135; *Hill v. Higdon*, 5 Ohio St. R. 245; *N. I. R. R. Co. v. Connelly*, 10 Ohio St. R. 162; *Malony v. City of Marietta*, 11 Ohio St. R. 638; *Reeves v. Treasurer of Wood County*, 8 Ohio St. R. 335; *Weeks v. Milwaukee*, 10 Wis. 256; *Garrett v. City of St. Louis*, 25 Mo. 508; *Newby v. Platte County*, Ib. 259; *Williams v. Cammack*, 27 Miss. 222; *Williams v. Mayor of Detroit*, 2 Mich. 560; *Municipality No. 2 v. White*, 9 Lou. Ann. 452; *Mayor of Baltimore v. Green Mount Cemetery Co.* 7 Md. 536; *Nichols v. Bridgeport*, 23 Conn. 206; *State v. City of Newark*, 3 Dutcher, 191, 193.) This point was so ruled by the late Supreme Court in *Burnett v. Mayor of Sacramento*, 12 Cal. 82, and *Hart v. Gaven*, Ib. 477. And were it not for the fact that this question has been much discussed, and that it is continually raised and pressed upon our notice, whenever there is a slight variation of circumstances or a change in the principle of apportionment, we should not have thought it necessary to do more than refer to the last two cases as settling the question in this State. Some confusion of ideas may formerly have arisen from a supposition that an apportionment according to benefits involved the principle of specific compensation for property taken, and still more from not separating and keeping distinctly in view

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the operation of the two powers in that class of cases involving both; as, where land had been taken for a new street, and at the same time an assessment made upon the owners of the property in the district embracing the new street, including the owner of the land taken, to pay for the land thus appropriated. There are such cases, and in these instances both powers may be called into action. Compensation must be made for the land appropriated under the power to take private property for public use, and a sum must also be levied under the right of taxation to make the compensation. The owner of the land in such cases would be liable to pay his share of such tax, and thus the amount ultimately received would only be the balance after deducting the amount of the assessment from the amount of compensation. But, if these distinctions are kept in view, it will be found in all cases of assessments for improvements, whether the sum to be raised is apportioned according to benefits, according to value, upon the front foot, square foot, square acre, or where each party is required to pay for the improvement in front of his own land, the assessment must be referred to the taxing power, and these different modes are only different modes of making the apportionment and not the exercise of different sovereign powers. In the language of Mr. Justice Ruggles, "They all operate upon a community, or upon a class of persons in a community and by some rule of apportionment," and not "upon an individual, without reference to the amount or value exacted from any other individual or class of individuals." And they exact—in theory at least—money or services from individuals, as and for their respective shares of contribution to the local public burden, and not as so much beyond their share; and these various modes of apportionment are only the means by which the law endeavors to ascertain that share.

The assessment in this case was made upon the front foot, and, as we have seen, was an attempt to exercise the sovereign right of taxation, and not to appropriate private property to public use under the right of eminent domain.

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In the expressive language of Mr. Justice Ruggles, which we again adopt: "If there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned; because the object for which the money was to be raised is, without dispute, one for which taxation by a different rule of apportionment would have been lawful. It remains to be seen whether anything can be found in the Constitution; in legal adjudication; in the practice of the Government, or in the nature of things, by which taxation upon this principle of apportionment can be judicially annulled. For the purpose of ascertaining what has been deemed on high authority, the nature and extent of the power of taxation vested in the Legislatures of the State Governments, I refer to the opinion of the late Chief Justice Marshall, in the case of *The Providence Bank v. Billings*, 4 Peters, 514, 561, 563.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the Government as part of itself, and need not be reserved where property of any description or the right to use it in any manner is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the Legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation.' And again, in *McCulloch v. Maryland*, 4 Wheat. 428, the following observations are found, coming from the same high authority: 'It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the object to which it is applicable, to the utmost extent to which the Government may choose to carry it. The

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only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax the Government acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State therefore give to their Government a right of taxing themselves and their property; and as the exigencies of the Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the Legislature and the influence of the constituents over their representatives to guard them against its abuse.' And again, at page 430, he speaks of it as 'unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.'"

"Assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation, and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the Legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation."

This doctrine is sustained by a uniform line of decisions in our own and our sister States. (See *People ex rel. Attorney-General v. Pacheco*, 27 Cal. 209, and cases cited.)

Is the principle upon which this assessment is made repugnant to the provisions of section thirteen of Article XI? If not, then, there is no provision that limits the power of the Legislature with respect to the principle upon which the apportionment of such burdens shall be made. The section reads:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors

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of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated."

If the term taxation is here used in a sense co-extensive with the sovereign power under which the right is exercised, or, if it is to be considered abstractly, without reference to the long and well established meaning of the words taxes and assessments, as used in the statutes and ordinary language of the several States, to indicate different classes of public burdens—the one imposed for general revenue for the purposes of the ordinary expenses of the State, county and town government, and the other to raise a special fund to defray the expenses of public improvements mainly locally beneficial—then, the term is broad enough to embrace assessments of the kind in question. But terms often, by general use, acquire, when employed in certain relations, a more limited signification. And this is true with reference to the signification in which words are used in statutes and Constitutions, as well as in common parlance. The use of the terms taxes, taxation and assessments affords, perhaps, as striking illustrations of this principle as any to be found in the language. The term taxation, both in common parlance and in the laws of the several States, has been ordinarily used, not to express the idea of the sovereign power which is exercised, but the exercise of that power for a particular purpose, viz: to raise a revenue for the general and ordinary expenses of the government, whether it be the State, county, town or city government. But there is another class of expenses, also of a public nature, necessary to be provided for, peculiar to the local governments of counties, cities, towns and even smaller subdivisions, such as opening, grading, improving in various ways, and repairing highways and streets, and constructing sewers in cities, and canals and ditches for the purpose of drainage in the country. They are generally of peculiar local benefit. These burdens have always, in every State, from its first settlement, been charged upon the localities benefited, and have

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been apportioned upon various principles; but whatever principle of apportionment has been adopted they have been known, both in the legislation and ordinary speech of the country, by the name of assessments. Assessments have also, very generally, if not always, been apportioned upon principles different from those adopted in taxation, in the ordinary sense of that term; and any one can see, upon a moment's reflection, that the apportionment, to bear equally, and do substantial justice to all parties, must be made upon a different principle from that adopted in taxation, so called. This will be manifest upon considering the following passage from the opinion of Mr. Justice Ruggles, in the case before cited:

"A property tax (we will add, according to value) for the general purposes of the government, either of the State at large or of a county, city or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burdens according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation in the protection and improvement of his property than a poor man, and ought, therefore, to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty, and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least, this has been supposed and assumed to be true by the Legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of this matter, being within the scope of its lawful power, is conclusive."

The different significations of the terms taxes and assessments, before referred to, will be found, upon examination, to be well established in the legal language of the several States, and to run through the statutes, and to have been recognized and enforced by the various judicial tribunals of the country; and, as we shall see, have found their way into the Constitu-

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tions of many of the States, our own among the number. Thus, *In the matter of Mayor of New York* for improving Nassau street, a church which had been assessed for the improvement, claimed exemption under the statute, which provided that "no real estate belonging to any church shall be taxed by any law of this State." The Court held that the provisions referred to general or public taxes to be levied and collected for the benefit of the town, county or State at large, and that a street assessment was not such a tax as the Act contemplated. (11 John. 77; 4 Comst. 433.) In *The State v. City of Newark*, 3 Dutcher, 187, the city had levied an assessment to a large amount for improving Market street, upon the property of the New Jersey Railroad and Transportation Company. The railroad company claimed exemption under their charter, which provides that the company "shall pay a tax of one half of one per cent upon their capital stock, and that no other or further tax or impositions shall be levied, or imposed upon the company." This assessment was held not to be a tax within the meaning of this provision of the charter. Yet it is expressly held that "the assessment in this case is a clear exercise of the taxing power. It is made for a public purpose, and confers no special benefits upon the property of the company." (Page 191.) There are other decisions in the same State to the effect that such assessments are not taxes within the meaning of that term as used in the various statutes. So also in *The Mayor and City Council of Baltimore v. The Proprietors of Green Mount Cemetery*, 7 Maryland, 517, the charter of the company provided that the land appropriated as a cemetery should "not be liable to any tax or public imposition whatever." An assessment was made for improving the street in front of the premises of the company, and the payment was resisted on the ground of exemption under this provision of the law. The Court, "on the fullest consideration," hold the assessment valid, and say: "We think the Legislature intended nothing more than to exempt the property of the proprietors from all taxes or impositions levied or imposed for the purpose of revenue, and not

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to relieve it from such charges as are inseparably incident to its location in regard to other property." (Page 533.) And there are other decisions in the State to the same effect. Yet, in the same case, the Court also say: "That the imposition of a paving tax is an exercise of the taxing power, and not of the right of eminent domain, we entertain no doubt, nor did we understand the counsel for the appellant to suggest any." So also in Missouri, church property was by law exempt from taxation, yet an assessment upon a church for the construction of a sewer was held not to be within the exemption. (*Lockwood v. City of St. Louis*, 24 Mo. 21.) So in *Northern Liberties v. St. John's Church*, 18 Pa. St. R., where churches were by statute exempt from "all county, borough and city taxes," it was held that the church was not exempt from an assessment levied to defray the expense of laying pipe in the street upon which the church lot fronted for the introduction of pure water. The Court, after stating the specific difference between the two classes of burdens, and the different established significations of the terms taxes, and assessments, say: "It is evident from the face of all the Acts of Assembly in relation to this incorporated district, that the Legislature had in view the difference between taxes, properly so denominated, and charges or assessments for improvement of particular streets as the population required such improvements." (Page 107.) So also in *Canal Trustees v. City of Chicago*, 12 Ill. 405, the same principle was sustained. An assessment was made upon certain lands belonging to the Illinois and Michigan Canal, for enlarging and improving an alley, bounded in part by the lands. The thirteenth section of the Act by which the lands were granted to the Trustees provides, that "the lands and lots shall be exempt from taxation of every description, by and under the laws of this State, until after the same shall have been sold and conveyed by the said Trustees, as aforesaid." The Court held the assessment not to be taxation within the meaning of this provision. Mr. Chief Justice Treat said: "In our opinion, the exemption must be held to apply to taxes levied for State, county and municipal pur-

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poses." (Page 406.) These are some of the numerous cases, that go to establish the fact, that, when not used for the purpose of designating the source or extent of the power itself, but only with reference to its exercise, the terms taxation and assessments, though both are an exercise of the same sovereign power have, in the legislative, judicial and general language of the country, acquired peculiar and more limited significations expressing different specific ideas. Indeed, taxation itself, in its ordinary sense, is, perhaps, not the exercise of a distinct, independent sovereign power, but only one form of exercising the right of eminent domain. Yet the terms, the right of taxation, and the right of eminent domain are ordinarily used to express different specific ideas, although both are, doubtless, grounded in the same ultimate sovereign power.

We will now consider the signification of these terms as used in the various State Constitutions, including our own, and in doing so, it must be borne in mind that these terms, also, as used in the several Constitutions, have reference to the exercise of the power. Constitutions are only laws of superior and paramount authority. And when the statesmen who frame, and the people who adopt them, employ terms in relation to any particular subject, which have, in that relation, in the legislative, judicial and general language of the country, acquired an established, well known and more limited signification than the word in other relations might indicate, it must be presumed that they intend to use those terms in such established, more limited sense, unless it clearly appears to the contrary by the context. And in Section 13, of Article XI we think the words "taxation" and "taxed" were used in the same sense as in the various statutes of the States before referred to, and others of a similar character, to signify such general taxation upon all property as is in use in all the States to raise a general revenue for the purposes of defraying the ordinary expenses of State, county and municipal governments. In the language of Mr. Justice Bennett, in *People v. Naglee*, 1 Cal. 252: "Our Constitution was framed by intelligent and practical men, who were well acquainted with the organiza-

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tion and operation of the system of State Governments in all portions of the Union; and when they declared that taxation shall be equal and uniform throughout the State, they must have referred to such general taxation as in the other States is commonly imposed alike upon all property, for the purpose of defraying the expenses of the Government of the State, or of some local municipal corporation." This clause in the Constitution was construed in the same way—all the Justices concurring—in *Burnett v. Mayor, etc., of Sacramento*, 12 Cal. 83. Mr. Justice Field said: "The thirteenth section of Article XI of the Constitution does not cover the case. That section provides for equality and uniformity of taxation upon property, but applies, in our judgment, only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the Government of the State, or of some county or town. We do not think it has any reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of the property, and in which the public is only to a limited extent interested. For the expense of such improvements, it is competent for the Legislature to provide, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon the property adjacent thereto and specially benefited thereby." The assessment in that case was made upon the adjacent property, according to value, and was, therefore, in accordance with the second clause of the section of the Constitution under consideration; whereas in the present case it is upon the front foot. In this respect the two cases differ. But the question was, whether the term "taxation," as used in that section, is applicable to assessments for street improvements. If the term taxation in the first clause—"taxation shall be equal and uniform"—is inapplicable to a street assessment, of course the term, as used in the second clause of the same section—"all property in this State shall be taxed in proportion to its value"—must also be inapplicable, and the point decided is the same in both

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cases. In *Hart v. Gaven*, 12 Cal. 487, under a law requiring the owners of property in San Francisco to repair the streets in front of their property, and in case of default on their part authorizing the Superintendent of Streets to make the repairs, and recover the expense against the owner, an action against the owner for such repairs was sustained. It does not appear, however, from the report of the case, that any question was raised on the constitutionality of the law on the ground that the apportionment was not according to value.

The construction thus given finds further support from an examination of other clauses of the Constitution. The same section further provides: "But Assessors and Collectors of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated." This form of expression would seem to have reference only to taxes for general revenue purposes. The State, county and town are coupled together without any reference to minor subdivisions for local improvements, etc. By no reasonable construction can the clause be regarded as pointing to anything other than revenue for general ordinary purposes of governmental expenses; and this clause undoubtedly refers to the same taxes mentioned in the preceding clause, wherein uniform and *ad valorem* taxation are provided for.

Again, there is another material provision of the Constitution, not hitherto noticed in the discussions in this State, relating especially to the local governments, in which the different forms of exercising the taxing power under different names and circumstances, is expressly recognized. Section thirty-seven of Article IV provides as follows: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessments, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

Taxation and *assessments* are here spoken of and recognized as legitimate modes of exercising power. The framers of the

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Constitution could not have intended to convey the same specific idea by these two terms. If so, they are guilty of unmeaning tautology, and might just as well have said, "taxation and taxation." They must have meant something by the use of the word *assessments* specifically different from *taxation*, as that term was understood by them. They must have contemplated that there is some form of exercising a power different from the ordinary form of taxation, and they assumed that that form was proper, and would actually exist under the Constitution of California. We know, also, that a particular system of imposing charges, with some variation in the principle upon which they were apportioned, for local improvements at that time, and for a long period prior thereto, existed in nearly every State in the Union from which the people of California emigrated, known under the name of assessments. And we know that this section of our Constitution is a *verbatim* copy of a section of the Constitution of the State of New York, where this system had been in use, according to the statement of Mr. Justice Ruggles, in one form or another, for one hundred and fifty years. And we know that substantially the same provision is contained in the Constitutions of several other States where the same system prevails. We may reasonably presume, then, that the terms taxation and assessments were intended to be understood in the sense in which they were used in the State from which the provision was borrowed, and consequently that taxation, as used in our Constitution in relation to a similar subject matter, is not to be regarded as including assessments. The history of the provision, and the mode of its introduction into the Constitution of New York, will be found in the case before cited from 4 Comst. 440. As this system of assessments had no relation to the State at large, or to the general financial affairs of the State, county, or city governments, there was no occasion to refer to it in the general provision relating to taxation, properly so called, for such purposes as were contemplated in Section thirteen of Article XI. But as these local matters are under the control of cities and towns, it was

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peculiarly proper to refer to them in a provision relating to such subordinate communities. This constitutional provision upon this particular subject matter now under consideration, has not itself imposed any restrictions whatever upon the power to authorize these assessments, but it has simply enjoined the duty of restricting the power upon the Legislature, leaving to its discretion the measure of the restriction. As the framers of the Constitution understood these terms to have different significations, and when they intended to include both systems in a provision, actually employed both terms to express that intention, it is fair to presume that, had they intended to include assessments in the limitation imposed by Section thirteen, Article XI, they would have said, "Taxation and assessments shall be equal and uniform throughout the State." From these considerations it seems impossible, upon the reason of the thing, to reach any other conclusion than that Section thirteen, Article XI, is inapplicable to assessments of the class in question.

Besides, we are not without authority upon this question in our sister States, having similar constitutional provisions, where the subject has been examined and illustrated by eminent Judges with signal ability. We shall now refer to some of the decisions; and, as we propose to discuss the question in this case for the last time, we shall not hesitate to quote largely from some of the first of these opinions, that the grounds upon which they rest may be fully appreciated.

The case of *Scoville v. City of Cleveland*, 1 Ohio St. R. 184, arose under the Constitution of 1802, which contained no provision similar to ours. There being no restriction in the Constitution upon the subject an assessment according to benefits was held to be constitutional. The new Constitution of Ohio contained provisions similar to those in the Constitution of California upon the same subject, but not couched in precisely the same language. Under those provisions an assessment per front foot was levied upon property bordering upon a public street to pay the expenses of re-grading and paving the same. The case was, therefore, precisely like the one now under con-

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sideration. In *Hill v. Higdon*, 5 Ohio St. R. 246, the Supreme Court of Ohio held the law under which the assessment was made to be constitutional and the assessment valid. In delivering the opinion of the Court, Mr. Chief Justice Ranney said: "By the positive terms of the second section of that Article 'laws shall be passed taxing by a uniform rule all moneys, etc., and also all real and personal property according to its true value in money.' In the case of *The City of Zanesville v. Richards*, decided at the present term, we have held that this section is equally applicable to and furnishes the governing principles for all laws levying taxes for general revenue, whether for State, county, township or corporation purposes; and it requires a uniform rate per cent to be levied upon all property, according to its value in money, within the limits of the State or the local subdivision for which the revenue is collected. The General Assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent must be levied upon all property subject to taxation, 'according to its true value in money,' so that all may bear an equal burden. If laws of the character of those now under investigation are controlled by this section, it is evident they cannot be sustained. They do not impose the tax upon all the property of the city or village, nor is it apportioned according to the true value in money of the property upon which it is laid. As the mode prescribed in this section is sufficient to enable municipal corporations to raise a revenue for the accomplishment of all their legitimate purposes, had the Constitution contained nothing further to evince the intention of its framers, it might be argued (and, I think, conclusively) that any other mode of levying taxes for any purpose was necessarily excluded. But it does contain a further provision, which every sound rule of construction binds us to regard, and which seems utterly inconsistent with such a conclusion. By the sixth section of the thirteenth Article the General Assembly is required to provide for the organization of cities and incorporated villages by general laws, and so

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restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power. It is very clearly our duty to give effect to the natural and obvious import of the language of this section. It relates to the organization of cities and villages, and imposes upon the General Assembly the very important duty of so restricting the powers it was supposed they would possess as to prevent their abuse. Amongst these is the power of 'assessment.' This power had for many years been in constant and active exercise in every part of the State and was perfectly understood by every member of the Convention. The popular as well as legal signification of this term, had always indicated those special and local impositions upon property in the immediate vicinity of an improved street, which were necessary to pay for the improvement, and laid with reference to the special benefit which such property derived from the expenditure of the money. They had always differed widely from the ordinary levies made for the purpose of general revenue. To confound them now, in giving a construction to the second section of the twelfth Article, is to make not only unmeaning but utterly absurd, a material part of the sixth section of the thirteenth Article. To restrict or regulate the exercise of a power, furnishes the strongest possible implication of its existence, and to impose upon the General Assembly the duty to do this, in respect to a power which did not exist, or which had been expressly prohibited, would be nothing better than nonsense.

"It is our duty to give such a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions. To do this, we have only to suppose that the Convention used language with reference to its popular and received signification; and applied it as it had been practically applied for a long series of years. That where taxation is spoken of in the second section of the twelfth Article, reference is made to the general burdens imposed for the purpose of supporting the Government, and the revenue raised expended for the equal benefit of the public

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at large; while the power of assessment, referred to in the sixth section of the thirteenth Article, although resting upon the taxing power, was intended to describe a distinct and well known mode of laying a local burden upon particular property, with reference to the peculiar and special benefit derived to such property from the expenditure of the money. The general language of the first of these sections is thus only so far restricted as to give effect to the specific provision contained in the last. By the first, as the money is raised and expended for the equal benefit of all, no discretion is left with the General Assembly; but the tax must be levied equally upon all property, and according to its true value. But in the exercise of the power of assessment, legislative discretion in apportioning the burden according to benefits is left as broad and unfettered as under the Constitution of 1802. The last of these sections contemplates a delegation of the power to municipal corporations, and imposes upon the Legislature the duty (as yet very imperfectly performed) of so restricting its exercise as to prevent abuse. A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction.

“The language of this section furnishes very strong evidence that the Convention carefully discriminated between taxation and assessment, and regarded them as distinct modes of raising money for different purposes, and upon different principles, from the fact that both terms are employed, and both are required to be restricted when used by cities and villages. The origin and history of the section lead to the same conclusion. It is almost a literal copy of the ninth section of the eighth Article of the Constitution of New York. From the case of *The People v. The Mayor, etc., of Brooklyn*, 4 Com. 440, it appears that this mode of taxation had been much complained of in that State, and that an attempt was made in the Convention of 1846 to effect its abolition. To this end the subject was referred to a committee, who reported a section for that purpose. But the Convention refused to adopt it, and finally incorporated the provision as it now stands in

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the Constitution of that State, and as it is found in ours. Upon this provision Judge Ruggles remarks: 'Instead of abolishing the system of assessments, this section of the Constitution refers it to the Legislature for the correction of its abuses. The direction given to restrict the power of cities and villages to make assessments, presupposes and admits the existence of a power to be restricted. The Constitution, therefore, in this section recognizes and affirms the validity of the legislation by which city and village assessments for local purposes, like that now in controversy, are authorized, and seems to remove all doubt in relation to the legislative power in question.'

"It cannot be supposed that those who borrowed this provision from the New York Constitution were ignorant of the objects and purposes for which it was there adopted; and it is but fair to presume that it was intended to effect the same purposes and objects here. In our present Constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument. The second section of the twelfth Article has established the principle upon which all taxes for general revenue purposes must be levied; but it does not extend to what was then and is still well known as special assessments, because the sixth section of the thirteenth Article shows that they were not intended to be included. Dealing with them under the name of 'assessments,' the people have contented themselves with enjoining upon the Legislature the duty of preventing abuses by restricting the power of the cities and villages to impose them."

This decision was affirmed in *Reeves v. Treasurer of Wood County*, 8 Ohio St. R. 337, in a case arising out of assessments made for the purpose of draining farming lands in the lowlands of northwestern Ohio. The assessment in this case was according to benefits. Again, in *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. R. 162, the constitutionality of a similar Act relating to street improvements was upheld. And

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the Court say: "That such assessment may be made in proportion to the front foot as well as upon the value of the lands, as assessed for taxation." And again in *Malony v. City of Marietta*, 11 Ohio St. R. 637.

The Constitution of Wisconsin contains provisions similar to our own upon the subject under consideration. And the section corresponding to Section thirty-seven of Article IV is in nearly the same language. Notwithstanding these provisions it was held, in *Weeks v. Milwaukee*, 10 Wis. 259, that a law which "requires every lot owner to build whatever improvements the public may require, on the street in front of his lot, without reference to inequalities in the value of the lots, in the expense of constructing the improvements, or of the question whether the lot is injured or benefited by their construction," is constitutional. After discussing the point at some length and presenting some further views, which we will not take up further space in quoting, the case of *Hill v. Higdon* is cited with approbation, and Mr. Justice Payne says: "The reasoning of Mr. Chief Justice Ranney upon the question I think it impossible to answer." (P. 261.)

The Constitution of Michigan also contains similar provisions, though not identical in language, and the term assessment is omitted in the provision corresponding to Section thirty-seven of Article IV, in ours. In *Williams v. The City of Detroit*, 2 Mich. 564, a law authorizing assessments for street improvements upon the lots fronting upon the street improved, was held to be constitutional. It would seem that the law in this case required the expense of the improvement in front of the lot to be assessed upon the lot, like the law of Wisconsin in the case just cited. At all events, this was the case in *Woodbridge v. The City of Detroit*, 8 Mich. 276, in which case all the Judges concurred in holding that a law apportioning the assessment per front foot would be constitutional, and approved of *Hill v. Higdon*, 5 Ohio. But, while two of the four Judges held the law in question in the case then under consideration to embody the same principle, and

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to be constitutional, the other two Judges thought, that, because a single lot was required to bear the entire expense of an improvement in front, there was no apportionment at all, and that this element of a tax, viz: apportionment, was wanting, and for this reason that the law could not be sustained. They concurred with the other Judges, however, as we understand them, on the proposition that whenever there is an apportionment, no matter upon what principle made, the law can be sustained under the Constitution of Michigan.

Similar laws have also been repeatedly sustained in Missouri under a Constitution which contains the provision, "That all property subject to taxation in this State, shall be taxed in proportion to its value," but does not contain a provision corresponding to Section thirty-seven, Article IV of the Constitution of California. In the *Egyptian Levee Company v. Hardin*, 27 Mo. 495, the question arose under an Act authorizing a corporation formed to reclaim lands in a certain designated district subject to inundation by constructing levees and digging canals, to raise the funds necessary for the work by assessing the sum of one dollar per acre upon the owners of the lands within the district embraced within the charter. The law was sustained. The Court say: "That provision of our State Constitution which requires taxation to be proportioned to the value of the property on which it is laid, is only applicable to taxation in its usual, ordinary and received sense, and is therefore limited to taxation for general purposes alone, where the money raised by the tax goes into the State Treasury, County Treasury, or the General Fund of some city or town, and is applicable to any purpose to which the legislative body of such State, county or town may choose to apply it; and is not intended to apply to local assessment where the money raised is to be expended on the property taxed. These local assessments are not necessarily, under our Constitution, apportioned by reference to the value of the property assessed, but may be regulated by the value of the benefit which the improvements to which the money is devoted is expected to confer on the proprietor."

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This conclusion seems to have been attained by reasoning upon principle, without the aid of any of the cases before cited in this opinion arising under similar constitutional provisions in other States, as none of them are referred to by the Court. Various cases were however cited construing the term taxation, as used in statutes. This case was affirmed in *City of St. Joseph v. Anthony*, 30 Mo. 541, where a street was macadamized, and the cost of the work "borne by the owners of the adjoining property, and apportioned and charged on the adjoining lots in proportion to their front." The principle had been recognized in the earlier case of *Garrett v. St. Louis*, 25 Mo. 509, 510, but the decision in that case was not put squarely upon this ground. This view was also foreshadowed in *Newby v. Platte County*, Ib. 272. And in *Inhabitants of Palmyra v. Morton*, Ib. 594, an assessment upon a lot of the entire cost of paving the street in front of the lot was held to be constitutional, but in this instance the decision was put upon the police powers. When these last cited but earlier cases were decided, the Court, although it had caught a view of the true ground, does not appear to have settled down upon the true and solid basis of construction.

We shall notice but one other decision upon this point, that in *Municipality No. 2 v. White*, 9 La. Ann. R. 450, arising under the following provision in the new Constitution: "Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law." An assessment for improvements, apportioned according to benefits, was held by three of the Justices to be repugnant to the provision of the Constitution just cited. Two Justices dissented. This was comparatively an early decision under these recent provisions in Constitutions, and the Court did not have the benefit of the discussions on the subject found in the cases before cited. After having determined that the power of enforcing assessments for improvements must be referred to the sovereign right of taxation, the Court seem to have taken it for granted that the term taxation, as used in the

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Constitution, must be interpreted as covering the entire field embraced by the power. Its attention does not seem to have been directed to the more limited sense which the term taxation has acquired in the legal and general language of the country. Besides, we do not find any provision in the Constitution of Louisiana corresponding to Section thirty-seven of Article IV of our own, and the grounds of the argument based upon that provision were wanting. So, also, the civil law is the basis of the code of that State, and we cannot undertake to say in what respect their system of making local improvements may have differed from that prevailing in the other States, and if it materially differed, to what extent the practice under that system may have operated to modify the views of the Judges. Nor whether the term taxation, in its legal and ordinary use in that State, had acquired a more comprehensive signification than in other States.

The result of our investigation is, that there is no restriction in our Constitution upon the power of the Legislature to impose assessments to defray the expenses of public improvement in the nature of grading and planking streets, upon the property supposed to be benefited thereby in any district designated by the Legislature, or the proper officers of municipal governments acting under the authority of law. And that it is authorized to apportion the amount to be raised according to value, according to the benefits received, in proportion to frontage or the superficial contents, or to adopt any principle of apportionment that can be referred to the general sovereign right of taxation as defined by Mr. Justice Ruggles, in *People v. Brooklyn*. We think this construction of the provisions of the Constitution in question based upon solid reasons; and that the arguments in support of it in the cases cited are impregnable. The chain of authorities in support of this view, also, so far as we have been able to find them, is unbroken, unless the case in Louisiana can be considered an exception.

The matter rests, then, in the discretion of the Legislature. But it is difficult to say which principle of apportionment

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would, upon the whole, most nearly approximate equality, and do exact justice to all. It would not be difficult to show that the *ad valorem* principle might in many instances work monstrous injustice; and it may be questionable whether, upon the whole, it is not more unequal and unjust in its operation than the front foot, or any other mode of apportionment. In many cases either principle of apportionment would, doubtless, approximate equality and uniformity sufficiently near to answer all the purposes of justice. In some cases an apportionment according to benefits, and in others an *ad valorem* or front foot apportionment might better answer the ends of justice. But every principle upon which these burdens have been apportioned has been in turn attacked as unequal and unjust. And such, from the nature of things, must continue to be the case where one uniform system is inflexibly followed. In the language of Mr. Justice Napton, 27 Mo. 498: "In every form of taxation, whether general or local, it is certainly desirable and proper that the burden should be distributed as near as may be in proportion to the benefit derived; and constitutional injunctions and restrictions, where they have been attempted on this subject at all, are designed to promote this end. But where there is an absence of constitutional provisions, it is not in the power of the Courts to enforce any fancied scheme of equality seeming to them more just than the one adopted by the Legislature. The latter department of government is wisely intrusted with the entire control of this subject; and if practical injustice is done, the remedy is in the hands of the people. Equality of taxation may, however, be regarded as one of those utopian visions which neither philosopher nor legislator has ever yet realized. Approximation may be arrived at, and ought to be, and to a reasonable extent attained; but such is the infinite variety and complexity which human transactions assume, that it surpasses the ingenuity of the political economist and practical politician to foresee exactly where and how the pressure of a proposed tax will fall."

Possibly it might tend to promote equality and justice to leave to the local communities, which have the supervision of

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this class of improvements, the discretion to adopt that principle of apportionment which the exigencies of each particular district designated for improvement may require. In this State, particularly with reference to the City of San Francisco, nearly, if not quite all the various modes of apportionment have been tried, and among them the *ad valorem* principle was for several years pursued. Each was in turn attacked as unjust, and abandoned. Under the first charter of San Francisco one third of the expense was paid out of the City Treasury, and two thirds "paid in equal proportions by the land on both sides of the street," etc., but the principle of apportionment is not indicated. Under the charters of 1851 and 1855 the apportionment was according to benefits. The great reform charter—the Consolidation Act of 1856—adopted the front foot principle, and this continued in force till 1859, when it was amended and an *ad valorem* apportionment adopted. After trying this system two years, and after having given each principle a fair trial, in 1861 the Legislature again returned to the front foot principle, which had been in force from 1856 to 1859, the only instance of a return to a principle once tried and abandoned. And finally in 1862—after twelve years experience—the present principle of assessing upon the front foot was continued, and for reasons which must be presumed to have been satisfactory to the Legislature. But whether the principle is a wise one or not is no concern of ours. The question of power having been determined in favor of the action of the Legislature, the duty of determining the proper principle to be adopted is devolved upon that body, and its determination is conclusive. The fact that the *ad valorem* principle has been after a thorough trial abandoned, and that there has been a return to the front foot principle is, however, some evidence that the former operates unjustly and the latter more equally. It must be manifest to any one who will reflect upon the subject that any constitutional restriction upon the legislative discretion as to the principle upon which the apportionment shall be made would have been unwise in the extreme, not to say absolutely absurd.

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With these observations we leave the matter, and those who desire to pursue the discussion further can do so by consulting the cases cited.

The further defense consists of various alleged defects and irregularities in the proceedings, through which the defendant is sought to be charged.

The proceedings in question were initiated by the Board of Supervisors on the 4th of August, 1862, by passing the following resolution, declaratory of their intention in the premises, pursuant to the provisions of Section three, Article IV of the Consolidation Act, as amended in 1862:

“Resolved, That it is the intention of this Board to order the following street work: That Fremont street, from Mission to Howard streets, be graded and macadamized.”

The defendant urges two objections to this resolution: Firstly, that the Board had no power under the statute to declare their intention to grade and also to macadamize a street in the same notice or resolution; secondly, that the resolution does not sufficiently describe the work intended to be done.

We do not think either of these objections is well founded. We find no provision in the Act which in terms or by necessary implication requires the Board to pass a separate resolution for each kind of work which they are empowered to order to be done under the provisions of the third section of Article IV. Nor can we perceive in reason or policy why such a course should be required. The sole purpose of the resolution and its publication, as required in section four, is to notify property holders that the Board are about to improve a given street, or some part thereof, by causing certain kind or kinds of improvements to be made, in order that they may have an opportunity to oppose the improvements in the manner prescribed in the Act, if they desire to do so. Suppose the Board intended to order all the different kinds of work requisite to the full improvement of a street upon a given plan to be done, what sense or reason, in the absence of an express and clear provision to that effect, is there in requiring them to pass and

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publish a separate resolution for each kind of work when, as to all parties concerned, it can be as well if not better done in a single resolution setting forth in connected detail all the improvements intended to be made? Such, it seems to us, would be the more orderly and systematic method, and therefore most advisable.

But it is contended that the Board cannot be allowed to join two or more kinds of work in the same notice, because by so doing the property holder may be debarred of his right of protest, as provided in the fourth section in case there should be one or more kinds included as against which he is not allowed to protest. There is no force in this reasoning for the conclusion attempted to be drawn does not follow. Assuming that the property holder can protest against grading, but cannot against macadamizing, it does not follow that he cannot protest against the former because the latter is included in the notice. If he has the right to protest against a particular kind of work the proceedings can take on no form by which he can be deprived of that right, nor is he deprived thereof by a notice like the present, nor is the exercise of the right, in any way which we can perceive, thereby impeded or impaired.

Construing the resolution (as it is construed by counsel for the defendant) as declaring an intent to both grade and macadamize (which, however, is not the sense in which we read it, as will appear hereafter,) we also think that it satisfies the statute upon the question of description. The kind of work is sufficiently described by the use of the terms "graded and macadamized." The description of the work which the fourth section of the Act calls for is given in the third section, in which each kind of work which the Board is authorized to order is set forth as described. The Board are not required to describe the work with any more exactness than it is described by law itself. When the Board say they intend to grade a certain street, they have said all that is needed by way of description. No property holder can be in doubt as to what is to be done. He knows that the street is to be so filled in or excavated, as the case may be, as to make it con-

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form to the official grade of the city; all of which the word grade itself imports, and the description of the work would have been no better or more complete had this definition of the term been employed instead of the term itself. The notice is to be read to the property holder in the light of the law which confers the power upon the Board, for that law is, so to speak, a part of the notice. By that law he is informed that the Board can only grade a street to the official grade of the city, and he is therefore fully informed as to what the Board intended to do, and he has no right to assume that they intend to make a grade not authorized by law and use the assumption as a foundation upon which to ground an objection to the notice.

The next objection to these proceedings is that the contract contains no provision to the effect that the material to be used shall be such as may be required by the Superintendent of Public Streets as directed by law. Upon this subject the statute provides that "the materials used shall be such as are required by the said Superintendent, and all contracts made therefore must contain this provision."

The contract, which was duly executed by the plaintiff and Superintendent of Streets, provides that the plaintiff "will do and perform, under the direction and to the satisfaction of the Superintendent, and with materials to be furnished by the said Joseph S. Emery, all the work, etc., according to the specifications hereto annexed." Among the specifications thus made a part of the contract is found the following: "The above named portion of Fremont street is to be macadamized with rock from Goat Island," etc. So it would seem that the Superintendent required that the material used should be Goat Island rock, and the contract was accordingly so drawn as to make it obligatory upon the contractor to furnish the material so required by the Superintendent. We think this not merely a sufficient but a most substantial compliance with the provision of the statute above quoted. The contractor is made to furnish and agrees to furnish a specified kind or qual-

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ity of material, which is the kind for which the Superintendent has expressly stipulated, and thereby required within the meaning of the law. The object of the law was to secure the use of such materials as the Superintendent might select. It cannot be denied but that this object was most effectually attained under the contract in this case.

The next and last objection urged is that the contract varies from the terms of the resolution of intention and subsequent order in pursuance thereof, because the latter require Fremont street to be graded and macadamized from Mission to Howard, while the former calls for grading and macadamizing that block "except where done."

In considering this point it is important to determine in the first place what is the true intent and meaning of the resolution of intention and subsequent order of the Board. They, like all other instruments, are to be read in the light of surrounding circumstances. It appears that at the time the resolution was passed the street in question was already graded to the official grade of the city—there could, therefore, be no sense in requiring that to be done which was already done. Upon the subject of grading, it would seem, the Board had either previously exercised its power or there had been no occasion for its exercise. It further appears that when a street, which is about to be macadamized, is already graded to the official grade, it is necessary, in order to preserve the official grade, to remove the surface to a depth equal to the thickness of the rock and other materials used in macadamizing. It is also necessary to round up the street toward the centre. This excavating and rounding up may, in one sense, be called grading, but it is not what is meant by that term as used in the third section of the Act in question. Thus there is a certain amount of grading always required as incidental to the macadamizing process, but such grading is regarded as a part of that process and not as constituting a distinct and separate kind or class of street work. In view of these circumstances, therefore, we understand the Board as using the term with reference to this latter grading which is incidental to the work

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of macadamizing, and, out of an abundance of caution for the purpose of guarding against any claim for the grading in question as something apart from that work. The same form of expression was carried into the contract, yet it was understood as referring only to the macadamizing, for no bid or charge was made for grading as such, although the contractor performed all of the work of that character which was required in order to macadamize the street.

By the same process of reasoning the objection that the contract excepts a part of the block, whereas the resolution and order of the Board directs the whole to be macadamized, is met and answered. The Board do not in terms propose to re-macadamize any part of the block, and if a portion was already macadamized their declaration must be read in the light of that fact, and construed as embracing only such portions as were not macadamized. But independent of this the notice is not thereby vitiated because it calls for more work than the contract does. It is nevertheless a good notice for that part which the contract does call for, which is all that is required.

In order to charge the property holder it was necessary to show that the Board had duly declared their intention to have the identical work done for which he is sought to be charged and thereafter ordered it to be done. This appearing, his liability to pay his share of the cost is established, and he cannot excuse himself by showing that other work called for by the declaration of intention was not done or was not included in the contract under which the work for which he is called upon to pay was done. All that he can demand is, that it shall appear that the work for which he pays has been specified in the resolution and order. Whether they specify more or other work is a matter of no consequence, for they are none the less a notice and order as to him for the work which has been done. The question is not what work is included and what has been done under the notice. On the contrary, the question is, does the notice include this particular work which has been done and for which the defendant is called upon to pay.

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If so, the law has been satisfied, and the defendant is charged so far as the question under consideration is concerned.

We are of the opinion that the work in question is specified and described in the resolution and order of the Board within the strict meaning of the statute, and that the contract follows and carries out their true intent and meaning, and that all the steps have been taken which are necessary under the law to charge the defendant.

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE v. PEDRO JUAREZ.

WHAT CONSTITUTES LARCENY.—The felonious and fraudulent taking of property with intent to deprive the owner thereof is larceny, even if the defendant did not intend to convert the same to his own use.

INSTRUCTIONS MUST APPLY TO THE TESTIMONY.—It is not error for the Court to refuse to give instructions asked for in a criminal case, which are not required by or founded on any part of the testimony in the case.

APPEAL from the County Court, Santa Cruz County.

The defendant was convicted and sentenced, and appealed. The other facts are stated in the opinion of the Court.

J. C. Willson, for Appellant, in support of the point that larceny could not be committed unless the property was taken *lucri causa*, cited Russell on Crimes, definition larceny, and authorities there cited.

J. G. McCullough, Attorney-General, for the People, cited *People v. Lockhard*, ante, and *The People v. King*, 27 Cal. 507.

By the Court, RHODES, J.

Indictment for grand larceny.

The appeal is taken from the judgment alone.

The defendant requested the Court to instruct the jury as follows: "The jury must be satisfied, from the evidence,

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beyond a reasonable doubt, first, that the defendant took and carried away, or removed, the property of Robert Majors, as charged in said indictment; second, that the said defendant so took said property with the intention of converting the same to his own use." The Court refused the instruction, on the ground that it tended to mislead the jury, and that the matters to which the instruction related had been fully explained in the charge of the Court. The Court had charged the jury that: "Every person who shall feloniously steal, take and carry away, lead or drive away the personal goods or property of another, of the value of fifty dollars or more, shall be deemed guilty of grand larceny. If from all the testimony you believe the prisoner took and carried, or rode away the horse and saddle, knowing them to be the property of another, and done so with a felonious intent, that is, with intent to steal, or fraudulently and feloniously deprive the owner thereof, the prisoner is guilty of larceny." The defendant assigns as error the refusal of the Court to give the instruction as requested, and contends that in order to a conviction it was necessary to show that the property was taken *lucri causa*, and that it is not enough to show that the intent was feloniously and fraudulently to deprive the owner thereof, as charged by the Court.

It is said by Wharton in his treatise on American Criminal Law (Vol. 2, Sec. 1,781): "If the taking be fraudulent, however, it is not necessary that it should be *lucri causa* and with intent wholly to deprive the owner of the property;" and he cites the case of *Rex v. Cabbage*, Rus. and Ry. 292, which was an indictment for larceny in stealing a horse, which the prisoner, to screen an accomplice, took from the prosecutor's stable and backed into a coal pit and killed; and it being objected that this was not larceny, because the taking was not with an intention to convert the property to his own use, a majority of the Judges held that it was larceny. And the same author says, that the doctrine has received in England several subsequent emphatic recognitions, and he cites several cases to that point. Although the doctrine has been repudi-

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ated in *The State v. Hawkins*, 8 Porter, 461, we think the cases in the English Courts place the matter on the true basis, and that proof of the felonious and fraudulent taking, with intent to deprive the owner of the property, is sufficient to charge the defendant, without proof that he intended to convert the property to his own use.

The second and third instructions asked for by the defendant were properly refused for the reason stated by the Court—that they were not required by or founded on any part of the testimony in the cause.

Judgment affirmed.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
JEROME MADDEN *v.* WILLIAM C. STRATTON.

PLEADINGS IN QUO WARRANTO.—The defendant in an action to try the right to an office may set forth in his answer more than one defense.

LIMITATION OF DURATION OF AN OFFICE.—The Constitution does not prohibit an office created by the Legislature from continuing over four years, but merely limits the incumbent's term which he holds by election or appointment to four years.

RIGHT OF INCUMBENT TO HOLD AN OFFICE AFTER EXPIRATION OF HIS TERM.—The incumbent of an office created by the Legislature, who has been elected or appointed to the same, notwithstanding the expiration of the term for which he was elected or appointed, continues to hold the office until a successor has been duly elected or appointed.

VACANCY IN OFFICE.—When a mode of filling a vacancy in an office is provided by law, other than by the appointment of the Governor, the Governor has no power to fill such vacancy by his appointment.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

On the 8th day of March, 1865, four of the Trustees of the State Library held a meeting and balloted for a Librarian, but failed to elect, their votes being equally divided between two candidates. The Board adjourned without any change in the vote, and made no further effort to elect. The Governor, assuming that the expiration of Stratton's term and the failure of the Board to elect had created a vacancy in the office, on the 22d day of April, 1865, appointed the relator to fill the

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supposed vacancy. Relator then demanded that Stratton surrender up the office, and upon his refusal to do so, commenced the present action.

The law organizing the State Library made the Board of Trustees to consist of five members. The Governor and Chief Justice were *ex officio* members of the Board. The Chief Justice did not meet with the Board on the 8th of March, 1865. The Governor and one other Trustee voted for J. L. Perkins, and the other two voted for defendant.

Defendant immediately qualified, and in his answer as a separate defense set up that by Section twelve of Article V of the Constitution, the Governor was disqualified from acting as Trustee, and that as the three legal Trustees who voted constituted a quorum of the Board, and he received two votes, a majority of the three, he was re-elected for a new term of four years.

The Court below gave judgment that the defendant was guilty of usurping the office and that he be excluded from it, and that relator was entitled to the office.

Defendant appealed.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

The office of Librarian had not become vacant, upon the supposition that the Trustees failed to elect a successor, on the 8th of March, 1865. The right of the incumbent to hold the office until the election and qualification of a successor results from a rule of the common law founded on public necessity. (*State v. Lusk*, 18 Miss. 336, 339; *Commonwealth v. Hawley*, 9 Barr, 516, 518.) The wisdom of the rule has been recognized in the organic law of this State by incorporating the rule itself into its own structure. (*People v. Oulton*, ante 44.)

It remains to be seen whether the relator is a duly elected and qualified successor. He claims title to the office solely by *executive* appointment. It is provided by the Constitution, Article V, Section eight:

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“When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people.”

The lawful exercise of the power depends upon the concurrence of two circumstances: First, *the office must have become vacant*; second, *there must be no other lawful mode of filling the vacancy*. Neither of these existed.

First—There was no vacancy in the office of Librarian. Section twenty-three of the Act of 1863, “concerning offices,” provides that: “Every office shall become vacant upon the happening of either of the following events before the expiration of the term of such office: First, the death or resignation of the incumbent,” etc.

A failure to elect is not one of the events mentioned in the section.

George Cadwalader, for Respondent.

Conceding that Stratton might hold over, he could only do so up to the time the Attorney-General filed this information. A State might never see fit to fill an office, or the property of the office might be destroyed, still the original appointee could not claim that the contract of the State was to keep him until his successor was appointed. The contract of the State is for the term expressed in the commission—no longer. Hence Stratton must yield his office, though the relator has no title to it. It is the primary duty of the Court under section three hundred and twelve, to determine the right of the defendant to the office. This suit is between the people of the State and the defendant. The relator is only an adjunct. The defendant can gain nothing from the weakness of the relator's title. (*People v. Abbott*, 16 Cal. 358.)

In *Gano v. The State*, 10 Ohio, N. S. 237, it was declared competent for the Court to oust the usurper without determin-

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ing the right of the claimant. Our Constitution has given to the Governor the power to fill all vacancies in office until such a time as the original appointing power acts, and this has been the uniform construction placed by this Court upon Section eight of Article V.

The words in the section, "*and no mode is provided in the Constitution and laws for filling such vacancy,*" have been construed to mean that the appointing authority have failed or neglected to fill such vacancy; and this interpretation is not an unjust one, because it is a safeguard to the State and insures the performance of all State functions, and the operation of all laws. Divest the Governor of such authority, and if the incumbent of an office retires at the end of his term, there would be an office without an officer.

The first case is that of *The People v. Mott*, decided by the first Chief Justice of this State. The report thereof appears in the appendix to the third volume of California Reports. (*People v. Baine*, 3 Cal. 510; *People v. Reid*, 6 Cal. 288; *People v. Mizner*, 7 Cal. 523; *Brooks v. Meloney*, 15 Cal. 58.)

By the Court, CURREY, J.

This is an information in the nature of a *quo warranto*, having for its object — first, the exclusion of the defendant from the office of Librarian of the State Library; and second, the investiture of the relator with the rights, privileges and franchises thereof.

The defendant was appointed to the office on the 16th of March, 1861, for the term of four years, and became duly qualified two days thereafter. Since that time, until issue was joined in this proceeding, he has exercised such office and been in the enjoyment of its privileges, franchises and emoluments.

On the 22d of April of the present year, the Governor of the State, assuming that the office was vacant, by reason of the failure of the Board of Trustees of the State Library to elect a successor to the defendant, appointed and commissioned

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the relator to hold the office of Librarian of the State Library until the Board of Trustees should elect his successor. On the day of his appointment, the relator took the constitutional oath, filed his official bond, and thereupon demanded of the defendant a surrender of the office. The defendant refused to comply with the demand, whereupon this action was brought.

The case was submitted to the District Court upon the pleadings, and on the 12th of May judgment was rendered, ousting and excluding the defendant from the office, its franchises and privileges, and it was further adjudged that the relator was entitled to said office, and to all its rights, privileges and franchises, and he was declared to be "the legal and rightful occupant of said office of Librarian of the State Library."

This judgment the defendant, who has appealed, insists is erroneous on the following grounds:

1. Because there was no vacancy in the office of Librarian to be filled by Executive appointment.

2. Because the appellant, at the time of the relator's appointment, was, and still is, lawfully holding said office, and is justly entitled to all its rights, privileges and franchises.

The first duty which the Court has to perform is to determine as to the right of the defendant to the office under the circumstances disclosed by the pleadings of the parties. (Practice Act, Sec. 312.) By the information, it is alleged in terms that during all the time since the 18th of March last, the defendant has usurped, intruded into, and unlawfully held the office of State Librarian, and during all such time has exercised the liberties, privileges and franchises thereof against the dignity of the State and to the damage and prejudice of the relator.

The information sets forth that the defendant was duly appointed on the 16th of March, 1861, to fill the office of State Librarian for the period of four years, and that he became duly qualified and entered upon the discharge of its duties on the 18th of the same month. The defendant admits in his answer this averment, and immediately thereupon avers

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that ever since the last mentioned day he has "continued to fill said office and exercise the functions thereof, under the laws of said State, of his own proper right. That at no time has there been a vacancy in said office of Librarian since defendant so entered upon the same." He then further answers, claiming that since the 18th of March last he has lawfully exercised the office of Librarian by virtue of his appointment to it by the Board of Trustees of the State Library, on the 8th of March, 1865. In reference to this branch of the answer, the facts stated and the position of the parties are in substance the same as appear in the case of *Stratton v. Oulton*, ante 44, and therefore need not be repeated in this place.

The counsel for the people and relator insist that the defendant's right to the office can be maintained under the pleadings in this case only on the ground that he was duly elected or appointed Librarian by the Board of Trustees in March last. In our opinion the defendant may also rely upon the facts which are admitted by the pleadings. That if he has a right in fact to exercise the office under the circumstances stated in the complaint and admitted by the answer, he is not precluded from relying on the circumstances so alleged and admitted, though he claims title to the office by virtue of an alleged appointment thereto by the Board of Trustees, in March, 1865. In short, in pleading he was at liberty to set forth by answer as many defenses as he had. (Practice Act, Sec. 49.)

In considering the case we shall dispense with any further reference to the appointment of defendant as Librarian, assumed by him to have been made by the Trustees in March, 1865.

I. The ground on which it is claimed the defendant is a usurper of and intruder into the office is, that the term for which he was appointed in March, 1861, had expired when this action was commenced, and that under the Constitution his lawful continuance in the office and in the exercise of the functions belonging to it beyond the term of four years was and still is an impossibility.

Section seven of Article XI of the Constitution is as follows:

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"When the duration of any office is not provided for by this Constitution, it may be declared by law, and if not so declared such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office not fixed by this Constitution ever exceed four years."

In the abstract, "office" signifies a place of trust. In legal idea, an office is an entity, and may exist in fact, though it be without an incumbent. In this sense the word "office" is used in a number of instances in the Constitution and also in the statutes. An office is also defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. (*Miller v. Supervisors, etc.*, 25 Cal. 98.) The section of the Constitution quoted declares that the duration of any office not fixed by the Constitution shall never exceed four years. This does not mean that the office shall cease to exist after the constitutional limit declared has expired; but the word "duration" evidently means the term which may be fixed by the constituting authority as the limit beyond which the incumbent's right by election or appointment to the office shall not extend. The constitutional inhibition operates as a total restraint to the creation of a term of office by election or appointment of longer duration than four years. So when, by an Act of the Legislature, an office is created and provision is made for filling it with a person who shall be invested with the right and authority to perform the functions belonging to it, for the period, for instance, of two years, the term thus prescribed is limited by a law of as binding obligation as the Constitution itself, provided it is in no sense repugnant to the organic law; and the incumbent's term is complete and at an end upon the expiration of the time prescribed for its duration. But notwithstanding the incumbent's term in such case be at an end by lapse of time, it is not to be gainsaid that he may remain in the exercise of the duties of the office as its *locum tenens* until his successor is elected or appointed. In such case he holds the position not as the incumbent by election or appointment, but because the public necessities require that the office shall not be with-

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out a person in its possession having authority to perform the duties appertaining to it. This continuance in office is not an extension of the term where the term is expressly limited, though it is an incumbency by sufferance for the public convenience, subject to be determined whenever the proper authority may act effectively. Now whether the term of office be two years or four years we apprehend can make no difference. In the latter case, as well as in the former, he who was the incumbent of the term expired is permitted to remain in office, invested with it as its *locum tenens*, until a successor is authorized to enter into and upon the discharge of its functions, because the public necessities demand that the duties of the office should be duly administered. (*Stratton v. Oulton*, ante 44, and the cases therein cited.) The views above expressed in our judgment are in no sense opposed to the letter or spirit of the seventh section of the eleventh Article of the Constitution, but in harmony with it.

II. In the next place was the office of Librarian vacant to a legal intent when the relator was appointed to it by the Governor, or when this action was commenced? And if it was so vacant was there no mode provided by the Constitution or any law of the State for filling the vacancy otherwise than by executive appointment?

Section eight of Article V of the Constitution reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the Governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people."

The defendant, as the occupant of the office of Librarian of the State Library, held the position provisionally—that is, subject to be superseded by the appointment by the proper authority of another person to the office. In a restricted and technical sense, perhaps it may be said the office was vacant—that is, without an incumbent whose tenure was by lawful appointment and subject to no condition or qualifications.

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Then, if in the sense suggested, the office of Librarian was vacant at the time the relator was appointed to it, it must be ascertained that there was no other mode than by executive appointment provided by the Constitution or by the law for filling such vacancy before it can be admitted that the Governor had the power to grant a commission to the relator or to any other person. By the Act of 1861, entitled "An Act prescribing rules for the government of the State Library," (Laws 1861, p. 45,) a mode was and still is provided for appointing a successor to the defendant. The power of appointment in this instance was conferred by the statute upon the Board of Trustees of the State Library. This duty was cast upon them for the reason, we may suppose, that the library was placed by the law under their direction and control, and they must be deemed the best judges of the qualifications and fitness of the person to whom should be intrusted the important and delicate duties of Librarian. Thus it appears that a mode for filling the office of Librarian was provided by law otherwise than by executive appointment.

The condition on which the exercise of the power of the Governor to appoint a successor to the defendant is made to depend by the Constitution did not exist, and therefore the commission granted to the relator was without authority and void.

At the time of the commencement of this action the defendant was in fact holding the office of Librarian, and performing the functions appertaining to it. In *Stratton v. Oulton*, ante 44, we held that he was Librarian *de jure*, notwithstanding the term for which he was appointed had expired. The reasons for the conclusion to which we came on the subject are stated in full in the opinion of the Court, and seem to us strongly fortified by the authorities, both English and American, therein referred to. It is said in that case that "the rule of the common law, as settled by the case cited, conserves the public good by conserving the methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences, it might result in a suspension

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of business in every department of the public service." We may say, at the risk of repeating what has been said in substance already, that the rule which continues an incumbent in office until his successor is duly elected and qualified, is to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. The incumbent's right in such case results from a rule of the common law founded on public necessity; therefore, it is the defendant's right to hold the office until all has been done which is required by law to give another title to it.

The defendant came into the office by lawful authority, and by the terms of his appointment held the place for four years. To his appointment and incumbency, and to the failure of an election and qualification of a successor, and to the rule of the common law to which reference is made, must be referred the defendant's right to continue in the exercise of the office and the performance of its duties until his successor shall be appointed and qualified as provided by law. When a successor shall be thus appointed and qualified, and the defendant shall be called upon to give place to him, then his tenure *de jure* will cease to exist.

The judgment of the District Court must be and is hereby reversed; and, further, the District Court is directed to enter judgment in favor of the defendant, dismissing the information and the complaint of the relator, with costs, etc.

Mr. Chief Justice SANDERSON expressed no opinion.

SAWYER, J., concurring specially.

I concur in the views expressed by Mr. Justice Currey, and add a suggestion upon one point. The relator claims the position under an appointment from the Governor, who assumed to act under Section eight, Article V, of the Constitution, which authorizes the Governor to make an appointment, "when any office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy."

Opinion of Sawyer, J., concurring specially.

But the Act of 1861 gives the appointing power to the Board of Trustees; hence there is a mode provided by law for filling any vacancy that may exist. This Board could at all times, and still can, at its own pleasure, meet and appoint a Librarian. This body is still in existence, and nothing but the volition of the members can for a moment delay an appointment. It matters not that it does not adjourn from day to day, for it can meet at any time irrespective of adjournments. Had the Board met and failed to elect, and then adjourned for an hour to consider the matter, or for any other purpose, I apprehend that no one would claim that the Governor could, during the recess, fill the vacancy, and thus take the appointment out of the hands of the regularly authorized appointing power. Yet the functions of the body authorized by law to fill the vacancy are no more suspended now than they would be during the recess of an hour, because they can meet at any moment when it suits their convenience or pleasure to do so. The case might be otherwise, where the body, when once dissolved, could not be re-organized except at the will or call of another not a member — such as the Legislature. Such were the cases of *People v. Baine*, 6 Cal. 510; *People v. Reid*, 6 Cal. 289; *People v. Mizner*, 7 Cal. 522. The reason in that instance is, that the body when once adjourned *sine die*, so far as its own volition is concerned, is incapable of performing any further functions. There was then a mode of filling the vacancy provided by law in existence at the time the appointment of the relator was made, and the conditions upon which the Governor was authorized to act did not exist.

These views are supported by the cases of *People v. Fitch*, 1 Cal. 536; *People v. Mizner*, 7 Cal. 523.

A. B. CHAPMAN v. J. L. MORRIS AND OTHERS, COMPOSING THE BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, AND CHRISTOBAL AQUILAR, TREASURER OF LOS ANGELES COUNTY.

FUNDING COUNTY WARRANTS DRAWING NO INTEREST.—A law authorizing a county to fund its outstanding warrants which were not to draw interest, and to make the bonds given in exchange therefor bear interest, is not unconstitutional.

APPEAL from the District Court, First Judicial District, Los Angeles County.

The Act of April 5th, 1861, to fund the indebtedness of Los Angeles County, then outstanding in the form of county warrants, provided that the county should not pay any interest on any warrants issued after July 1st, 1861.

In 1864 the county had outstanding a large amount of warrants unpaid, which had been issued under the Act of 1861, and did not draw interest. The Act of April 4th, 1864, authorized the county to fund these outstanding warrants with bonds running twenty years, and bearing interest at seven per cent per annum. The plaintiff, who was District Attorney of the county, had issued to him a warrant for his salary on the 8th day of February, 1864, for six hundred and seventy dollars. The county officers were proceeding to fund the warrants under the Act of 1864, with interest bearing bonds, when he commenced this action to enjoin the Board of Supervisors and Treasurer from issuing the bonds.

Defendants demurred to the complaint, the demurrer was sustained, and the Court gave judgment for defendants.

Plaintiff appealed.

Crockett & Whiting, for Appellant.

Could the Legislature modify the Act of April 5th, 1861, as was attempted to be done, in respect to interest, by the tenth section of the Act of April 4th, 1864?

By section ten of the first named Act, the claims authorized to be funded could be paid in no other manner. Creditors

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were forced to fund their claims or get nothing. They were to accept bonds bearing a low rate of interest and payable at a distant period. And as an inducement to the creditors to accept these hard terms, and as an assurance to the taxpayers that they were thereafter to be oppressed with no payment of interest, except that to be paid on the bonds, the Legislature, in section eighteen, declared that no interest should be paid on warrants to be issued after July 1st, 1861. On the faith of this enactment the debt was funded; and subsequently to July 1st, 1861, other warrants were issued by the Auditor, which bore no interest, and could bear none as the law stood. The holders of these warrants knew, when they accepted them, that they were to receive no interest. It was, to all intents and purposes, a *contract* between the county and the holders of the warrants, that no interest was to be paid. A contract made by a municipal corporation is as much within the protection of the Constitution as the contract of a private person. (*Benson v. The Mayor of New York*, 10 Barb. 223; *Bayley v. The Mayor, etc.*, 3 Hill, 531; *Angell & Ames on Corporations*, § 33.)

V. E. Howard, for Respondents.

The claim for interest was equitable, as the county could not pay, according to the face of the warrant, but deferred payment. If not legal, still as the interest was a good, equitable claim, the Legislature might authorize the payment. (*People v. Burr*, 13 Cal. 351.)

The power of the Legislature to authorize a county to fund its indebtedness and postpone creditors, does not appear to be an open question. (*Hunsacker v. Borden*, 5 Cal. 290; *McDonald v. Maddux*, 11 Cal. 187.)

By the Court, SAWYER, J.

Section eighteen of the Act of 1861, authorizing Los Angeles County to fund its indebtedness, provides that no interest shall

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be paid on any warrant drawn on the County Treasurer after July 1st, 1861.

In 1864 another Act was passed authorizing the further funding of the indebtedness of the county, which should accrue prior to July 1st, 1864; and the Act provides, that, on all indebtedness entitled to be funded on that day, interest shall be allowed at the rate of ten per cent per annum from the date of the protest of the same by the County Treasurer, to said July 1st, 1864. This provision embraces warrants that were not to bear interest under the Act of 1861.

The only question made by the appellants is, that the provision authorizing interest to be allowed on those warrants, which, by the Act of 1861, bore no interest when the indebtedness was incurred, and the warrants drawn, is unconstitutional and void. The bonds to be issued were made payable in twenty years, with interest at only seven per cent. The county being unable to pay its warrants as they were issued, the postponement of the payment for a period of twenty years, at the low rate of seven per cent per annum interest, would seem to be a sufficient consideration for allowing interest from the time of protest for non-payment till the time of funding. At all events, the postponement gave the holders an equitable claim to the allowance of interest which it was competent for the Legislature to recognize, and authorize to be paid. The principles announced in *Blanding v. Burr*, 13 Cal. 349; *Contra Costa County v. Board of Supervisors of Alameda County*, 26 Cal. 649; and *People v. Pacheco*, 27 Cal. 176, are applicable to this case. Upon the authority of these cases the provisions of the Act complained of must be held to be constitutional.

Judgment affirmed.

THE PEOPLE v. THOMAS J. STEWART.

EVIDENCE OF CHARACTER IN CRIMINAL CASE.—On a trial for the crime of murder the defendant is entitled to introduce testimony for the purpose of proving his character for peace and quiet to be good. To that extent his character is involved in the issue of not guilty.

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CASES OVERRULED.—The cases of *People v. Josephs*, 7 Cal. 120, and *People v. Lombard*, 17 Cal. 316, as to evidence of good character in doubtful cases, overruled.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The defendant was indicted for the crime of murder, and convicted of murder in the second degree, and appealed.

The other facts are stated in the opinion of the Court.

E. Cook, for Appellant.

The Court erred in refusing evidence of good character of the defendant. (Wharton, 5 Ed. Sec. 636, and authorities cited; *Ib.* 824; 2 Russell on Crimes, 784; *People v. White*, 24 Wend. 583; *People v. Van*, 12 Wend. 83.)

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, C. J.

The Court below erred in excluding the testimony offered by the defendant for the purpose of proving his character for peace and quiet to be good. To that extent his character was involved in the issue of not guilty, and it was competent for him, if he could, to prove it to be good. (3 Greenleaf on Evidence, Sec. 25, *et sequens*.)

The cases of *The People v. Josephs*, 7 Cal. 120, and *The People v. Lombard*, 17 Cal. 316, so far as they may seem to hold a contrary doctrine, are not law. It is not for the Court to determine whether the case is doubtful or not, and if doubtful exclude evidence as to character. That question, like all other questions arising upon the evidence, is for the jury. It is the duty of the Court to admit all evidence which is relevant to the issue, and leave the jury to determine its weight. After the evidence is all in the Court may, as a matter of law, instruct the jury that evidence as to previous good character is not entitled to any weight except in doubtful cases.

Judgment reversed and new trial ordered.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE *ex rel.* B. F. ALEXANDER v. CHARLES
H. SWIFT, PRESIDENT OF THE BOARD OF TRUSTEES OF
SACRAMENTO COUNTY.

WATERWORKS FUND OF SACRAMENTO.—The President of the Board of Trustees of the City of Sacramento has no authority to sign a warrant drawn by the Auditor on the Treasurer, payable out of the "Waterworks Fund," for sitting up the Police Court Room, though the room is in the waterworks building.

WARRANTS DRAWN BY AUDITOR OF SACRAMENTO.—If the Auditor of the City of Sacramento, in drawing a warrant on the Treasurer, incorrectly designates the fund out of which the demand should be paid, it is not the duty of the President of the Board of Trustees to sign it.

This was an original proceeding commenced in the Supreme Court.

The other facts are stated in the opinion of the Court.

George R. Moore, for Relator.

The Auditor has the power, and he is the only officer upon whom such authority is conferred, *to designate the fund out of which a demand shall be paid.* In this, too, he has a discretion which he is bound by his oath and his bond to exercise legally and honestly, and to the best of his knowledge and ability. If in this matter he fails or neglects to do his duty properly, the injured party has his remedy: It seems to us that no proposition can be clearer than the one under discussion, that in the performance of these duties the Auditor acts entirely independent of the President, and that the President can in no manner control or dictate to him. If the President had the power to veto the acts of the Auditor as well as the Board of Trustees, his authority would be almost unlimited and absolute; but such is not the letter or meaning of the law. When a claim is presented to the Board it is acted upon, and either allowed or rejected; if allowed, it then goes to the Auditor, who also carefully examines it, and either allows or rejects it. If he allows it he determines the fund out of which it must be paid. This frequently is no easy matter, as often a demand may almost as properly be paid out of one fund as another. But some one must perform this duty, and the law has designated the Auditor.

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Charles H. Swift, in pro per.

The account could not legally be allowed, as it was based on and referred to an ordinance that was void in law. (Laws 1863, p. 421, Sec. 9; *Ib.* 1863, p. 426, Sec. 27.) The President cannot sign a warrant drawn on the Waterworks Fund excepting for the purposes described in section twenty-seven, and this claim is not of that character. (Laws 1863, p. 426, Sec. 27.) The President is prohibited signing warrants for accounts approved by the Auditor, unless he finds all the proceedings legal. (Laws 1864, p. 484, Sec. 1.)

Admitting the claim itself to be legal and just, and for "materials furnished in finishing Police Court room," the Auditor committed an error in certifying that the same was payable from the Waterworks Fund, and drawing his warrant thereon. The only class of claims payable from said fund being set forth in Laws of 1863, p. 426, Sec. 27.

It is not the duty of the Auditor to *designate* the fund out of which a claim is payable, but to "satisfy himself out of what fund it is payable" according to law.

By the Court, CURREY, J.

The relator has applied for a writ of mandamus to compel the respondent to sign a warrant drawn by the Auditor of the City of Sacramento on the Treasurer of the city, directing him to pay to the relator five hundred and seventy-four dollars and thirty-eight cents out of the money in the Waterworks Fund. The amount for which the warrant was drawn was due the relator on the 2d of January, 1865, for materials furnished and work performed by him in fitting up the Police Court room in the waterworks building in Sacramento, of which he rendered an account to the Trustees, which on the 9th of January, they examined and allowed as correct. The account was then examined and approved by the City Auditor, who indorsed on it his approval, and designated the same as payable out of the Waterworks Fund. (Laws 1863, p. 415.)

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The warrant thus drawn was presented to the President of the Board of Trustees for his signature. He refused to sign it, and hence this application.

On the 2d of January, 1865, the Trustees passed an ordinance providing that: "The sum of six hundred dollars is hereby appropriated from the Waterworks Fund to pay B. F. Alexander for work done finishing Police Court room in waterworks building."

The respondent justifies his refusal to sign the warrant on two grounds. The first is, that the Board of Trustees had no power to pass the ordinance appropriating the money of the Waterworks Fund for the payment of the demand of the relator; and the second is, that the Auditor had no authority to designate the Waterworks Fund as that from which the warrant should be paid.

The Act to incorporate the City of Sacramento (Laws 1863, p. 415) confers the power in general terms upon the Board of Trustees to make by-laws and ordinances not repugnant to the Constitution of the United States or of the State of California. Then follows a particular enumeration of the powers of the Board of Trustees. Among these is the authority to make contracts in behalf of the city, and to examine and liquidate all accounts against the city. The same Act specifies in detail the duties of the principal officers of the corporation. It is made the duty of the President of the Board of Trustees to sign all warrants drawn upon the City Treasurer; but before he shall sign any warrant, he shall ascertain from the books of the Auditor that there is sufficient money in the proper fund to pay the same. (Laws 1864, p. 484.)

The revenues of the city are derived, under the Act, from various sources, viz: Taxes, licenses, harbor dues, water rents and fines, and these revenues are directed to be apportioned and distributed in a particular manner. The revenues derived from the waterworks it is declared shall be paid into a fund to be known as the "Waterworks Fund," which fund is primarily devoted to the payment of all necessary expenses to carry on and keep in order the waterworks, and it is made the duty of

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the Auditor at the end of every three months to apportion the residue of this fund, if there be any after such payment, as other funds of the city are required to be apportioned. (Act of 1863, p. 426, Sec. 27.) The twenty-sixth section of the Act provides that the revenues derived from taxes, licenses, harbor dues, net water rents, and fines collected in the Police Court or otherwise, except as provided in section twenty-seven, when paid into the Treasury shall be appropriated and divided as follows: Fifty-five per centum to an Interest and Sinking Fund, which shall be applied to the payment of the annual interest upon the bonds legally issued for city indebtedness, issued under the Act of 1858; the excess of said fund, after the payment of said interest, shall be applied to the redemption of said bonds, in such manner as the Board of Trustees may determine; eight per cent to a School Fund, to be applied to the support of schools within the limits of said city; seven per cent to a Fire Department Fund, and the residue to a fund to be called the General Fund, to be used for all such necessary municipal expenses, including salaries, as not otherwise provided for in this Act. Then follows a proviso which requires no special notice.

The Waterworks Fund *eo nomine* cannot be apportioned by ordinance nor can it be reached by the designation of the Auditor, except in accordance with section twenty-seven of the Act. If the relator's demand had been for necessary expenses to carry on and keep in order the waterworks, there could not have existed any objection to the ordinance, nor would the respondent have been justified in withholding his signature from the warrant. But the work of fitting up the Police Court room, though it was in the waterworks building, did not pertain to carrying on or keeping in order the waterworks, and hence the expenses of such work could not be charged to the Waterworks Fund. As we have already seen, this fund can be reached directly only for the objects of the waterworks. Whatever may remain after the necessary expenses mentioned in the Act have been paid, is to be appropriated and distributed to other purposes, that is to say, fifty-

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five per cent of this surplus or "net water rents" to an Interest and Sinking Fund; eight per cent to a School Fund; seven per cent to a Fire Department Fund, and the residue—thirty per cent—to the General Fund. These several funds, except the last, are apportioned to particular uses. The holders of the bonds mentioned have an interest in the fifty-five per cent named. Those who have children to educate are particularly concerned in the just application of the eight per cent assigned to the School Fund; and those having property to be preserved from destruction by fire, are interested in the Fire Department Fund. The Act has appointed the General Fund for the payment of such municipal expenses as are not otherwise provided for.

It is urged on behalf of the relator that it is the province of the Auditor to designate the fund out of which the demand shall be paid. It is undoubtedly his duty to so designate, but at the same time he must designate correctly, otherwise it is not the duty of the President of the Board to sign the warrant. If the Auditor had certified that the relator's demand should be paid out of the interest and Sinking Fund or out of the Fire Department Fund, would that designation have been binding and conclusive on the President of the Board of Trustees? Is the relator in any better condition because the Waterworks Fund was designated by the Auditor as the source from which the demand should be paid? These questions can only be answered in the negative. The President of the Board of Trustees is the chief officer of the corporation whose duty it is to supervise the conduct and acts of its subordinate officers. It is his duty to sign warrants properly drawn on the City Treasury, provided he shall ascertain from the proper source, before signing any warrant, that there is sufficient money in the proper fund to pay the same. Here is an important condition which must precede rightful action on his part. He must ascertain that there is in the proper fund money enough to pay the amount of the warrant before he signs it. When the warrant in question was presented to him

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he must be presumed to have known that any money in the Waterworks Fund could not be properly applied to the payment of it, and therefore he was in duty bound to refuse it his signature.

We are of the opinion the respondent was justified in refusing to sign the warrant, for the reasons stated by him in his answer.

The application must be denied, and it is accordingly so ordered.

JOSEPH KILE AND REESE B. THOMPSON v. SILAS TUBBS.

PRE-EMPTOR AND PRIOR POSSESSOR.—One who is in possession of public land, and has secured a right of pre-emption thereto under the laws of the United States, stands in such relation to the United States Government as entitles him to retain the possession as against a prior possessor who is as a mere trespasser.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Plaintiffs recovered judgment in the Court below, and defendant appealed.

The other facts not stated in the opinion of the Court will be found in 23 Cal. 442, in the opinion delivered by Mr. Justice Crocker.

J. H. Budd, for Appellant.

Defendant founded his defense not only on the defects of plaintiffs' title, but by showing a right of possession through the pre-emption laws of the United States.

Defendant was a qualified pre-emptor under the laws of the United States. He had complied with the pre-emption laws so far as in his power. He had a right, as a pre-emptor, to occupy unsurveyed land of the United States. (Laws of U. S., Vol. 12, 410, Vol. 10, 305, 309, 310, 576.) He had acquired rights under the pre-emption laws that the Courts

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will regard and protect. (*McAfee v. Kein*, 7 Smede and Marshall, 780; *Little et al. v. The State of Arkansas*, 9 Howard, 333-5.) He had so connected himself with the title of the United States as to be able to attack a patent for the land from the State. (*Kile v. Tubbs*, 23 Cal. 442.)

Yet the Court, in effect, instructed the jury that this claim under the pre-emption laws was not available as a defense against a right acquired by prior possession.

P. L. Edwards, for Respondents.

By the Court, SAWYER, J.

This is an action to recover lands. Plaintiff relies for a recovery, firstly, upon a patent from the State issued under the Act providing for the sale of swamp lands; secondly, upon prior possession.

The defendant claims that the lands are not swamp lands, and attacks the patent on the ground that it is void, as having been issued without authority. He claims to be lawfully in possession, claiming in good faith a right of pre-emption under the laws of the United States. There was conflicting evidence upon the question as to whether the lands are swamp lands within the meaning of the Act. Also testimony as to the possession of the respective parties, and testimony tending to show that defendant is a person authorized to acquire a pre-emption right, and that he had taken the proper steps to acquire it. It was held in this case when it was before the late Supreme Court, that a person who has secured a right of pre-emption stands in such a relation to the United States Government—the source of title—as entitles him to attack the patent collaterally, as being void for want of power to grant the land covered by it. (23 Cal. 441.) A similar ruling was made in *Terry v. Megerle*, 24 Cal. 609.

The instructions of the Court make no reference to the patent, but seem to have been addressed solely to the question of prior possession. The fourth instruction, given under

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exception on the part of defendant, is as follows: "That if the jury believe from the evidence that the land claimed by the plaintiffs in controversy was in the possession of Stayton, through whom plaintiffs claim, prior to the possession of the defendant, it was sufficient for plaintiffs to maintain the action, unless that possession was abandoned; that the question of abandonment was one of intention, of which they were to judge exclusively; that in order to do so they must take into consideration all the facts and circumstances before them in evidence."

The instruction is erroneous, because it wholly ignores any rights that might have been acquired by the defendant under the pre-emption laws. There was testimony bearing upon the question, and this testimony is an element which should have been considered in the instruction.

For this error the judgment must be reversed and a new trial granted, and it is so ordered.

THE PEOPLE v. U. S. GASSAWAY.

PRINCIPAL AND ACCESSORY AFTER THE FACT.—One indicted for the crime of robbery as principal, cannot be convicted of the offense charged in the indictment if the evidence shows that he was only an accessory after the fact.

NAME.—Upon a trial for robbery, if the evidence is circumstantial and involves the inquiry whether the defendant was guilty, if guilty at all, as principal or as an accessory after the fact, the Court should instruct the jury, if requested, that the defendant cannot be convicted if he was only an accessory after the fact.

APPEAL from the County Court, Butte County.

The facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, CURREY, J.

The defendant was indicted with four other persons for the crime of robbery, charged to have been committed on the 25th

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of June, 1864, in the County of Butte. He pleaded not guilty. He was tried and found guilty and then sentenced to be imprisoned in the State Prison for the term of six years.

It was proved on the trial that a robbery was committed on the day named, near Bidwell, in the County of Butte, by several persons who were disguised. The defendant was encamped at the time with his family near the scene of the robbery, and it was sought to implicate him as an accessory before the fact, with the commission of the crime, by proof of circumstances tending to establish his connection with it. All the evidence in the case, so far as this defendant was concerned, was of a circumstantial nature.

When the case was finally submitted at the trial, the defendant's counsel requested the Court to instruct the jury that, "whilst knowledge of the commission of a crime, acquired after the same had been perpetrated, connected with the act of concealing the same or harboring or protecting the person charged, would constitute the offense of accessory after the fact, yet such knowledge and acts do not constitute, nor are they of the offense of which the defendant is indicted." The Court refused to so instruct the jury, and the defendant excepted.

The evidence in the case was of a character involving the inquiry whether the defendant was guilty, if guilty at all, of the offense charged in the indictment, or as an accessory after the fact. The charge requested appears to have been designed to instruct the jury that in the event the evidence satisfied them the defendant acquired a knowledge of the commission of the crime after its perpetration and concealed it, or harbored and protected the persons charged with its commission then he was only an accessory after the fact, and could not be found guilty as an accessory before the fact, or, in other words, as a principal.

By the eleventh section of the Act concerning crimes and punishments an accessory before the fact is to be deemed and considered as a principal, and punished accordingly. The twelfth section of the same Act defines an accessory after the

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fact to be a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime. There is an important and material difference between an accessory before the fact and an accessory after the fact. The former is a principal, and is to be punished as a principal. If found guilty as an accessory to the commission of a robbery before the act of robbery is perpetrated, he may be punished by imprisonment in the State Prison for any length of time between one year and the time of his death. But if a person be found guilty as an accessory after the fact, the statute provides that he shall be imprisoned for any term not exceeding two years, and fined in a sum not exceeding five thousand dollars, according to the circumstances of the case and the enormity of the crime.

If the jury had been instructed as requested, or so substantially, it may be they would have found a different verdict. We think, considering the nature of the evidence, the defendant was entitled to the benefit of the instruction requested, and that he may have been injured by its refusal.

The judgment is reversed and the cause remanded for a new trial.

GEORGE W. TYLER v. L. D. GREEN.

PRE-EMPTION RIGHT TO PUBLIC LAND—PROOF OF.—In an action to recover possession of public land, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptor under the laws of the United States, he is entitled to prove the necessary facts to establish his pre-emption right.

SAME.—Where a defendant has not been called upon to state whether he expected to prove all the facts essential to his defense, his testimony should not be rejected, because his offer does not embrace every fact necessary to establish it.

IMMATERIAL ERROR.—A judgment will not be reversed for an error that could not affect the rights of the parties.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Argument for Appellant.

Previous to 1863, J. D. Able had been for four or five years in possession of a tract of land in San Joaquin County, and was residing on the same, and had it inclosed. In 1862, Frank Stewart recovered a judgment against him for over two thousand dollars. An execution was issued on the judgment, and the land was sold by the Sheriff to the plaintiff in this action, who in due time received a Sheriff's deed. In the spring of 1863, Able left the land, and Green, the appellant, went into possession. Tyler, the respondent, brought this action to recover possession, claiming to recover on his Sheriff's deed and Able's prior possession.

It appeared that the day before the trial the Sheriff had amended his return on the execution by inserting a more particular description of the land levied on. The defendant objected to the amended return being received in evidence. The Court overruled the objection. Plaintiff recovered judgment, and defendant appealed.

The other facts are stated in the opinion of the Court.

J. H. Budd, for Appellant.

The amended return of the Sheriff was not competent evidence against defendant, Green—Green not having been a party to the attachment suit. (*Newhall v. Provost*, 6 Cal. 85; *Webster v. Hayworth*, 8 Cal. 41; *Emerson v. Upton*, 9 Pick. 167; *Freeman v. Paul*, 3 Greenl. 260; *Putnam v. Hall*, 3 Pick. 445.)

Defendant Green had a right to occupy unsurveyed lands of the United States in California, if a qualified pre-emptor. (Laws of the United States, Vol. 12, p. 410, Sec. 7; *Ib.* Vol. 10, p. 305; *Ib.* Vol. 10, pp. 309, 310, Secs. 10 and 12; *Ib.* Vol. 10, p. 576, Chap. CXXIX.)

Green, by his settlement on the land sued for, if a competent pre-emptor, acquired rights that the Courts must recognize and respect. He is not a wrongdoer. (*McAfee v. Kein*, 7 Smedes & Marshall, 780; *Little et al. v. The State of Arkansas*, 9 Howard, 333-5; *Terry v. Megerle*, 24 Cal. 609.)

In this case Green, the defendant, has connected himself

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with the title of the United States as the owner, (*Kile v. Tubbs*, 23 Cal. 442,) and one connecting himself with the title of the owner can always successfully defend against one who claims merely as prior possessor. (*Moore v. Moore*, 8 Shepl. 350; 1 Leon, 301; 2 Green. Ev. Sec. 625.)

Tyler & Cobb, for Respondent.

A party in possession of public lands may mortgage his interest, and his right may be taken and sold upon execution. (*Whitney v. Buckman*, 13 Cal. 536. See, also, 3 Cal. 263; 4 Cal. 247; 12 Cal. 290.)

Is it necessary that defendant should retain possession of any portion of the land in controversy, to give him the benefit of his pre-emption right, if he has one, when the lands are surveyed and the plats returned to the Land Office? We say no. His pre-emption claim is just as perfect now, and he can enforce it just as well when the land is surveyed, if he is now ousted by the action of this Court, as he could if he was to remain in possession of the whole land up to that time.

By the Court, SAWYER, J.

This case differs from *Page v. Hobbs*. In that case the declarations of intantion filed in the Land Office were not admissible, because they were made for the purpose of acquiring a pre-emption right to lands which, at the time, were not subject to pre-emption. They were of no validity, and therefore irrelevant. In this case the defendant sets up in his answer that the lands in question are public lands of the United States, subject to pre-emption, and alleges that he is in possession claiming a pre-emption right; also averring the necessary facts to constitute that relation. On the trial he offered to prove by competent witnesses several of the facts averred, and necessary to establish his pre-emption right. The plaintiff objected on the ground that the evidence was "improper and irrelevant." The objection was sustained and the testimony excluded. The evidence was certainly relevant to

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the issues raised by the pleadings, and necessary to sustain the defense of lawful possession giving a pre-emption right. It is now contended, however, by respondent that the evidence was inadmissible because the offer did not embrace every fact necessary to establish the defense. It was relevant as far as it went. The defendant may not have been able to prove all the facts by the witnesses then under examination. It may be that he intended to prove other facts by other witnesses, who did not know the facts now offered. It does not appear that he was called upon to state whether he intended to follow the testimony offered by other testimony or not. As this essential evidence was excluded, it would have been useless to offer testimony as to the other facts necessary to sustain this defense, because without the testimony offered and excluded he must necessarily have failed on that defense. It does not appear that the evidence was excluded, because the defendant did not propose to prove the other facts essential to his defense. If this was the point of the objection it should have been so stated. The objection was general that it was improper and irrelevant. The Act of Congress of 1862 (12 Stats. at Large, 410, Sec. 7) extended the right of pre-emption to unsurveyed lands in California. We think the exclusion of the testimony was error.

If there was error in allowing the Sheriff to amend his return to the execution, it in no way affected the defendant, for he claimed no title under the defendant in the execution. No rights were acquired under the defendant in the execution, between the times of making and amending the return.

Judgment reversed and new trial ordered.

LOUIS VILHAC v. WILLIAM BIVEN AND ISABELLA BIVEN.

TIME TO FILE AMENDMENTS TO STATEMENT.—The time within which proposed amendments to a statement on motion for a new trial are to be made and filed is left for the regulation of the Court.

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NOTICE OF SETTLEMENT OF STATEMENT.— If notice of the time and place of the settlement of a statement before a Judge on motion for a new trial is given to the appellant, and he does not attend, he cannot afterwards complain of the statement as settled.

SERVICE OF AMENDMENTS TO STATEMENT.— The statute makes no provision for the service of amendments to a statement or a copy thereof upon the adverse party, and if notice is given of the time and place of the settlement of a statement before the Judge, the engrossed statement as settled will not be stricken out because the amendments were not served on the opposite party.

CERTIFICATE TO STATEMENT.— A statement on motion for new trial which is not certified as correct by the parties or by the Judge will not be regarded in the appellate Court.

ASSIGNMENT OF ERRORS IN STATEMENT.— A statement on motion for new trial must specify the particulars wherein it is alleged the evidence is insufficient to justify the verdict and the errors upon which the appellant will rely.

TENDER OF MONEY.— A tender of legal tender notes in payment of a note payable in gold coin is not a discharge of the debt.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

A. M. Heslep, for Appellant.

Tyler & Cobb, for Respondent.

By the Court, CURREY, J.

This action was brought to recover the amount due on a promissory note and to foreclose a mortgage of certain real property executed by the defendants to secure the payment of the note. The note, a copy of which is set forth in the complaint, bears date the 5th of October, 1863, and is made payable six months after date, with interest at one and a half per cent per month, in current gold coin of the United States. The mortgage was executed on the day of the date of the note and was duly recorded on that day. The action was commenced on the 18th of July, 1864. On the 6th of August the defendants filed their answer, in which they admit the execution and delivery of the note and mortgage to the plaintiff, and they state that on the 3d of August there was due by reason thereof for the debt and costs incurred, the sum of

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thirty-two hundred and fifty dollars; but they aver that the sum due on the note and mortgage on the day last mentioned, including the costs then incurred, was paid by one of the defendants to the plaintiff in satisfaction of the amount due him. That such payment was made "in the currency of the United States, known as legal tender notes, commonly called greenbacks."

From the statement of the evidence in the case, it appears that on the 3d of August the defendant William Biven obtained from an officer of the United States Government certain United States notes, commonly called "greenbacks," amounting to the sum of thirty-two hundred and fifty dollars. This money belonged to the United States, and was obtained for the purpose of being used as a tender to the plaintiff in payment of the amount due him.

William Biven was sworn as a witness for the defendants, and testified that to induce the officer to let him have these United States notes, he told him he did not expect the plaintiff would receive them, and that if plaintiff offered to take them, he (Biven) would not let him do so. Another witness testified that when Biven applied for the money the officer told him he could have it to use in making the tender if he would take his (the officer's) brother along to witness it; and the officer at the same time told his brother and the defendant to be sure not to let the plaintiff have the money if he offered to accept it, assigning as a reason therefor that if the plaintiff was allowed to take the money it would ruin him (the officer).

The officer's brother testified that he and Biven then called on the plaintiff, when Biven handed him four bundles of United States notes, three of which contained one thousand dollars each, and one two hundred and fifty dollars, saying to him: "Louis, here is the money I owe you for the mortgage." The plaintiff took the notes, and while counting them, Biven said to him: "I give them to you at par;" to which the plaintiff made no reply, but continued counting. After having counted the money, he handed the package back to the wit-

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ness, who was near by, and who took possession of them and carried them away with him. The witness further testified as follows: "After I received the money from Vilhac, and just as we had started to go away, he called us back, and said to me he supposed I was a witness to the transaction, and he wished to say he would take the greenbacks at their market value in coin. Biven then said to him: 'No; you cannot have them in that way; if you take them, you must take them at par.' Vilhac then shook his head and turned away, when we left." In answer to an inquiry made by the Court, this witness stated that he went to the plaintiff's place of business to witness the tender and bring back the money.

The Court below, after having heard the evidence, rendered a finding and judgment for the plaintiff. The defendants gave notice of a motion for a new trial, and filed a statement, to which the plaintiff proposed amendments. The statement was settled and engrossed. The application for a new trial was in due time overruled. From the judgment and the order denying a new trial the defendants have appealed.

The statement to be used on the motion for a new trial was filed on the 30th of August, to which the respondent proposed amendments and filed the same on the 30th of September. The appellants moved to strike the proposed amendments from the files of the Court, on the ground that the same were not duly filed nor submitted to the appellants or their counsel. This motion was made after the Court had settled the statement, and it had been engrossed and filed, and also after the appellants' motion for a new trial had been denied. The motion to strike from the files of the Court the proposed amendments, and with it, as a consequence, the engrossed statement, was denied. This ruling of the Court is assigned as erroneous.

The statute does not specify the time within which proposed amendments to a statement prepared and filed to be used on motion for a new trial shall be made or filed. As the statute is silent on the subject, the practice in such cases must necessarily be regulated by the Court. In respect to the service of

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proposed amendments or a copy thereof, the statute makes no provision. The statute provides that when the moving party's statement is not agreed to by the adverse party, it shall be settled by the Judge upon notice. The appellants do not show that the statement was not settled by the Judge upon notice, but they say the engrossed statement was never submitted to them or their counsel, and that they, as well as their counsel, were wholly ignorant of its existence. It is to be presumed the Judge was judicially satisfied that defendants' counsel had notice of the time and place when and where the statement would be settled. If, after having had notice, the defendants' counsel neglected for any cause to attend before the Judge upon the settlement of the statement, or afterward remained ignorant of the existence of the engrossed statement, they have no cause of complaint. They must bear the consequences of their own negligence.

By the statement as settled, the judgment, in our opinion, was eminently just and should be affirmed. The same result would follow if the settled and engrossed statement was rejected, and the statement prepared and filed on the part of the defendants was substituted in its place. The statute provides that when the statement shall be agreed to, "it shall be accompanied by the certificate of the parties or their attorneys that the same has been agreed upon and is correct." And "when settled by the Judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct."

The statement prepared and filed by defendants was not accompanied by any certificate of its correctness, and therefore could not be regarded even if the engrossed statement was rejected. Besides this, the statement does not specify the particulars in which the evidence is alleged to be insufficient to justify the judgment, nor the errors upon which the defendants relied for a new trial. The statute declares that if no such specifications be made the statement shall be disregarded. (Practice Act, Sec. 195; *Hutton v. Reed*, 25 Cal. 478.)

The case and points made by defendants are, in our judg-

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ment, wholly destitute of merit. The pretended payment was a reprehensible attempt to obtain an unjust advantage of the plaintiff without paying him his due or any part of it.

The judgment is affirmed with ten per cent damages.

Ex Parte H. KELLY on Habeas Corpus.

SENTENCE FOR ASSAULT WITH DEADLY WEAPON, ETC.—Upon conviction for an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, the Court may lawfully sentence the offender to pay a fine of five thousand dollars, and direct that he be imprisoned in the County Jail at the rate of two dollars per day until the same is paid.

SAME — PAYMENT OF THE FINE.—In case of such sentence the prisoner is entitled to a credit of two dollars per day for each day he remains in prison, and he may at any time pay the sum then remaining unsatisfied and claim his discharge from custody.

THE defendant was indicted in Sacramento County for an assault with a deadly weapon, with intent to commit bodily injury upon the person of Anton Taylor, committed on the 30th day of April, 1864, and was convicted, and on the 25th day of November, 1864, sentenced by the County Court. August 15th, 1865, the prisoner applied to the Supreme Court to be discharged on *habeas corpus*.

The other facts are stated in the opinion of the Court.

J. C. Goods, and J. W. Coffroth, for Petitioner.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, C. J.

The judgment is in harmony with the law of the case. Section fifty of the Act concerning crimes and punishments, and section four hundred and sixty of the Act concerning criminal practice are *in pari materia* and must be read together. There is no conflict between them, and when read together the intent and meaning is obvious. Upon conviction for an assault with a deadly weapon with intent to inflict upon the person of another

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a bodily injury, the Court may lawfully sentence the offender to imprisonment in the State Prison for any term not exceeding two years, or to pay a fine not exceeding five thousand dollars, or both; and in case a fine is imposed, may further direct that he be imprisoned until the fine be satisfied, such imprisonment not to exceed one day for every two dollars of the fine. The judgment in this case does not violate any of the foregoing provisions, but on the contrary is in keeping therewith. It imposes a fine of five thousand dollars, and directs "that the defendant be imprisoned in the County Jail at the rate of two dollars per day, until the same be paid." That it is fully authorized by the statute in question there can be no doubt.

The mere fact that by its operation the defendant may be imprisoned in the County Jail, by way of enforcing payment or satisfaction of his fine, for a longer period than he could be lawfully imprisoned in the State Prison by way of punishment, is entitled to no weight. The latter imprisonment is the punishment or a part of it; but the former is no part of the punishment *per se*, but is merely one of the modes by which the law enforces the satisfaction of the fine which is in itself the punishment or a part of it. The punishment fixed by the statute is imprisonment in the State Prison, or fine, or both; all beyond is mere mode and manner of enforcement. The first is to be satisfied by serving out the prescribed term in the State Prison, and in that way only; but the latter may be satisfied in either of three ways, by voluntary payment of the amount of the fine, or by its collection under execution as in the case of a judgment in a civil action (Crim. Prac. Sec. 461); or by imprisonment in the County Jail not exceeding one day for every two dollars of the fine. The alleged incongruity is apparent only when the mere mode and manner of enforcing the punishment is confounded with the punishment itself and regarded as a part of it, but it wholly disappears when the obvious distinction between the two is kept in view.

There is no force in the point that the defendant is bound to satisfy the whole fine by imprisonment and cannot be

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allowed to pay the unsatisfied portion of his fine and be thereupon discharged from custody. For each day which he has or may hereafter pass in prison he is entitled to a credit of two dollars upon his fine and he may at any time pay the sum then remaining unsatisfied and claim his discharge from custody.

Let the prisoner be remanded to the custody from whence he came.

Mr. Justice RHODES expressed no opinion.

WILLIAM H. GRAY v. JOSEPH C. PALMER *et als.*

WHEN JUDGMENT BECOMES FINAL.—When an order for judgment has been made and regularly entered by the Clerk in the minutes of the Court, and the judgment has been drawn up in form, signed by the Judge, and filed with the Clerk, final judgment has been rendered within the meaning of the terms "rendition of the judgment," as used in section three hundred and thirty-six of the Practice Act, and the time for taking an appeal commences to run.

ENTRY OF JUDGMENT BY CLERK.—The entry of such judgment in the Judgment Book is a mere ministerial duty to be performed by the Clerk.

TIME WITHIN WHICH APPEAL MUST BE TAKEN.—An appeal from a judgment must be taken within one year from the time of its rendition. The failure of the Clerk to enter the judgment in the Judgment Book at the time it is rendered, cannot extend the time within which to appeal.

SAME.—The question whether an appeal from a judgment should not be taken within one year from the time when the order for judgment is made and entered in the minutes of the Court, discussed.

APPEALS FROM ORDERS.—The questions discussed in the opinion as to the time within which appeals must be taken from various orders.

WHEN EXECUTION MAY BE ISSUED.—The question discussed in the opinion as to the time when an execution can be issued on a judgment.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff appealed from the judgment.

The facts of this case will be found reported in 9 Cal. 616.

J. B. Crockett, for Appellant.

W. W. Crane, Jr., Philip G. Galpin, and H. & O. McAllister, for Respondents.

By the Court, SAWYER, J.

The appeal in this cause was dismissed by the late Supreme Court, on the ground that it was not taken in time. Upon application of appellant's counsel, in which, in view of the supposed importance of the question decided, a large number of the attorneys of this Court not of counsel in the case united, the same Court granted a rehearing.

Upon a former appeal the judgment of the District Court had been reversed, and the cause remanded for further proceedings. The remittitur having been filed in the District Court, the defendant's counsel moved to dismiss the suit on the ground, that the decision of the Supreme Court was a final adjudication against the plaintiff of all the matters in litigation in the cause, and that such judgment of dismissal would be in pursuance of the mandate of that Court. After consideration the District Court sustained the motion, and on the 6th of April, 1861, by its direction an order was entered in the minutes of the Court dismissing the action, and directing a judgment to be entered accordingly. On the same day a bill of exceptions was prepared by appellant's counsel, settled by the Judge, and filed. On the 9th of April, 1861, a formal judgment was drawn up in pursuance of the order entered in the minutes on the sixth, signed by the Judge, and filed in the case. On the 17th of June, 1861, and not before, the judgment thus signed and filed on the 9th of April, was entered by the Clerk in the "Judgment Book." On the 14th of June, 1862, this appeal was taken.

Section three hundred thirty-six of the Practice Act authorizes an appeal to be taken from a final judgment "within one year after the rendition of the judgment." If the judgment is to be regarded as having been rendered on the 17th of June—the time when it was entered in the Judgment Book—within the meaning of the Act, the appeal is in time. But if the 6th of April—when the order for judgment was announced and entered on the minutes of the Court—or the 9th of April—when a formal judgment was signed and filed

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in the case—is to be regarded as the date of the rendition of the judgment, then the appeal was too late, and it must be dismissed.

The decision must turn upon the construction to be given to the statute. The words, “rendered,” and “rendition,” and the word “entered,” are frequently used in the Practice Act, and in no instance does the latter word appear to us to be used in the same sense as either of the former. Thus, in section one hundred seventy-five, it is provided that the jury, in certain cases, “may render a general or special verdict,” and that “the special verdict or finding shall be filed with the Clerk and entered upon the minutes.” Of course the rendition of the verdict is something different from the filing or the entry, and must precede both. So in section one hundred ninety-five, notice of intention to move for a new trial must be given “within five days after the rendition of the verdict,” or “ten days after receiving written notice of the rendering of the decision of the Judge”—not the entry of the decision. So section one hundred ninety-seven provides that “judgment shall be entered by the Clerk within twenty-four hours after the rendition of the verdict, unless,” etc. Section two hundred and one requires the Clerk to keep a “book for the entry of judgments, to be called the ‘Judgment Book,’ in which each judgment shall be entered,” etc. But the entry of a judgment in the Judgment Book presupposes the existence of a judgment rendered, or pronounced, to be entered. The Court renders the judgment, and the Clerk enters it. “After the entry of the judgment,” the Clerk is to make up a judgment roll (Section 203,) and “after filing the judgment roll” he is to docket the judgment, and from the time of docketing the judgment becomes a lien upon real estate.

“The party in whose favor judgment is given may at any time within five years after the entry thereof issue a writ of execution,” etc. (Sec. 209.) Although judgment may have been given or rendered, execution cannot issue until it is entered, and although so far perfected as to authorize execution, it does not even then become a lien upon real estate

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until docketed. We now come to section three hundred thirty-six, which provides that "an appeal may be taken :

"First — From a final judgment in an action, or special proceeding commenced in the Court in which the judgment is rendered within one year after the rendition of the judgment.

"Second — From a judgment rendered on an appeal from an inferior Court within ninety days after the rendition of the judgment."

Third — From certain orders specified. "within sixty days after the order is made and entered in the minutes of the Court." In this last class of cases there is a marked change in the language. In the case of appeal from an order the time commences to run, not from the making of the order, but from the time when it is "entered in the minutes of the Court." If the construction claimed by appellant for the word rendition is to prevail, the third clause of section three hundred thirty-six might just as well have ended with the word "made," and the phrase "entered in the minutes of the Court" has no office to perform, and means nothing. But we are not to presume that the Legislature intended nothing by this change of phraseology. It evidently was designed to add something to the idea already expressed by the word "made." Section three hundred thirty-eight authorizes a party who desires "a statement of the case to be annexed to the record of the judgment or order," to prepare such statement "within twenty days after the entry of such judgment or order." After a careful review of these and other sections of the Practice Act we cannot resist the conclusion that the terms "rendition" and "entry," are used in different senses, and to express the idea appropriate to those words respectively; and that there is a rendition of a judgment before it is actually entered in the Judgment Book. Different stages of the proceeding are recognized by the statute as initial points from which other proceedings may be taken, or other rights acquired. Thus the right of appeal attaches, and time for taking it commences to run from the rendition of the judgment by the Court; the right to issue execution from the time of the entry of the judg-

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ment rendered; and the judgment lien upon real estate attaches from the docketing of the judgment rendered and entered.

We do not perceive that any argument can be drawn against this construction from the provisions of sections five hundred ten and five hundred eleven. Section five hundred ten simply allows two days to the prevailing party to file his bill of costs. Section five hundred eleven directs the Clerk to "include in the judgment entered up by him any interest on the verdict or decision of the Court from the time it (the verdict or decision, not the judgment) was rendered or made, and the costs, if the same have been taxed or ascertained." (If—as appellant seems to suppose—the words, "it was rendered," refer to the judgment, then we have in this section an express recognition of the distinction between the rendition and the entry of a judgment; for the Clerk is to "include in the judgment entered up by him any interest * * * from the time it was rendered." Of course, if the judgment is not to be regarded as rendered till it is entered, no interest could accrue between the rendition and the entry of the judgment.) In case the costs are not taxed, or ascertained, it directs the Clerk, within two days after they are taxed or ascertained, to "insert the same in a blank, left in the judgment for that purpose." The judgment is not always rendered immediately after the rendition of the verdict, or even after the finding of facts by the Judge or referee has been filed. A special verdict is sometimes returned in pursuance of section one hundred seventy-five. In such case, it not unfrequently happens, that the question as to what judgment shall be rendered on the verdict is reserved for argument, or for further consideration, as provided in sections one hundred seventy-eight, one hundred ninety-seven and one hundred ninety-eight. So, after the facts have been found by the Court or referee, the same course may often be pursued. It thus not unfrequently happens, that the judgment is not rendered for several months after the rendition of the verdict, or filing of the findings of facts. Doubtless such cases were intended to be provided for by section five hundred eleven, which authorizes the interest to be included down to the ren-

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dition of the judgment. The argument of appellant, based upon this section, is just as cogent against considering the time for taking the appeal to commence from the entry as from the rendition of the judgment, as that term is construed by us. For the costs are to be inserted in a blank left for the purpose in the judgment actually entered. And when there is a contest in the taxation of costs, the contest may not be settled and the costs ascertained for months after the entry of the judgment, and of course the amount could not be known, and the appellant could not determine whether he wished to review that part of the judgment until these facts are ascertained.

Upon the construction given by us there are not two final judgments—as is argued by appellant. The Clerk enters the judgment rendered by the Court. The Court pronounces the judgment, and the Clerk performs the ministerial duty of entering it. The judgment rendered is the judgment entered.

We have thus far endeavored to solve the question by a careful examination and comparison of the various provisions of the statute, under the test of the ordinary rules of construction.

Upon examination of such decisions as we have been able to discover upon similar language in other statutes, we find that our construction is also sustained by authority. Section twenty-one, Chapter nine, of the Revised Statutes of New York (Ed. of 1836), marg. p. five hundred ninety-four, is as follows:

Sec. 21. "All writs of error upon any judgment or final determination rendered in any cause, in any Court of law and of record in this State, shall be brought within two years after the rendering of such judgment or final determination, and not after; except in the cases specified in the next two sections."

In *Fleet v. Youngs*, 11 Wend. 527, there was a motion to dismiss the writ of error. The second ground of the motion was, in the language of the Chancellor: "The omission to bring the writ of error within two years after the actual rendition of the judgment in the Supreme Court;" and the solution of the question depended upon the signification to be

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given to the words, "rendering of such judgment." In deciding the point the Chancellor said (527): "By the English Statute of Limitations as to writs of error, the plaintiff was required to sue out his writ within twenty years after the judgment was signed or entered of record, with the usual saving in favor of infants, etc. But in the former revision of the laws in this State, the language of the statute, as well as the time of the limitation, was changed. The period of limitation was reduced to five years, without any exception in favor of infants, *femme coverts*, etc.; and the statute required the writ of error to be brought within five years after the rendition of the judgment, instead of directing the time for suing out the writ of error to commence from the signing or entering the judgment on record as in the English statute. The language of the statute, as contained in the recent revisions, is, that the writ of error shall be brought within two years after the rendering of the judgment or final determination of the Court, and not after; with an exception in favor of infants, lunatics, etc., for a further time, not exceeding five years from the time of rendering the judgment. I am at a loss to account for this change in language from the English statute, except upon the supposition that the Legislature intended the statute should commence running from the time the judgment was actually given, which seems to be the natural meaning of the expression—within two years after the rendering of such judgment or final determination."

Senator Tracy also said (528): "It strikes me that the more obvious and natural import of the expression 'rendering of such judgment,' is the annunciation or declaring the decision of the Court indicated by the rule for judgment; and this construction is fortified by the fact that our statute varies in its expression from the English statute which refers in terms to the filing of the judgment record."

A similar question arose upon the same statutory provision in *Lee v. Tillotson*, 4 Hill, 29, in which the same construction was given to the statute. Mr. Justice Bronson said: "The judgment or final determination in the cause was rendered in

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July, 1840, when the motion which had been made to set aside the report of the referees was denied. The record which was afterwards filed was not the judgment, but only a written memorial of the judgment which had been previously rendered."

The only difference between the language of the New York Act here construed and our own, is, the former has the word "rendering," and the latter "rendition," words of precisely equivalent import in the connection in which they stand.

In this case the judgment announced was not only "indicated by the rule (order) for judgment actually entered in the minutes of the Court on the sixth, but it was drawn up in form in the precise terms in which it was to be entered, signed by the Judge and filed in the cause on the 9th of April. It was the judgment of the Court. Nothing remained to be done but the mere ministerial duty to be performed by the Clerk of copying it into the record. At that date, at least, the judgment had been rendered.

Possibly, the formal judgment thus signed and filed may be regarded in legal contemplation as having been entered from the time of the filing. Such was the rule in the old chancery practice. (*Gay v. Gay*, 10 Paige, 375; 1 Barb. Ch. Pr. 341.) But it is unnecessary to determine that question now. We are of the opinion that there was a "rendition of the judgment" within the meaning of section three hundred thirty-six of the Practice Act as early, at least, as the 9th of April. This being the case the appeal was not taken in time.

Appeal dismissed.

THE PEOPLE v. JOHN KELLY.

CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASE.—An instruction to a jury in a criminal case that they have a right to take into consideration all the surrounding circumstances in making up their verdict, is to be understood as limited to the circumstances in evidence.

POSSESSION OF STOLEN PROPERTY.—In a trial for larceny, where the testimony for the people consists of many suspicious circumstances, one of which is the possession of the property stolen by the defendant soon after the

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larceny was committed, if the defendant fails to account for this possession it is a circumstance to be taken into consideration with other circumstances tending to show his guilt.

INSTRUCTIONS TO JURY.—If instructions given in a criminal case embody the law of the case, it is not error to refuse other instructions which also embody the law.

REBUTTING TESTIMONY FOR THE PROSECUTION.—The defendant in a criminal action is as much bound to produce testimony to rebut testimony for the prosecution which merely tends to prove his guilt as any other testimony introduced by the prosecution.

APPEAL from the County Court, Solano County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Wm. S. Wells, for Appellant.

The second instruction given on behalf of the people is irrelevant, and tended to mislead the jury by reason of its implied assumption that suspicious facts were in evidence which made it necessary to explain the possession. If such were the proper rules, we have gained nothing upon the rules that laid down possession to be *prima facie* evidence of guilt; for the Government has only to put in evidence the most trivial circumstance, as, for instance, the presence of the defendant at or near the time when and the place where the act is said to have been committed, follow it by proof of possession, and the burden of proof is conclusively thrown upon the prisoner. The instances given in 3 Greenleaf, Sec. 31, show that the character of the testimony required in such cases as the one at bar must be matters or circumstances naturally calculated to awaken suspicion, inconsistent with innocence, and tending *ex parte* to establish guilt. (*The People v. Chambers*, 18 Cal. 382; *People v. Ah Kee*, 20 Cal. 177.)

J. G. McCullough, Attorney-General, for the People.

The evidence, though only substantially given, is ample to sustain the verdict before this Court. The law is correctly given in the several instructions, and is applicable to the case made out by the evidence. There are many suspicious circumstances shown by the testimony indicative of guilt, which,

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together with the recent possession of the property, warrant the verdict. In truth, if the law in this State is to be carried any further than *People v. Chambers*, we may despair of a conviction for larceny from circumstantial evidence. It is exceedingly doubtful if this State has adopted the better rule as to the recent possession of stolen property, and it is presumed the rule will not be made any more liberal to defendants.

By the Court, CURREY, J.

The defendant was indicted for grand larceny. He was tried and found guilty and sentenced to be imprisoned in the State Prison for the term of five years. The evidence against him was mostly of a circumstantial nature, and though it is not insisted, it was not sufficient to warrant a verdict of guilty, if the case had been properly submitted to the jury, yet the defendant claims that the Court erred in matters of law on the trial to his prejudice, and that in consequence thereof the verdict and the judgment pronounced upon it should be reversed.

At the request of the District Attorney the Court instructed the jury as follows: "Although the jury are to be satisfied of the guilt of the defendant in order to convict, yet they have a right to take into consideration all the surrounding circumstances in making up their verdict, and if from such circumstances they believe, beyond a reasonable doubt, that the prisoner is guilty, although there may have been no eye witness of his taking the property, they must find a verdict of guilty." The defendant's counsel insists that the instruction did not limit the jury to the circumstances proved in the case. It must be presumed the Court was speaking of the circumstances which were in evidence, and that the jury understood the charge as referring to those circumstances and none others; because in such cases the jury is presumed to be composed of "good and lawful men," possessed of at least ordinary good sense, and capable of appreciating the obligation of their oaths to render a verdict "according to the evi-

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dence." The obvious meaning of the instruction is this, that if the jury, from all the circumstances in evidence, believed without any reasonable doubt intervening, that the defendant was guilty of the crime alleged against him, then the verdict should be in accordance with such belief, even though no one saw the defendant steal the money described in the indictment. The instruction is an inculcation of a plain rule of law, namely, that if the circumstances proved establish the truth of the fact in issue to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment honestly and conscientiously exercised, then the verdict should in effect determine the existence of such facts; or in other words, should be according to the evidence. (*Com. v. Webster*, 5 Cush. 320; *Sumner v. The State*, 5 Blackf. 580.)

The Court also instructed the jury, at the request of the District Attorney, in the following words: "If the jury believe that the property was stolen and was found in the possession of the prisoner very shortly after being stolen, and the prisoner failed to account for such possession, or to show that such possession was honestly obtained, it is a circumstance tending to show his guilt; and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts."

The fact of recent possession of stolen property standing wholly unconnected with any other circumstances, is of very slight persuasive force. (3 Greenleaf's Ev., Sec. 31.). But the circumstance is permitted to be proved as a relevant fact, constituting an item of the aggregate of facts and circumstances necessary to warrant the conclusion of the defendant's guilt. While a single circumstance tending to establish the truth of the charge might not authorize the conclusion that the charge was true, all the circumstances, of which the circumstance merely tending to establish the main fact was one, might, taken together, be of a conclusive nature, and satisfy

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the jury to a moral certainty and beyond all reasonable doubt of the defendant's guilt.

In *The People v. Ah Ki*, 20 Cal. 178, the Court charged the jury that the accused was bound to explain his possession of goods recently stolen, and how he obtained them. In reviewing this charge Mr. Justice Norton held that its effect was to convey to the jury the idea that the possession of the stolen goods, unexplained, was of itself sufficient to authorize a conviction, contrary to the rule laid down in *The People v. Chambers*, 18 Cal. 382; but he said: "If this charge could be understood as only stating that the accused was bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, it would not be erroneous."

The instruction under consideration conforms to the law as declared in the case of *The People v. Ah Ki*, and is in no sense repugnant to the doctrine laid down in *The People v. Chambers*, (18 Cal. 382), or of the recent case of *The People v. Antonio*, (27 Cal. 404), and hence we hold the instruction correct.

The counsel for the defendant submitted nine instructions which he asked the Court to give the jury—seven of which the Court gave, but refused the others for reasons assigned, which will be stated hereafter.

The instructions given comprehended in clear and direct language the questions of law involved in the case. If the jury heeded these instructions, as we must intend they did, we do not see how any injury could have resulted to the defendant from the refusal of the Court to give the other instructions requested, of which the jury knew nothing, even were it admitted that they embodied the law as it is; for it is not to be presumed that either the Court or counsel read to or in the presence of the jury the requested instructions which the Court refused to grant. Requested instruction number two the Court refused on the ground that it was calculated to mislead the jury as to the law. It reads as follows: "The People must make out their case by evidence that will amount to proof of the facts alleged in the indictment, and the defend-

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ant is not required to produce evidence to rebut such evidence on the part of the prosecution as merely tends to prove the fact in question." The portion of the instructions given was, in effect, the same as that covered by the first proposition contained in the requested proposition here set forth in *hæc verba*, and in connection therewith the jury were told that proof beyond a reasonable doubt was necessary to establish a fact against the prisoner, and that if there was any such doubt as to any particular fact essential to be proved to establish the defendant's guilt, he was entitled to the benefit of the doubt and to be acquitted; and, also, that if, upon a review of the evidence, there existed in the minds of the jury a reasonable doubt as to the defendant taking the property, as charged in the indictment, then he must be acquitted.

The second branch of this requested instruction that "the defendant is not required to produce evidence to rebut such evidence on the part of the prosecution as merely tends to prove the fact in question" in order to secure his acquittal, as abstractly stated, was properly refused because evidence which merely tends to prove a material fact may become a constituent portion of the aggregate of proof which in its sum establishes the principal matter in issue beyond all reasonable doubt. Then, when in the first place a criminal charge is made out by all the evidence taken together, the defendant is bound, in order to overcome the case so made, to produce evidence in rebuttal, which evidence in rebuttal may be directed to and necessary for the overthrow of that produced on the side of the prosecution tending merely to the proof of a material fact. Hence, to have charged the jury as requested would have been improper.

Requested instruction number eight the Court refused to give to the jury on substantially the same ground as in the one noticed. It reads as follows: "Even though the jury should believe from the evidence that the money was stolen, and was found in the possession of defendant within a short time after its taking, the defendant is not bound to show to the reasonable satisfaction of the jury that he became pos-

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sessed of it otherwise than by stealing. The evidence may fall far short of establishing that, and yet create in the minds of the jury a reasonable doubt as to his guilt." This instruction proceeds upon the theory that the only evidence in the case going to show that the defendant was guilty consisted in the fact that the stolen money was found in his possession soon after it was stolen. If it were admitted that the defendant's recent possession of the stolen property was the only evidence against him, the substantive portion of the requested charge would have been in consonance with the law as declared in *The People v. Chambers*. The rule relating to the question passed on in the case last cited was well stated in one of the instructions given by the Court to the jury at the defendant's request in the following words: "Even if the jury believe that the defendant had possession of the property, and that the same had been recently stolen, the fact is not of itself sufficient to authorize his conviction; it is merely a circumstance to be considered in determining his guilt."

The charge and instructions given seem to have been full, and a just exposition of the law applicable to the case before the jury. We are of the opinion the judgment should be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* JONATHAN HUNT v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

WHEN WRIT OF MANDATE MAY BE APPLIED FOR.—The writ of mandate may be applied for to ascertain whether a Board, officer, or tribunal has the power to perform the duty required by the relator, and mandamus is the only speedy and adequate remedy that the relator possesses to test the question of power.

WHEN WRIT OF MANDATE WILL BE REFUSED.—When the Board, officer or tribunal against which the writ of mandate is asked has not the legal authority to perform the act required by the relator, the writ will be refused.

MANDAMUS AGAINST BOARD OF SUPERVISORS.—If a Board of Supervisors of a county refuse to act on a claim against the county presented to them, for the reason that they have not the power to approve of it, mandamus is the proper action to determine whether they possess such power.

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COMMISSIONS OF COLLECTOR OF SAN FRANCISCO.—The Collector of Taxes for the City and County of San Francisco is not entitled to any commissions or salary for the collection of that portion of the revenues assessed and collected for the use of said city and county.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The relator commenced the action on the 6th day of April, 1861, and upon judgment having been rendered against him in the Court below, appealed.

The other facts are stated in the opinion of the Court.

John B. Felton, for Appellant.

Horace Hawes, for Respondents.

By the Court, RHODES, J.

Jonathan Hunt, the former Tax Collector of San Francisco, filed his petition in the District Court for a writ of mandamus to compel the Board of Supervisors of said city and county to approve his demand upon the Treasury for commissions alleged to be due him for the collection of taxes. The Court, having issued an alternative writ and the cause having been heard, denied the petitioner's motion that the mandamus be made peremptory and dismissed the proceedings, on the ground that the relator was not entitled to his remedy in that proceeding. The respondents now insist that mandamus is not the proper remedy in the case. They state in their answer to the petition that they have not lawful authority to approve the demand of the relator on the Treasury, because the same is not authorized by law. Other grounds of refusal to approve the accounts are alleged, but it is unnecessary to consider them, because if the Board based their refusal upon the want of legal authority to approve the demand, the objection to the account for matters of form, or because the Tax Collector was indebted to the Treasury, or had not discharged his duties according to law, would be idle and useless — as nugatory in every respect as would be the subsequent proceedings of a Court after it had

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adjudged that it had no jurisdiction of the subject matter of the action.

The refusal to approve the demand on the alleged ground of the want of lawful authority to approve it, amounts in substance to a refusal to act upon it.

The question whether the Board has, under the law, competent power to allow or approve the demand, which is strictly a jurisdictional question, stands *in limine* and must be first disposed of, and if determined against the asserted power, the Board can proceed no further; but if the decision is in favor of such jurisdiction, then the Board may consider and pass upon all the questions they have raised in this case or any others that may be presented, bearing any relation to the demand under consideration. If the claimant is dissatisfied with the determination of the Board, after they have proceeded to act upon it, and have disallowed it wholly or in part, he may then commence his action against the county; but he has no cause of action against the county for the recovery of a sum of money until he has presented his claim or demand to the Board for allowance, and the Board, after consideration thereof, have failed or refused to allow the same or some part of it. (Wood's Digest, p. 696, Sec. 24; *Price v. Sacramento County*, 6 Cal. 254; *McCann v. Sierra County*, 7 Cal. 121.) We are cited to no law, that exempts the City and County of San Francisco from the operation of the general Act above cited.

If the Board, instead of proceeding to consider the claim, refuse to act upon it—and we consider their allegation that they have not legal authority to approve the claim, though coupled with reasons why they cannot approve it, if they should consider it, as simply equivalent to a refusal to act for the want of legal power to approve—then mandamus is the proper remedy, and we think the only plain, speedy and adequate remedy that the claimant possesses, to test this preliminary jurisdictional question. (*Frank v. San Francisco*, 21 Cal. 668; *Emeric v. Gilman*, 10 Cal. 404; *San Francisco Gas Company v. Board of Supervisors of San Francisco*, 11 Cal.

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42; *People ex rel. Plumb v. Cortland County*, 24 How. Pr. 119; *People ex rel. Hasbrouck v. New York*, 21 Id. 322.)

If the decision of the Board on that question is sustained, the Court refuses to issue the peremptory mandamus and the controversy between the claimant and the Board there ends; but if, on the other hand, the decision is against the Board, then they must proceed to consider the claim, and if the claimant is dissatisfied with their action, he may commence a suit against the county. The Court will not, under the proceedings by mandamus, control or interfere with the discretion of the Board in matters where they possess it, or supervise their actions upon questions of fact. It interposes its authority upon questions of law, and simply directs the Board to proceed to act upon the claim, in the same manner that they would have done, had they determined the legal question, as the Court decide it.

It by no means follows, that because it is held that mandamus is the proper remedy, by which to ascertain whether the Board possesses the power asserted by the relator, that therefore, they must have and exercise that power in the given case, but the Court having investigated the question under the alternative writ, and determined that the Board has not legal authority to proceed as the relator has demanded of them, will refuse the peremptory mandamus and dismiss the proceedings. Cases almost without number are found in the books, in which mandamus was resorted to as the appropriate remedy to ascertain if the Board, officer or tribunal, had the power to perform the duty required by the relator; and the Court refused the peremptory writ and dismissed the proceedings, not because it was not the proper remedy, but because the Board, officer or tribunal were not required by law to perform the duty.

It is said by Mr. Justice Harris, in *The People v. Supervisors of Greene*, 12 Barb. S. C. 220: "To entitle him to this remedy (mandamus) two things must appear: First, that he has a legal right to have something done by the party to whom he seeks to have the writ directed, which has not been done; and sec-

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ondly, that he has no specific legal remedy to which he can resort to compel the performance of this duty." We have already seen that he has no legal remedy against the county until the Board has acted on his claim. Has the relator a legal right to have the Board proceed to allow or approve his demands upon the Treasury of the city and county? If he does not possess that right, then the judgment of the Court below refusing to issue the peremptory writ and ordering the proceedings to be dismissed must be affirmed. This brings us to the consideration of the principal question in the case, which, in view of its public importance, we ought to have been permitted to pass upon disembarrassed of the preliminary point we have had before us.

That question is whether the Tax Collector is entitled to be paid from the Treasury of the city and county, the commissions he claims in this case. This involves the consideration of many sections of the Act of the Legislature passed April 19th, 1856, organizing the government of the City and County of San Francisco, commonly known as the Consolidation Act, and of the Acts amendatory thereof; also of the general revenue laws in force from 1854 to 1860, as well as of special revenue laws applicable to San Francisco alone.

The Tax Collector presented to the Board his three accounts, claiming that there was due to him from the city and county, commissions amounting in the aggregate to seven thousand three hundred and three dollars and fifty-nine cents, for the collection of that portion of the revenue which was assessed and collected for the use of the city and county and paid over to the Treasurer by him in 1860, the main portion paid by him having been assessed for the years 1859-60 and 1860-61. The accounts do not include any charge for the collection of the State's portion of the taxes, but the commissions are calculated and charged on that portion which was collected as the portion belonging to the city and county.

The commissions are computed and claimed at the rates provided in the Revenue Act of 1855. (Statutes 1855, p. 120.)

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The Board deny his right to those commissions and say that it was intended by the Consolidation Act that he should be compensated for all his services, by fees and by commissions payable out of the State's portion of the funds.

One of the leading objects intended to be accomplished by the Consolidation Act, was to secure economy in administering the city and county government. A large amount of fees and compensations in various forms, before that time payable out of the County Treasury, was stricken off in the Act, and officers were required in a great measure to look to other sources for the payment of their services.

Instead of keeping up two sets of officers—one for the city, and another for the county, as was previously done—the Act provided for one set of officers, who were required to discharge the duties that had pertained to the officers of both the city and county government. Many other provisions were made, calculated to relieve the Treasury of the city and county in some measure from the burdens of the municipal government.

All the officers charged with the maintenance of that government, were named in the Act, and the compensation to which each of them should be entitled, whether by the way of salaries, fees or commissions, was expressly mentioned—unless the Tax Collector formed an exception—and in case where the compensation was payable out of the City and County Treasury, the amount, or the maximum amount, was specially fixed in the Act.

The Tax Collector, under the Consolidation Act of 1856, was charged with the performance of only a portion of the duties that devolve upon that office in other counties, under the general revenue laws. At the passage of that Act the Sheriff was the Collector of Taxes in San Francisco, but it was provided by section seventy-seven of the Act that all taxes should be directly paid to the Treasurer; “and in default of such payment before the time when the Tax Collector may be authorized by law to seize and sell the property therefor, the said Tax Collector shall proceed to collect said taxes, together with his legal fees, by seizure and sale of the property liable,

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in the mode prescribed by law for the collection of such State and county taxes," and that upon the payment of the taxes to the Treasurer before the property was sold, and upon the payment to the Tax Collector of his fees, for the services rendered by him, the property should be released from sale. This section clearly entitled him to all the fees for his services, that were allowed by law to the officer, whose duty it was, under the revenue laws, to seize and sell property for delinquent taxes.

The Act has not directly made provision for the payment of any further sum for his services, either by way of salary or a commission on the amount collected by him; and as if to make it clear and unmistakable that it was not intended that he should not receive the commissions given by the general revenue laws upon the city and county taxes, it was provided by section seventy-eight that upon his final settlement, according to the revenue law, he should pay over to the Treasurer "the full amount of taxes by him collected and not previously paid over, without any deduction of commissions, fees or otherwise." Thus, the commissions that the Tax Collectors in other counties were entitled to retain, were, by the Consolidation Act, required to be paid into the Treasury, and if he would claim the repayment thereof, he must show the provision of law authorizing the payment to be made out of the Treasury; for section eighty-two, which seems to have been designed to cut off all constructive fees, commission and compensation, declares that "no payments can be made from the Treasury, or out of the public funds of said city and county, unless the same be specially authorized by this Act." This restriction would not prevent him from receiving from the Treasury, payable out of the State's funds, the commissions for collecting the State's portion of the taxes. Provision is made in the Act for the payment of all other officers, who are entitled to be paid out of the city and county funds in the Treasury; but no section of the Act is cited specially authorizing any payment therefrom to the Tax Collector.

Under the Revenue Act of 1854, which was in force at the

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time of the passage of the Consolidation Act, the Sheriff was the collector of all the property taxes, and he was authorized to collect his own fees, and on settlement with the Auditor, to retain his commissions on the amount collected, and was required to pay the balance over to the Treasurer; but under the Consolidation Act, the Tax Collector, as we have already seen, was required to pay over the whole amount collected for taxes, without any deductions for commissions. It appears from a review of the Act, that it was intended that the Tax Collector should be charged only with the collection of delinquent taxes, and that he should receive for his compensation the fees allowed by the revenue law for the seizure and sale of property, and his commissions on the State's funds collected by him, but should have no claim upon the city and county funds, for commissions for collecting the same.

Such was the position of the Tax Collector under the Consolidation Act in 1856. The Revenue Act of 1857 effected a material change in the duties as well as the compensation of the Tax Collector in the City and County of San Francisco. He was required to collect all the taxes assessed upon real and personal property, and was entitled to all the fees and commissions on the collection of taxes that the Sheriff would have received under section one hundred eleven of the Revenue Act of 1854, as amended in 1855, except so far as that section was modified or restrained by the Consolidation Act, and the Revenue Act of 1857. The revenue laws of the State at large, after the passage of the Act of 1857, subject to the modifications of the Consolidation Act, were in force in San Francisco at the time the taxes in this case were collected and paid over.

No question is made in respect to the right of the Tax Collector to all the fees that the Tax Collectors in other counties were entitled to, under the revenue laws in force in 1857, and it is conceded that the fees for seizure, advertisement and sale of property, and for the execution of certificates of sale and tax deeds, and any other fees of the like character, belonged to him, and were not required to be accounted for by him; nor is any doubt expressed by the respondents as to his being

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entitled to the commissions specified in section one hundred eleven, as amended by the Act of 1855, upon the portion of the revenue collected for State purposes, and that is expressly conceded to him. But the issue is made upon his right to commissions under that section, upon that portion of the revenue collected for city and county purposes.

That section, at the time of the passage of the Act of the 17th of April, 1855, establishes the rates of commissions payable to the Tax Collectors throughout the State, except so far as the same were modified or restrained by special enactments; and in respect to the City and County of San Francisco, it had not been expressly repealed at the time of the collection of the taxes on which the commissions in this case are claimed. Has the Act been repealed or modified by implication, in whole or in part?

The ninety-sixth section of the general Revenue Act of 1854, which permitted the Tax Collector to retain his commissions, upon settlement and paying over to the Treasurer the balance of the several funds in his hands, after deducting his commission, was expressly repealed by section fifty-five of the Revenue Act of 1857, and that Act contains no provision similar in substance or effect, nor does any subsequent Act that is applicable to the City and County of San Francisco, that we have been able to find; but the Act of 1857, section thirty-six, provides that the Tax Collector, at the times therein stated, shall "pay to the County Treasurer all money in his hands belonging to or collected for the use of the State and county." This law, the appellant has pursued, and his learned counsel makes no question that it was the Tax Collector's duty to pay to the Treasurer, all the money collected by him for State, and city and county taxes.

The money having been rightfully and properly paid into the City and County Treasury, the question is narrowed down to the inquiry as to the right of the Tax Collector to demand the repayment to him of commissions for the collection of the city and county taxes, as a legal claim on the Treasury. It would seem from the Act of 1857, that the Legislature, while

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taking from the Treasurer and committing to the Tax Collector, the collection of the taxes upon property, was at the same time studious to preserve unimpaired the several restrictions contained in the Consolidation Act, designed for the protection of the Treasury, and the limiting of the compensation to be paid to the officers of the city and county. It is provided in section fifty-six that nothing in that Act shall be construed "to remove or otherwise affect or impair any restriction now fixed by law, as to the compensation of any officer of said city or county, or otherwise in any manner to authorize any expenditure or payment to be made out of the Treasury, or any public funds of said city or county, beyond what is now authorized by law, except for State purposes." The intention manifested by that provision is too plain to admit of doubt or question.

Officers charged by that Act with the performance of duties, for or on behalf of the State, were not forbidden, but by inference were permitted, to resort to the City and County Treasury for compensation for their services; but all the restrictions then existing calculated to limit the appropriations from the Treasury for services performed for the city and county, were preserved and continued in full force. It is argued with much earnestness, that as the Tax Collector performed great and important services in behalf of the city and county, that therefore it must have been intended by the Legislature, that he should receive all the commissions that the Tax Collectors in other counties were entitled to, under the same general law; and to make the argument more cogent and the presumption of the legislative intent the stronger, the argument proceeds on the theory that a denial of compensation for services rendered for the city and county, is a denial of any compensation whatever. This, as we have seen, is a misapprehension of the law, for he is evidently entitled to his commissions for collecting the State's portion of the revenue, and to his fees in proceedings to collect the delinquent taxes, which together might, in the opinion of the Legislature, amount to an ample compensation. If the position of the respondents is true, it will

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be found that this is not altogether an exceptional case, for in some of the States, the officers who are paid by fees, receive nothing in criminal cases from the State or county. In most of the States the officers charged with the collection and disbursement of public funds, whose duty it is also to collect and disburse public school funds, receive but small, if any, fees or compensation for administering the school funds. The Consolidation Act presents several instances of the same policy. According to amendments of that Act passed in 1857, the Sheriff, County Clerk, Recorder, Surveyor, Justices of the Peace and Constables are entitled to no fees or compensation for services for which, under the general laws, they would have been authorized to charge the city and county, but in lieu thereof, a part of those officers receive a small salary.

The District Attorney receives a salary, but instead of his receiving the fees that the same officer is entitled to in other counties under the general law, those fees are paid into the Treasury as a special fund. The Compensation of the Treasurer affords another instance. It is provided that he shall receive a salary of four thousand dollars, and such fees and commissions as are by law a State charge or allowable out of the State's funds. If the Legislature had reduced his salary to one dollar it could not have been said with propriety, that therefore it shall be presumed that it was intended that he should receive commissions on the city and county funds, for the Legislature may have deemed his fees and commissions, receivable out of the State's funds, an ample compensation for his services rendered for the city and county as well as the State. No reason can be assigned that will preclude the Legislature from restricting an officer in a particular county, to a given source of compensation, while those in other counties may resort to several sources, that will not apply with equal force, to prevent the Legislature from establishing different salaries and rates of fees and commissions in the several counties.

The third subdivision of section ninety-five of the Consolidation Act is cited by the appellant as conclusive of this

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question, and clearly showing that the Tax Collector is entitled to the commissions in controversy. The language of the subdivision, as amended in 1857, is in some respects different from that in the original Act. It is as follows: "Third—Out of the General Fund, the fixed salaries or compensation of the Assessor and his deputies, the salaries fixed by law, of the Judge of the Superior Court, and other officers of said city and county, and of the officers of the Fire Department, and the legal fees of jurors and witnesses in criminal cases where the same by law are payable out of the County Treasury." Commissions are not directly mentioned, but perhaps they are included in the more comprehensive term "compensation." Neither this nor any of the subdivisions of that section purport to establish the rates of fees, commissions or salaries of any of the officers; but the main object of this section is to declare out of what fund in the City and County Treasury, payment shall be made on account of the several classes of services and debts rendered for, or owing by the city and county. We must look elsewhere to find the rates of compensation for the services of the officers. In the case of the Tax Collector, the rate is found in section one hundred eleven, of the Act of 1854, as amended April 17th, 1855, subject to the limitations and restrictions of the Consolidation Act, all of which are saved, as before stated, by section fifty-six of the Revenue Act of 1857. It will be observed also, that it is provided by subdivision third, above quoted, that the salaries, fees and compensations are to be paid out of the General Fund, where the same are payable out of the County Treasury; and it is beyond all question that it was not the intention to provide that all the salaries, fees and commissions for county officers that were or might be fixed by general laws, should be satisfied from the Treasury of the city and county without regard to the restrictions of the Consolidation Act. That subdivision does not regulate, either generally or specially, the compensation to be paid, but when the amount of that compensation is ascertained, it directs from what fund it shall be paid.

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We subject the Tax Collector to no rule that we do not equally apply to all the other city and county officers similarly situated. Take the Recorder, as he stood under the amendments of the Consolidation Act in 1857. He has been discharging the duties of his office for one year, and during that time he has performed a large amount of official business, both for private persons and for the city and county. To ascertain the measure of his compensation he examines the general law (unless there was a special one applicable to San Francisco) fixing the Recorder's fees. He claims and receives those fees from private persons; and entertaining the view of the law that the Tax Collector does, he presents to the proper officers his account against the city and county for a large amount of services performed for the city and county at the same rate of fees that he charged private persons, and he is met with the objection that by the Consolidation Act he is entitled to a salary of fifty dollars instead of the fees claimed. In other words, he is entitled to such compensation for his services rendered for the city and county, as the Legislature directs to be paid to him, and no more.

The appellant's construction of subdivision third of section ninety-five, if it could be maintained, would remove most of the restrictions of the Consolidation Act that were intended to limit the appropriations from the city and county funds, for services rendered for her by her officers, who under the general laws receive their compensation in fees and commissions. The Consolidation Act was passed subsequently to the Act establishing the rates of the Tax Collector's commissions; and by the provisions of the Act requiring the taxes to be paid directly to the Treasurer, and allowing him only commissions as Treasurer, not those of the Tax Collector, the Act of 1855 regulating the Tax Collector's fees was suspended, so far as San Francisco was concerned — but perhaps it was not repealed. Upon the passage of the Revenue Act of 1857, the collection of taxes was given to the Tax Collector, an office then existing under the city and county government, and acting

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under certain restrictions precluding him from receiving payment from the Treasury for services performed for the city and county; and when the collection of taxes was committed to his hands, those restrictions were not expressly repealed, and it cannot be said that they were repealed by implication, because, as already remarked, the Legislature seemed to be careful to preserve all the restrictions and limitations of the Consolidation Act. It is declared in section eleven of said Act, that "no fees or compensation, other than as expressly allowed in this Act, shall be received by any officer of said city and county, or any district, nor shall any allowance be made to them or any of them beyond the fixed compensation aforesaid, under the name of office rent, fuel, lights, stationery, contingencies or otherwise." And the same prohibition, only in more comprehensive language, is found in the Act of 1857, section eleven, amendatory of that Act. This restriction was applicable to the Tax Collector, upon his entering upon the discharge of further duties, as clearly as to the Treasurer, who was relieved of the performance of duties theretofore incumbent upon him, or as to any officer of the city and county government.

We are of the opinion that the Act of the 17th of April, 1855, was not expressly repealed, but that it was modified and restricted in its operation, so as to accord with the provisions of the Consolidation Act, and that so far as it was in conflict with those provisions it was repealed by implication. And we are further of the opinion that the restrictions and limitations of the Consolidation Act, and the amendatory Act of 1857, were not repealed, either expressly or by implication, so far as the Tax Collector is concerned, by the Revenue Act of 1857.

We therefore hold that the appellant was not entitled to the commissions claimed in the accounts presented by him to the Board of Supervisors, and that the Board had not legal power or authority to approve or allow them.

The judgment is affirmed.

Opinion of the Court on Petition for Rehearing.

Mr. Justice SHAFER, having been of counsel, did not sit on the trial of this case.

Mr. Justice SAWYER expressed no opinion.

By the Court, RHODES, J., on petition for rehearing.

We are satisfied of the correctness of the conclusions to which we have arrived in this cause, but in argument we used language more comprehensive than the necessities of the case required, or perhaps was justified by the statutes under consideration. We said that "All the officers charged with the maintenance of that government (the government of the City and County of San Francisco) were named in the Act; and the compensation to which each of them was entitled, whether by way of salaries, fees or commissions, was expressly mentioned — unless the Tax Collector formed an exception — and in case where the compensation was payable out of the City and County Treasury, the amount, or the maximum amount, was specially fixed in the Act." This does not comprehend such officers or employes as are suggested by counsel in his petition for rehearing — such as the officers of the Fire Department, officers and employes of the Hospital, City Attorney, Judge of the Superior Court, etc. We intended to include those officers who, under some name, are more particularly charged with the government of a city or a county, as Mayor, Aldermen, Supervisors, Clerk, Sheriff, Marshal, Treasurer, Assessor, etc., and to officers charged with functions of the character of those mentioned, as well as to some others named in the Consolidation Act, our remarks properly and correctly apply.

If the position of the learned counsel can be sustained, that "where the offices have existed before, the compensation is left to existing laws," it will be found that the grand purpose of the Consolidation Act, which is apparent without great familiarity with the Act, and with no acquaintance with its practical workings — that is, economy in the administration of the municipal government — will be defeated, and a large portion of the wholesome restrictions in the Act become nugatory.

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We see no difficulty in maintaining that when the Tax Collector is required to collect the delinquent taxes, and in the discharge of that duty he is permitted by the revenue laws to collect from the delinquent, or from the purchaser at the tax sale, certain fees over and above the taxes, and is required to pay over to the Treasurer the taxes collected by him, there is left in his hands the fees he collected. And we find as little difficulty in understanding, that after the general revenue law has committed to the Tax Collector, the collection of all the taxes, and has allowed certain commissions on the collection both of State and city and county taxes, and the law has directed him to pay over all the taxes without any deduction for commissions, and has saved the restrictions of the Consolidation Act, one of which was that "no payment can be made from the Treasury, or out of the public funds of the county unless the same be specially authorized by this Act;" that if the Consolidation Act has not "specially authorized" the payment to the Tax Collector of such commissions out of the funds of the city and county, the Board of Supervisors are not authorized to allow or audit a claim for such commissions, and the Tax Collector is not entitled to receive them; and that if there is no restriction to prevent him from receiving the commissions on the funds collected for the State, he is entitled to have them allowed and paid.

It appears obvious that the appellant's construction of subdivision third, of section ninety-five, of the Consolidation Act, holding that it authorizes the payment of the commissions in controversy, cannot be maintained, for that subdivision merely specifies the General Fund, as the fund out of which fixed salaries or compensations shall be paid; and if his construction could be maintained, it would result in the absurd conclusion, that the commissions for collecting the State tax, would be payable out of the General Fund of the city and county.

Rehearing denied.

Mr. Justice SAWYER expressed no opinion.

THE PEOPLE v. ROBERT DODGE.

PERSONAL ATTENDANCE OF WITNESS IN CRIMINAL CASE.—When an absent witness for a defendant in a criminal action is sick, and it is made to appear that his personal attendance can be procured without unreasonable delay, the statutory mode of taking the testimony of the witness by a commission ought not to be forced upon the defendant against his will, under the penalty of going to trial without it.

CONTINUANCE IN CRIMINAL CASE.—A defendant in a criminal action is entitled to a continuance to enable him to obtain the personal attendance of his witnesses at the trial, if the same can be obtained without unreasonable delay.

APPEAL from the District Court, Fourteenth Judicial District, Nevada County.

The defendant was indicted for the crime of murder, on the 11th day of February, 1865. On the 15th day of March, 1865, the case was set for trial in the District Court for the 4th day of April, 1865. On the last named day the defendant applied for a continuance, on the ground of the absence of Margaret Dodge, one of his witnesses. It was shown that the witness resided in Nevada County, and a subpoena had been served on her, but she had been ill for several weeks, too ill to leave her house without endangering her health. Her attending physicians testified that if quiet was secured to the witness, she might possibly be able to attend the trial within two months.

The District Attorney opposed the continuance because the witness lived in Nevada County and had been sick for several weeks, and the defendant had made no effort to have her testimony taken by commission, as by law provided.

The motion for a continuance was denied, and the defendant was convicted and sentenced. The defendant appealed.

Dibble & Belden, for Appellant.

In many of the States the defendant in a capital case is allowed a continuance for one term, almost as a matter of course. (2 *Graham & Waterman*, N. T., 699.) And if the party, when called for trial, still finds himself unprepared, Courts are extremely indulgent in granting adjournments, even where it is *simply expedient* that a continuance should be had.

Argument for Appellant.

(3 *Graham & Waterman*, N. T., 894; *Turner v. Morrison*, 11 Cal. 22.)

The requisite showing for a continuance is: that a material witness is absent; that due diligence has been used to procure his attendance; that the same fact cannot be proven by any other person; the probability of procuring his attendance within a reasonable time, and that the application is not made for delay; and when no suspicious or countervailing circumstances appear, the continuance will be granted. (*Jackson v. Granger*, 6 Cowen, 578; *People v. Vermilyea*, 7 Cowen, 399; *Toy v. State*, 9 Georgia, 373; *Gross v. State*, 5 Indiana, 533; *Clark v. Dillbee*, 16 Wend. 603; *People v. Diaz*, 6 Cal. 250.)

The Court's discretion is to be exercised within well established legal rules. It is a sound and equitable, and not an arbitrary discretion, he is required to exercise. (3 *Graham & Waterman*, N. T., 1,001; *People v. Vermilyea*, 7 Cowen, 398.)

That the statute permits a deposition to be taken in this case, does not affect the question. The section permitting a commission to issue in criminal cases is not compulsory; it was designed to furnish to a defendant the means of preserving and perpetuating testimony that would otherwise be wholly lost, and not as a compulsory process to force defendants into trials with insufficient evidence, when a few weeks or days would enable him to procure the personal attendance of his witnesses. The same provision exists in the New York Practice Act; and in adverting to it, said the Court, Mr. Justice Bronson: "The inability of a sick or infirm witness to attend at the trial, although her deposition was taken, and the parties were under a stipulation to try the case, would have been a sufficient excuse for putting off the case." (*Clark v. Dillbee*, 16 Wend. 603.) Treating the right of the party to a continuance as a matter of course.

The difference in character and effect of evidence presented by deposition, and from that produced by the personal attendance and examination of the witness before the jury, is well stated in *The People v. Vermilyea*, 7 Cowen, 399; *People v. Diaz*, 6 Cal. 250.

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This continuance should have been granted for the reason that defendant had a right to the personal attendance of his witness, and could not be forced to risk his case and his life upon the meagre and unsatisfactory results of a written deposition.

J. G. McCullough, Attorney-General, for the People.

The defendant failed to take any steps to obtain the testimony by deposition or commission. He had from the time of his arrest to do so. He had nearly two months from the finding of the indictment. He had twenty days from the day the case was called and was set for trial until the day of trial. As the record shows, he knew the witness lived in the county; that she was likely to be too sick to attend the trial. It does not show but that she was able to testify upon deposition. There was an entire want of diligence on the part of defendant. In a civil case he could have obtained no continuance on this state of facts. (*Pierson v. Holbrook*, 2 Cal. 598.) If there is any difference, the Criminal Practice Act, as to taking depositions in criminal cases, is stricter than the Act making such provision in civil cases. The same rules govern in criminal as in civil cases in these matters of continuances, and the same amount of diligence is required. (*Commonwealth v. Gross*, 1 Ashland Pa. Rep. 281.) The granting or refusing such orders rests in the sound discretion of the Court below, and this Court will not interfere unless for the most cogent reasons, even though the Court below in its action approached very nearly to an arbitrary exercise of its discretion. Its action must be arbitrary and oppressive to warrant interference by this Court. (*Sealy v. State*, 1 Kelly Ga. R. 215; *Pilot Creek Canal Company v. Chapman*, 11 Cal. 162; *Griffin v. Polhemus*, 20 Cal. 181.)

By the Court, SANDERSON, C. J.

The affidavits upon which the motion for a continuance was made were sufficient to entitle the defendant thereto, unless

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he was bound under the circumstances to obtain the testimony of the absent witness in the manner authorized by the statute in such cases. (Wood's Digest, p. 314, Secs. 562 to 582 inclusive.) The defendant knew, as appears from the record, that the witness would not, in all probability, be able to attend the trial, and had ample time to obtain her testimony by deposition had he elected to do so; but it also appears that her illness was believed to be temporary, and that she would be able to attend the trial if postponed until the next term of Court. Under these circumstances was the defendant bound to take her testimony on commission or go to trial without it? Such was the only ground urged against the motion in the Court below, and such seems to have been the only ground upon which the motion was denied; and in view of the affidavits used upon the motion, it is clear that there could have been no other ground for the ruling of the Court.

A defendant in a criminal action is undoubtedly entitled to the personal attendance of his witnesses at the trial, if the same can be obtained without unreasonable delay. Such is the policy of the law, not merely from considerations affecting the defendant only, but also from considerations affecting the ends of public justice, irrespective of individual interests, which is manifest from the fact that the depositions of such witnesses are allowed to be read in evidence only upon further evidence at the trial that their personal attendance cannot be obtained. (Section 582.) It is to the interest of the people, as well as the defendant, that the witnesses of the latter should be made to give their testimony in the presence of the jury, for we all know, by daily experience, how much weight is added to or taken from testimony by the personal appearance, bearing and manner of the witness while under examination; if these add to the weight of his testimony, the defendant ought not be deprived of such effect, except upon grounds of necessity; and if they detract therefrom, such effect should be secured to the people, in order that the ends of public justice may be subserved. Thus this rule requiring the personal attendance of witnesses, if the same can be had, is founded

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upon considerations of the wisest policy, and the provisions of the statute whereby the defendant is enabled to examine conditionally, on commission, a witness who is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, were not designed to impair the rule or abridge the previous rights of the defendant, but, on the contrary, to enlarge those rights by enabling him to secure testimony of which he would otherwise be deprived, and at the same time preserve the rule in full force, so far as the same could be done in view of the right conferred by the statute. When, therefore, it is made to appear that the personal attendance of the absent witness may be procured without unreasonable delay, a resort to the statutory mode of taking his testimony ought not to be forced upon the defendant against his will under penalty of going to trial without it. What would be an unreasonable delay must of course depend upon all the circumstances of the case; but it is certain that a delay of one term of Court upon a first application would not be unreasonable.

Judgment reversed and a new trial ordered.

EZRA BEALS, ADMINISTRATOR OF THE ESTATE OF WILLIAM BEALS, DECEASED v. THE BOARD OF SUPERVISORS OF AMADOR COUNTY.

INDEBTEDNESS OF COUNTY WHEN DIVIDED.—When a new county is organized out of a part of the territory before constituting another county, the claim of the old against the new county for the payment of the new county's proportion of the debt of the old county is of an equitable nature only, and requires legislation to enable the old county to enforce it.

DEBT OF AMADOR COUNTY TO CALAVERAS COUNTY.—The Act of 1855 organizing Amador County out of a part of the territory of Calaveras County, and compelling the former to pay a portion of the debt of the latter, does not require Amador County to pay interest on its proportion of the debt due to the County of Calaveras.

APPEAL from the District Court, Eleventh Judicial District, Amador County.

Argument for Respondent.

The facts are stated in the opinion of the Court.

John W. Armstrong, for Appellant.

Interest is now allowed at common law where there is an express or implied contract to pay interest, but without such contract it is not given, even on written instruments. (*Sammis v. Clark*, 13 Ill. 546; *Hogan v. Page*, 1 Bos. & Pul. 337; *Foster v. Weston*, 7 Bingh. 709, 714; *DeBernales v. Fuller*, 2 Camp. 427; *DeBelloix v. Lord Waterpark*, 1 Dow. & Ryl. 16, 19; Chit. on Contracts, 558, 559.) Interest was not recoverable in England for the non-payment of the principal debt due, though often demanded, until the statute of 3 and 4 Will. 4, C. 42. As there is no stipulation to pay interest in the warrant in our case, we insist that no interest is recoverable on common law principles.

But there is another ground upon which we contend that the warrant in question did not draw interest. The State never pays any interest unless she expressly agrees to pay it. It is said, "the general rule is that the State never pays interest unless she expressly engages to do so." (*Attorney-General v. Cape Fear Nav. Co.* 2 Ired. Eq. Rep. 454. *The State v. Mayes*, 28 Miss. 709; *Auditor v. Duggen*, 3 Leigh, 247; *U. S. v. Hoar*, 2 Mason, 314.) And now, if interest cannot be recovered against the State, as the county government is a portion of the State Government, (*Hunsacker v. Borden*, 5 Cal. 290; Article IX, Sec. 4, Constitution of the State; *The People v. The Supervisors of Alameda County*, 26 Cal. 641,) we maintain that by parity of reasoning, interest cannot be recovered from a county unless by express agreement to pay it. (3 Atkins, 636.) Again, the statute of this State which allows interest to creditors for all moneys after they become due does not by name include the State or counties.

P. L. Edwards, and *Lewis Ramage*, for Respondent.

The warrant in question lawfully bears the interest demanded. California has never had any statute against usury, and that by the general statute regulating interest, a demand like this,

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as between private individuals, must draw it. (Wood's Dig. 551.) This warrant, drawn in pursuance of the action of the Commissioners, fixed the amount due from the one county to the other, and of itself raised the obligation to pay interest. The Acts do not distinguish between general and special funds. All are equally embraced. The county is expressly bound to pay interest in any and every case within their purview, and that whether there is a State, county, or individual sovereignty involved.

In conclusion, upon this point we submit that in the absence of inhibitory statutes, the whole theory of the counsel regarding interest is at war with all modern authorities. The general principle has long been settled, that if a debt ought to be paid at a particular time, and is not paid through the default of the debtor, compensation in damages equal to the value of the use of the money, which is the legal interest, shall be paid during the continuance of the default. (1 American Leading Cases, 498, top; *Renss. Gas Co. v. Reid*, 5 Cow. 587.)

By the Court, SAWYER, J.

The County of Amador having been organized out of territory before constituting a part of the County of Calaveras, the Legislature in 1855 passed an Act appointing Commissioners for the purpose, and authorizing them to ascertain the amount of indebtedness of the County of Calaveras at the time of the establishment of the new County of Amador, and to determine the amount of said indebtedness to be paid by the said County of Amador to the County of Calaveras.

Sections nine and ten of the Act are as follows:

"SEC. 9. The Board of Supervisors of Amador County are hereby authorized and required to assess a special tax of thirty cents on the hundred dollars on all taxable property of said county, to create a 'Sinking Fund' for the liquidation of said debt; said tax to be collected at the time and in the same manner as other county taxes; and said Supervisors are required to set apart from the 'General Funds' of said county a sum,

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which, added to the 'Special Fund,' shall be equal in amount to the one half of the entire 'General Fund' of said county; which 'fund' the Treasurer of Amador County is required to set apart and reserve for the payment of said indebtedness of Amador County to Calaveras County, when ascertained in the manner above prescribed; which said 'fund' shall be appropriated to no other purpose than the extinguishment of said indebtedness; and the creation of which said 'fund' shall continue until said indebtedness be declared, and until an amount equal to said indebtedness shall be set apart and reserved by said Treasurer as aforesaid."

"SEC. 10. When the amount of said indebtedness of Amador County to Calaveras County shall have been determined by said Commissioners, they shall certify the same to the Auditor of said County of Amador, who, immediately on the receipt of such certificate, shall draw his warrant or order on the Treasurer of said County of Amador, in favor of the said County of Calaveras, for the amount of said indebtedness, as certified by said Commissioners; which warrant or order shall state upon its face that it is for the indebtedness due from the County of Amador to the County of Calaveras, as determined by the Commissioners appointed by and under the provisions of this Act; and which said warrant or order shall be delivered by said Auditor to the Treasurer of Calaveras County, and shall be paid by the Treasurer of Amador County out of the funds or moneys required to be set apart and reserved according to the ninth section of this Act."

The Commissioners in pursuance of the provisions of the Act ascertained the indebtedness, and determined that Amador County should pay to Calaveras County the sum of twenty-six thousand five hundred and seventeen dollars and thirty-two cents, for which amount the proper warrant was drawn, in pursuance of the Act, on the Treasurer of Amador County, and delivered to the Treasurer of Calaveras County. The latter immediately presented the warrant to the Treasurer of Amador County for payment, and the fund provided by law

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for the payment not having been collected, the Treasurer of Amador County indorsed upon the warrant the following: "Presented and not paid for want of funds. February 18th, 1856." Subsequently, as funds for the purpose came into the Treasury, payments were made from time to time, from March 8th, 1859, to February 1st, 1861, amounting in the aggregate to the sum of thirty-one thousand four hundred and twelve dollars and eighty-three cents. The warrant in the meantime had been assigned to William Beals. The plaintiff, who is the administrator of William Beals, claims that the said warrant bore interest at ten per cent per annum from the date of its presentation for payment, and the indorsement of non-payment for want of funds, February 18th, 1856, and that there is consequently now a large amount due and unpaid. He therefore seeks, by a mandate from the District Court, to compel the Board of Supervisors to levy, and cause to be collected, a tax, to create a fund sufficient to pay the balance still due. The respondents, on the contrary, insist that the warrant does not bear interest, and that the warrant has not only been fully paid, but largely overpaid. The District Court allowed interest, and found a balance of seven thousand five hundred and thirty-two dollars and twelve cents to be still due, and accordingly ordered a peremptory mandate to issue. The Board of Supervisors appeal, and the question is whether the warrant bears interest?

There is no express contract to pay interest, and no rule of law independent of statutory provisions that would require interest to be paid. No statutory provision imposing an obligation upon the County of Amador to pay interest on the warrant in question has been brought to our notice, unless it is found in the Act of March 27th, 1850, "concerning the office of County Treasurer." Section ten of that Act provides, that when a warrant is "not paid for want of funds," an indorsement to that effect shall be made thereon, and from the date of such indorsement till redeemed said warrant shall bear ten per cent per annum interest. Subsequent sections provide for payment of such warrants upon notice to be given

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when there are funds applicable to that object, in the order of presentation as shown by the dates of the indorsements; and that upon such notice being given the interest shall cease. If not presented within sixty days after notice, they cannot be paid till other registered warrants have been paid in their proper order without a special order to that effect made by the Board of Supervisors. The claim to interest on the warrant in question must rest upon these provisions, or it cannot be sustained. But we do not think the rights of the parties are governed by the provisions of this Act. The Act is one of a general character, and has reference to the general and ordinary financial operations of the several counties, and to warrants issued for usual county expenses, payable out of its general and ordinary revenues.

The claim in question was one of an equitable nature, of imperfect obligation upon the County of Amador, arising, not upon contract between the two counties, but out of the legislation of the State in dividing the County of Calaveras, and which required further legislation to ripen it into a legal liability, and enable the County of Calaveras to enforce it against the County of Amador. The Legislature recognized the equitable character of the claim, and provided means for ascertaining the amount of the indebtedness of Calaveras County, at the time of the division, and the proportion that ought to be paid by the new County of Amador; and imposed the payment of that portion, when it should be ascertained, upon the said county. When this proportion so equitably due and required to be paid was ascertained, the amount became the exact measure of the liability thus imposed — this amount became the “indebtedness of Amador County” mentioned in the Act. The warrant was to be drawn “for the amount of said indebtedness, *as certified by the Commissioners.*” A special tax was authorized “to create a Sinking Fund for the liquidation of *said debt*” * * * “which fund the Treasurer of Amador County is required to set apart and reserve for the payment of *said indebtedness of Amador County to Calaveras County, when ascertained in the manner above prescribed.*” And

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“said fund shall be appropriated to no other purpose than the extinguishment of said indebtedness, and the creation of which fund shall continue until said indebtedness be declared, and until an amount equal to said indebtedness shall be set apart and reserved by said Treasurer as aforesaid.” Now, the indebtedness here provided for is the amount ascertained by the Commissioners, and for which the warrant was to be drawn. Nothing is said about the addition of other amounts resulting as damages for default in payment of the amount of indebtedness actually ascertained by the Commissioners. The fund authorized to be raised and set apart for payment *was limited to the amount of indebtedness ascertained to be due*, and for which the warrant was authorized to be drawn. Nothing more was authorized to be paid out of that fund, and no provision was made for payment out of the General Fund. The interest accruing after default was no part of the indebtedness, for it could not exist until after the amount was ascertained and the warrant drawn, presented, and indorsed, “Not paid for want of funds.” The Legislature evidently contemplated that the first year’s tax might not be sufficient to pay the amount due, for it is provided that “the creation of the ‘fund’ shall continue * * * until an amount equal to said indebtedness shall be set apart and reserved by said Treasurer, as aforesaid.” Yet they did not authorize interest to be paid in case of such delay. Only the specific indebtedness found to exist at the time was provided for, and not such indebtedness, and any interest that might accrue thereon. Undoubtedly it was competent for the Legislature to have imposed the payment of interest also, in case of default in payment of the principal, but it did not do it. Nor did it even authorize the money to be paid any faster than the specific revenue authorized to be provided should be sufficient to pay it. If the amount authorized to be raised should be insufficient to pay the full amount during the first, or second, or even third year, *there would be no default as to the excess*, even admitting that the county was authorized to pay in instalments, for it must be paid out of the specific fund, and such fund was limited in amount by the Act itself.

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The Act in question is specific, relating to a single transaction, imposing a specific liability upon the County of Amador, willing or unwilling, and providing a specific remedy for discharging it. The Act itself prescribes the measure of the liability, and the means of discharging it, and furnishes the entire rules by which the rights of the two counties are to be governed.

We think it was not contemplated that the indebtedness should bear interest. The judgment must therefore be reversed and the District Court directed to deny the mandate, and it is so ordered.

THE PEOPLE v. BARNEY OLWELL.

EVIDENCE TO SHOW INSANITY UPON PLEA OF NOT GUILTY.—Upon a trial for murder, where the defendant pleads not guilty, he is entitled to have testimony introduced on his behalf to show his insanity at the time the alleged offense was committed.

ERROR IN LAW IN CRIMINAL CASE.—If in a criminal case the defendant is tried on a good indictment, and convicted and sentenced, and an error of law occurs in the progress of the trial to defendant's prejudice, and he appeals, the judgment must be reversed, although the defendant does not ask for a new trial.

POWER OF COURT TO GRANT A NEW TRIAL IN A CRIMINAL CASE.—If the defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate Court may order a new trial, even though the defendant does not move for a new trial, and denies the power of the Court to grant a new trial.

A REVERSED JUDGMENT IN A CRIMINAL CASE NO BAR TO A NEW TRIAL.—If the defendant in a criminal case is convicted and appeals, and asks for a reversal of the judgment, but does not move for a new trial, a reversal of the judgment and an order for a new trial take from him the right of setting up the former trial and conviction in bar of another trial.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Asher B. Bates, for Appellant.

By the common law *all* Courts are without authority to grant a new trial *after a conviction*, or *discharge the prisoner*.

By the statute of this State (Wood's Digest, p. 304, § 440) the District Courts may grant a new trial when certain speci-

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fied errors or irregularities have occurred, namely: 1st, when the trial has been had in the absence of the accused; 2d, when the jury have received any evidence out of Court; 3d, when the jury have separated without leave, or have been guilty of any misconduct; 4th, when the verdict has been decided by lot; 5th, when the Court has misdirected the jury; or 6th, when the verdict is contrary to law or evidence.

Such specified errors or irregularities did not occur in this case, which furnishes an explanation why a motion for a new trial was not interposed upon the suggestion of the presiding Judge. An appeal therefore became necessary, and by the local law it is declared that by this Court "any decision of the Court (below) in an intermediate order or proceeding forming any part of the record, may be reviewed," (Wood's Digest, p. 308, § 484,) and "the appellate Court may *reverse, affirm, or modify* the judgment appealed from, and may, if *necessary or proper, order a new trial*," (Wood's Digest, p. 309, § 500,) and "if a judgment against the defendant be reversed without ordering a new trial, the appellate Court shall direct, if he be in custody, that he be discharged therefrom." (Wood's Digest, p. 309, § 502.)

There is no motion for a new trial pending, and unless this Court orders a new trial upon its own motion, (which is not anticipated,) perpetual imprisonment or a discharge is the alternative.

But even if such a motion was pending, then it would be a grave question, which I shall not discuss, whether the appellant could waive the constitutional inhibition, that "no person shall be subject to be twice put in jeopardy for the same offense." He has elected to ask to be discharged, and it is claimed this Court is without a choice, as it cannot permit perpetual imprisonment. The judgment being reversed, the appellant stands convicted, and if he cannot be held in perpetual custody, a new trial cannot be ordered after a conviction, as another alternative. It is conceded that it has been a mooted question before many of the State Courts, whether

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a mistrial for any cause, and no verdict rendered, did not operate as an acquittal. Without specially reviewing the cases, I refer the Court to Judge Story's opinion (2 Sumner, 37, and to 25 N. Y. 416; and *Hartung v. The People*, 26 N. Y. 167.)

J. G. McCullough, Attorney-General, for the People.

Under a plea of "not guilty," a defendant in this State can give in evidence any matter tending to establish a defense, other than that of a former conviction or acquittal, and consequently can show his irresponsibility for the crime. (Crim. Prac. Act, Sec. 304.)

Assuming that the Court erred—

1st. The defendant on his *own motion* would have been entitled to a new trial. This is now true in England and in this country, and especially in our State, under our statute providing for new trials in criminal cases. The counsel for appellant is wrong both as to our statute and the common law. And it is well settled that the new trial would have been no new jeopardy, as if error occurred defendant was never in jeopardy, and this whether it be an error of the Court or the jury. It is useless at this day to discuss this point. (Crim. Prac. Act, Sec. 632, Amendment 1863, p. 162, 5th subdivision; *Reg. v. Scaife*, 2 Den. C. C. 281; 2 Wharton's Am. Crim. Law, Sec. 3,061 *et seq.*; *Commonwealth v. Green*, 17 Mass, 534; *State v. Prescott*, 7 N. H. 288; *U. S. v. Veen*, 1 McLean, 438; *Grayson v. Commonwealth*, 6 Grattan, 723; *Weingarpflin v. State*, 7 Blackf. 196; *U. S. v. Connor*, 3 McLean, 574; *People v. Morrison*, 1 Parker C. C. N. Y. 643, 635; *Hasting v. People*, 26 N. Y. 179, 180, 181, 187, 188; *People v. March*, 6 Cal. 543; *People v. McNealy*, 17 Cal. 335.)

We have referred to but a few of the leading cases. The cases in New York, relied on by appellant's counsel, are not analogous, and do not sustain his position. In those cases the Legislature had repealed the law providing the punishment, and consequently the defendants could not be punished or retried under another law.

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2d. Was not Judge Pratt, when discovering an error in his former rulings, right in tendering defendant a new trial? (*United States v. McComb*, 5 McLean, 287.)

3d. If the defendant does not see fit to move for a new trial, or to accept it when tendered, he has a right to thus waive the error and suffer execution. He may testify against himself before a grand jury. (*People v. King*, *ante*.) He may testify against himself before a petit jury. (*People v. Bruzzo*, 24 Cal. 41.) He may refuse to plead, after demurrer overruled, and let judgment of guilty be passed. (*People v. King*, *ante*.) He may waive a trial by jury altogether. (*French v. Teschemacher*, 24 Cal. 559.) And in this case the defendant might plead guilty, or refuse a new trial, and let the judgment be executed. If he insists upon his right, he is entitled to be hung as the judgment stands against him. If to secure himself against the jeopardy of a second trial he prefers to undergo the sentence upon the first, he is entitled thus to do. (*United States v. Kean*, 1 McLean, 439; *People v. Morrison*, 1 Parker, 636, 641; *United States v. Harding*, 1 Wallace C. O. 143; 2 Whar. Am. Crim. Law, Sec. 3,077.) When the defendant, by entry of record in the Court below, refused a new trial, was he not forever estopped to ask it, and must he not suffer execution? (*United States v. Harding*, 1 Wallace, Jr. 148.)

4th. But this Court is relieved from such action by our statute, which empowers it to grant a new trial if proper or necessary for the ends of justice, (Crim. Prac. Act, Sec. 500,) which it is hoped will be done.

5th. Asking affirmative relief of this Court from the judgment below is a waiver on the part of defendant, and on a new trial, if granted, he will be estopped from setting up the former judgment in bar. (*Gerard v. People*, 3 Scammon, 362; *Lane v. People*, 5 Gilman, 308.) It is presumed, therefore, that this judgment will be reversed, and that that reversal will run back to the error committed in the proceedings below; that with it, it will carry the verdict and the whole proceedings of the District Court on the trial, leaving standing the indictment. Upon that indictment defendant is to have a

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trial. It raises against him a presumption of guilt for all purposes except for a fair and impartial trial before a petit jury. (*People v. Tinder*, 19 Cal. 543.) That trial he has never yet had, and that presumption is not yet removed, and this Court will not discharge the defendant, but will award him a fair trial upon a sufficient indictment.

By the Court, CURREY, J.

The defendant was indicted for the murder of James Irwin. He pleaded not guilty. On the trial it was proposed, on the part of the defendant, to prove that he was insane when he committed the homicide. The counsel for the people objected to the testimony offered, and the Court sustained the objection, on the ground that upon the trial upon the plea of not guilty the defendant could not introduce evidence to show he was insane at the time the offense was alleged to have been committed, assigning as a reason for such decision that it was provided by the Third Chapter of Title XII of the Act to regulate proceedings in criminal cases (Laws 1851, p. 277) that the question of the insanity of the defendant must be tried upon a special issue. To this ruling of the Court the defendant's counsel excepted. The defendant was found guilty of murder in the first degree. At the time appointed for pronouncing judgment, the Court, in the presence and hearing of the defendant, inquired of his counsel if he desired, on behalf of the prisoner, to move for a new trial, stating, at the same time, that if such motion was made the inclination of the Court was to grant it, and also stating that such inclination arose from a conviction that there was error committed by the Court on the trial in making the decision above noticed. The defendant's counsel declined to ask or move for a new trial. The Court then pronounced judgment that on a particular day the defendant be hanged by the neck until he should suffer death.

A bill of exceptions on behalf of the defendant was settled and signed by the Judge of the Court, and then filed, which

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is brought before this Court by the defendant on appeal from the judgment.

The defendant's counsel does not ask this Court to reverse the judgment and order a new trial of the cause, but to reverse the judgment and order the defendant discharged.

That the Court below erred in rejecting evidence of the defendant's insanity at the time he killed Irwin, the learned Judge of that Court admitted when the suggestion was made that if a new trial was applied for on behalf of the defendant it would be granted; and in this Court the Attorney-General has confessed the error. We deem it unnecessary to say more than that we also are satisfied that the ruling of the Court below was erroneous and that on account of it the judgment should be reversed; but whether it is competent for this Court to order a new trial, upon a reversal of the judgment, involves the consideration of a constitutional provision of grave importance.

The defendant was tried upon a sufficient indictment. The verdict of the jury was that he was guilty of murder in the first degree, as charged in the indictment. Upon this verdict the judgment of the law was pronounced. By his appeal the defendant asks this Court to reverse this judgment for error of law which occurred prior to the verdict in the progress of the trial, to his injury. For the error assigned the judgment must be reversed, and we are of the opinion it is proper to order a new trial of the case, if it can be done. But on the part of the defendant the power of the Court to do so is denied on the ground that thereby the defendant would be put in jeopardy the second time, when the Constitution declares that "no person shall be subject to be twice put in jeopardy for the same offense."

This question was passed upon and decided in this State in the case of *The People v. March*, 6 Cal. 546. In that case the defendant was indicted for murder, and was convicted of the crime. The judgment was reversed by the Supreme Court for an error committed on the trial, and a new trial was ordered. After the remittitur had been filed in the Court in which the

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defendant was tried, the indictment was set aside on application of the Prosecuting Attorney, and a new indictment was found against the defendant for the same offense, to which he pleaded not guilty; and he also pleaded specially *autrefois convict* and the reversal of that conviction by the Supreme Court. He was tried, found guilty and sentenced to death. On appeal from this judgment, March, the defendant, claimed that he was entitled to be discharged on the dismissal of the first indictment against him, and that the trial and the subsequent proceedings under the second indictment were in violation of the constitutional provision before cited. To this the Court in its opinion answered: "This provision was never intended to apply to cases in which a judgment of conviction was reversed in the appellate Court, and a new trial ordered. In such cases it being apparent, from the judgment of the reversal, that such trial was erroneous, the defendant, in fact, was not in jeopardy. The order for a new trial places the party in the same position as though no trial had been had."

It has been a maxim of the common law for centuries, that no person shall be subject for the same offense, to be twice put in jeopardy of life or limb. (4 Black. Com. 335.) This maxim is incorporated in the Constitution of the United States and also in the Constitutions of many of the States of the Union. That "no person shall be subject to be twice put in jeopardy for the same offense," is a part of the Constitution of this State. This constitutional maxim is intended for the protection of the citizen from oppression, and not as a shield to the guilty. If one accused of crime has once been tried and convicted of it, and judgment has passed against him, the law is satisfied. If he has been tried and acquitted, he is in the eye of the law innocent of the offense of which he was accused. But to constitute a former conviction a bar to a second trial for the same offense, it must appear that the judgment or verdict of conviction was final; otherwise the accused cannot say he was in jeopardy. At common law upon a second indictment for the same offense, the prisoner could not avail himself of a former conviction, under the plea

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of not guilty, but he was required to plead it specially. Then to ascertain what constitutes a complete defense under the clause of the Constitution cited, we need only to ascertain what, in substance, is necessary to constitute at common law a good plea of *autrefois acquit* or *autrefois convict*. (*Corn v. Olds*, 5 Littell, 139, 140; *State v. Ainsworth*, 11 Verm. 92.) Now by reference to the precedents of pleas of the kind mentioned, to be found in the early editions of Archibold's Criminal Pleading, it appears that the defendant must aver that the judgment, on which he relies as a bar to the further prosecution of the indictment against him, "remains in full force and effect, and not in the least reversed or made void."

By taking and prosecuting his appeal, the defendant seeks a reversal of the judgment. The reversal of a judgment in such a case, for error in the proceedings prior to the verdict, operates to vacate the verdict. The judgment and verdict being reversed and held for naught, there is nothing left to support the plea of *autrefois convict*.

As we understand the learned counsel for the appellant, his position is that, while this Court may reverse the judgment of the Court below for error which occurred on the trial, we have no power to order a trial *de novo*, because by another trial the defendant would be put in jeopardy more than once for the same offense, and in support of his position he cites the case of the *United States v. Gilbert*, 2 Sumner, 37, in which Mr. Justice Story, in an elaborate opinion, endeavored to show that when a trial had been regularly had before a Court of competent jurisdiction, upon a good indictment, and a verdict has been rendered by a competent jury, the party accused cannot be tried a second time for the same offense. He was of the opinion that the provision of the Constitution which adopts the maxim of the common law that a man shall not be twice put in jeopardy for life or limb for the same offense, presented an insurmountable barrier to a second trial, even if applied for by the defendant himself. But Judge Davis, in the same case, dissented from that part of the opinion of the learned Justice which denied the power to grant a new trial

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on the merits, upon the application of the prisoner to reverse a verdict of conviction. Referring to the English authorities on the subject, he said: "It is true, that, according to approved authorities, the plea of *autrefois convict* depends on the same principle as the plea of *autrefois acquit* — that no man ought to be twice brought in danger of his life for one and the same cause. The doctrine establishes a right in the prisoner to resort to that defense, if it be attempted or moved against his will to subject him to a second trial. The case of a verdict of conviction set aside at the request of the prisoner is not suggested in those authorities, and would stand, in my opinion, on very different ground. The previous question would not, I apprehend, under such circumstances, be considered as a sufficient bar to a second trial." Opposed to the doctrine of Mr. Justice Story is a strong current of decisions to be found in the volumes of reported cases of the Federal Courts, as well as of the highest Courts of many of the States of the Union. Many of these authorities are referred to by Mr. Justice Harris, in his opinion in *The People v. Morrison*, 1 Parker's Cr. R. 626, in which he says Justice Story stands alone in his construction of the constitutional provision under consideration; "that not a Judge of any Court in the United States has been found to concur in his views." (See also, *Com. v. Green*, 17 Mass. 515.)

It is insisted, however, that if it be assumed that this Court has the authority in certain cases to order a new trial, notwithstanding the Constitution provides that "no person shall be subject to be twice put in jeopardy for the same offense," such authority cannot be exercised unless it appears that the defendant moved in the Court below for a new trial. The statute provides that on the trial of a person indicted for a felony, exceptions may be taken by the defendant to a decision of the Court upon a matter of law in certain specified cases. Exceptions may be taken for rejecting testimony which ought to be admitted, or for erroneously deciding any question of law, not a matter of discretion. (Laws 1851, p. 259, Sec. 438.) On appeal, this Court is to "give judgment without

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regard to technical error or defect which does not affect the substantial rights of the parties," and "may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. (Laws 1851, p. 267, Secs. 499, 500.) If it be necessary or proper in the judgment of the Court to make such order, its power is in nowise abridged because the defendant may fail or intentionally refuse to ask in terms for a new trial upon a reversal of the judgment. The Court is to determine the question of the necessity or propriety of ordering a new trial, and may exercise the power of making the order in such cases unless inhibited by the provision of the Constitution to which we have referred. The taking of an appeal from the judgment of conviction was a matter of the defendant's option. He had his choice to let the judgment stand, and abide the consequence of it, or to move for its reversal in order to relieve himself from the jeopardy in which he was by reason of it. The appeal was taken on his behalf, and for his benefit. The verdict and judgment by which his life was in peril being annulled at his request, the same are as though they never had been, and he is not in a position to set up the former trial and conviction in bar of another trial. (*United States v. Kean*, 1 McLean, 436; *United States v. Harding*, 1 Wallace, Jr., 142; *Gerard v. The People*, 3 Scam. 363.) The reversal of the judgment at the defendant's instance on appeal takes from him the right of setting up the former trial and conviction in bar of another trial as effectually as if he had secured the same end by a motion for a new trial.

The judgment is reversed, the verdict vacated, and a new trial ordered.

THE PEOPLE v. W. A. HENDERSON.

TIME OF OBJECTING TO GRAND JURORS.—If the defendant is in custody, objections to grand jurors, on the ground of not being citizens or taxpayers, must be taken by challenge when the grand jury is impannelled, or they are waived.

CHALLENGE OF TRIAL JURY FOR CAUSE.—Unless it clearly appears from the answers of the juror that the District Court erred in its ruling upon a

Points decided.

challenge for cause in a criminal case, the verdict will not be set aside on that ground by an appellate Court.

TESTIMONY OF QUARRELS OF DECEASED ON MURDER TRIAL.—On a trial for murder, testimony of quarrels of the deceased with a person other than the defendant, and threats made by deceased against such person immediately before the homicide, is not admissible on the part of the defense, if the defendant was not present and the facts were not brought to his knowledge before the killing.

ERROR IN REJECTING TESTIMONY CURED.—If, on the trial of a criminal case, the Court erroneously rejects testimony offered by the defense, and the testimony is closed, and the Court adjourns until the next day, and upon the meeting of the Court on the next day it offers to allow the rejected testimony, and to give time to defendant to send for his witness, or to allow him to read the testimony taken down by the Clerk on a former trial, and he elects to read, and does read the testimony taken down, the judgment will not be reversed because of the first error.

INSTRUCTION IN LANGUAGE OF STATUTE.—There was no error in giving section thirty-seven of the Act concerning crimes and punishments, in the language of the statute as an instruction to the jury.

REPUDIATION OF AGREEMENT IN CRIMINAL CASE.—The appellate Court will not reverse a judgment of conviction, in a criminal case, by reason of alleged error in a proceeding had in the course of the trial, by express agreement of the defendant and his counsel, unless bound to do so by some controlling rule of law.

CHANGE OF JUDGES DURING A CRIMINAL TRIAL BY CONSENT.—If, after the evidence is closed on the trial of a criminal case, the Judge of another district, with the consent of the defendant and his counsel, upon the request of the Judge who commenced the trial, takes the place of the presiding Judge, charges the jury, and receives the verdict, a verdict of guilty will not be set aside on the ground of irregularity in this respect.

WAIVER OF OBJECTION TO CHANGE OF JUDGES IN CRIMINAL CASE.—If, in the progress of a criminal trial, the Judge of the district leaves the bench, and another Judge takes his place, and hears the argument and receives the verdict, and the Judge of the district afterwards resumes his seat upon the bench, and passes on a motion for new trial without objection, the defendant waives any objection to the further control of the proceedings and the passing of sentence by the Judge of the district in which the trial was had.

CHANGE OF JUDGES BEFORE SENTENCE IS PRONOUNCED.—The Judge of a district in which the cause was tried may pass sentence on a verdict of guilty when the Judge of another district presided during the argument of the case to the jury and received the verdict.

WHO MAY PRONOUNCE SENTENCE ON VERDICT.—A Judge who did not try the case, if legally presiding, has jurisdiction to pronounce sentence.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The defendant was indicted for killing one James Drew. This was the second trial of the defendant on the indictment.

The defendant appealed from the judgment and order denying a new trial.

The other facts are stated in the opinion of the Court.

Jo. Hamilton, for Appellant.

The Court erred in allowing the challenge to the juror tried for cause. He had neither formed nor expressed an unqualified opinion. (Wood's Digest, p. 296, Sec. 347; *People v. Reynolds*, 16 Cal. 110.)

Eisner's testimony should have been stricken out. The defendant does not appear to have been cognizant of or had anything to do with Mills' declarations or acts, and his testimony was calulated to prejudice him in the minds of the jury.

The Court should have allowed the testimony of McIntire, Ford, and Harford. The defense was that the act was committed in self defense. Whatever tended to show that the defendant had reasonable cause to believe himself in danger, was admissible. This testimony, although defendant was not present, would have shown the dangerous character of deceased. (*People v. Arnold*, 14 Cal. 476.)

The Court erred in rejecting the testimony of witness Starr, as to what a witness for the defendant, who had died, had testified to on the first trial of defendant. (1 Phillips on Ev. 337, 338, 339; 1 Greenleaf on Ev., Secs. 163, 166.) The prosecution contend that this error was cured by the subsequent offer of the Court to admit the testimony. A defendant intrusts his case to his attorney, who arranges his testimony and introduces one branch of it at a time. If testimony is improperly rejected and the case closed, and an offer made the next day to allow it, the effect on the jury is prejudicial to the defendant. They had the period of the adjournment of the Court to reflect on the case as it stood, and of course their minds are influenced by it.

The assent of the defendant to a change of Judges cannot cure the error. (*Muldrow v. Norris*, 2 Cal. 78.) The Judge who had not heard the argument or reviewed the verdict, was not authorized to pronounce sentence. (Section 27 of Laws of 1863, page 336, is fully explanatory of this point.)

J. G. McCullough, Attorney-General, for the People.

The defendant was in custody, and should have challenged the grand jurors in the County Court. Assuming that the challenge of Kind was for implied bias, I contend that allowance of a challenge to a trial juror for implied bias is not a ground of exception. (Crim. Prac. Act, Sec. 433.) If the defendant challenges, and the challenge is disallowed, this may be a reversible error. Even if the allowance of a challenge is ground of an exception, how can it be said that the defendant suffered any injury? (Crim. Prac. Act, Sec. 499.) The defendant was tried by a competent jury. (*People v. Gatewood*, 20 Cal. 149.)

The testimony of Eisner about the knife was a part of the *res gestæ*. The rejection of the testimony of McIntire and others was not error. The acts of the deceased towards persons other than defendant were not relevant. The case of *The People v. Arnold* decides that where the plea is self defense, the declaration of deceased at the time of borrowing the weapon may be proved to show the purpose for which it was borrowed. The alleged error in rejecting Starr's testimony was cured by the subsequent action of the Court. Merely because the Court made an error and then rectified it, is not ground of reversal. (1 Greenleaf on Ev., Sec. 431.)

Defendant had a right to agree to a change of Judge. (*People v. Garcia*, 25 Cal. 531; *French v. Teschemacher*, 24 Cal. 559.) The new Judge had a right to sit and hold a Court (not a term merely, as the law formerly stood) on the request of the presiding Judge. (Laws 1863, p. 336, Sec. 27; *People v. Wells*, 2 Cal. 207.)

By the Court, SAWYER, J.

The defendant was indicted for murder, tried and found guilty in the second degree.

Defendant moved to set aside the indictment on the ground that Charles Gould, one of the grand jurors, at the time he

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was summoned, was not a citizen, although he was a citizen at the time the Grand Jury was impanelled, he having, in the meantime, been naturalized; and that Gould Osborne, another grand juror, was not a taxpayer. The defendant, being in custody, was present in Court with his counsel at the time the Grand Jury was impanelled, examined such jurors as he saw fit as to their qualifications, and exercised his right of challenge. No objection was then made to either of these two jurors, nor did defendant question them upon the points referred to. Conceding the point to be otherwise good, under these circumstances the objection came too late, when taken for the first time after indictment found. The objection should have been made by challenge at the time of the impanelling of the jury. (Crim. Prac. Act, Secs. 188, 189, 297; *People v. Colmere*, 23 Cal. 632; *People v. Arnold*, 15 Cal. 479; *People v. Chung Let*, 17 Cal. 322; *People v. Romero*, 18 Cal. 93.)

The answers of the juror, Kind, are such that we should not be justified in saying that the Court erred in allowing the challenge on the part of the prosecution. The most that can be said is, that the answers do not disclose a clear case, and where error is not clearly shown, the ruling of the District Court will not be disturbed.

There was no error in refusing to strike out the testimony of Eisner.

The Court having refused to permit defendant to prove by McIntire, Ford, Harford, and others, that at the public meeting on the evening of the homicide, deceased drew his knife upon a stranger, and would have cut him had he not been prevented, also, that he slapped the naked knife against the cheek of another man, at the same time using threatening language, this ruling is assigned as error. Defendant was admitted not to have been present at the time the transactions offered in evidence took place, and defendant's counsel did not offer to show that these acts were brought to the knowledge of defendant. The counsel for the prosecution at the time stated that he did not object to their giving in evidence any declara-

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tion made by deceased against the defendant. We think there was no error in excluding these acts and quarrels of deceased with other parties having no relation to the defendant. With still less plausibility can it be urged that the acts of a similar character, which transpired some ten days before, offered to be proved by other witnesses were admissible.

No exception was taken to the ruling in rejecting Carnahan's testimony to declarations of defendant made an hour or so before the homicide. Besides they were inadmissible. (*People v. Wyman*, 15 Cal. 74.)

The defendant offered to prove by Starr what a witness testified at a former trial, said witness having since died. The Court rejected the testimony, on objection by the District Attorney. The testimony having been closed, Court adjourned till the next morning. On the opening of Court in the morning, the District Attorney stated that he was inclined to think the testimony ought to have been admitted, and offered to allow the case to be opened and the testimony introduced, to which suggestion the Court assented. The defendant then raised the objection that his witness had gone home, whereupon the Court offered to give him any reasonable time to procure the witness, or to allow him, if he preferred it—the District Attorney consenting—to read the testimony of the deceased witness from the minutes of his testimony taken down by the Clerk on the former trial. Defendant finally concluded to read the evidence from said minutes—still reserving his exceptions—and it was so read. It is claimed that these proceedings were erroneous and that the defendant was injured thereby. We do not see how the defendant was injured. The error at first committed was afterwards rectified by the Court. We have read all the testimony in the case, and from the character of the testimony we cannot see that, in this instance, it could be a matter of the slightest consequence at what particular point in the defense it came in. The testimony appears, upon its face to have been very fully and very well taken down, and in that form it is quite evident that it is much more satisfactory than the mere recollection

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of some other person could well be. At all events, the defendant concluded to put the evidence in, and to read it from the minutes, rather than send for the witness. The Court did not compel the defendant to put in the evidence in any form. It merely gave him the opportunity, of which he concluded to avail himself. There is nothing in this part of the proceeding that would justify a reversal of the judgment.

The observations already made apply to all the testimony rejected. Besides, there is much testimony uncontradicted in the case upon all the points covered by the rejected evidence, and, if admitted, it would only have been cumulative upon points about which there does not seem to have been any controversy. But we think there was no error in the rejection of evidence.

We think the evidence entirely sufficient to sustain the verdict. It is possible, as suggested by defendant's counsel, that the jury, if they erred at all, leaned to the side of mercy in finding the prisoner guilty of murder in the second degree. But if so, he surely has no reason to complain on that ground.

The only instruction complained of was copied from the Act relating to "crimes and punishments," (Laws 1850, p. 232, Sec. 37.) There is no error in giving this instruction.

At the close of the testimony the District Judge, who had thus far presided at the trial, was informed by telegraph that his presence was immediately required at home, in consequence of the dangerous illness of a member of his family. It was thereupon agreed by the parties, the prisoner consenting thereto, that the Judge of the Sixth Judicial District might sit during the remainder of the trial; and, at the request of the presiding Judge, in pursuance of this agreement, the Judge of the Sixth District appeared at the hour appointed for opening the Court on the following morning, and held the Court till the conclusion of the trial and the rendition of the verdict. The testimony was all in, with the exception of the testimony of the deceased witness, which was afterwards read from the minutes of the Court, as before stated. The Judge of the Sixth District heard the argument, charged the jury,

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and received the verdict. No question is made upon the charge, except upon the instruction given copied from the statute before referred to, and it must therefore be presumed to have been satisfactory. The charge given is manifestly adapted to the evidence in the case, and was probably written by the retiring Judge. After the rendition of the verdict, and before the day appointed for passing sentence, the Judge of the district in which the case was tried—the Fourteenth—resumed his seat on the bench, and finally pronounced the judgment of the Court upon the verdict rendered. Defendant objected, and excepted to his passing sentence.

The defendant now insists that the calling of the Judge of the Sixth Judicial District to preside, after the commencement of the trial, and with the express consent of the defendant, was error. But if not, that it was error for the Judge of the Fourteenth District to resume his place upon the bench and conduct the proceedings subsequent to verdict.

It is not surprising that the first point was not very distinctly made on the oral argument. It is squarely made, however, in the brief, notwithstanding the embarrassment under which counsel must be supposed to have labored in repudiating an express agreement after taking the chances of an acquittal, and losing. This course, it is true, is not without precedent, but the practice is not to be commended, and it cannot be supposed that an experiment of the kind will be successful, unless the Court is bound by some controlling rule of law.

In this case we think the verdict is not vitiated by the violation of any principle of law. The Judge of the Sixth District was authorized by the statute, upon the request of the Judge of the Fourteenth District, to hold the Court. He held the Court upon such request. The Court was a regularly authorized tribunal, having jurisdiction to try the cause. Although it is desirable that the same Judge who commences the trial should sit until it is completed—and in many cases, doubtless, it would be impracticable to do otherwise—yet, in some instances, as in this, there may be no inconvenience resulting from the taking up of the case by another Judge

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after the testimony closes. And if the parties interested consent to such a course of proceeding, we can see no objection to it. The parties interested are in a condition to judge whether the circumstances of the case are such that they are liable to be affected unfavorably by the change. After deliberately consenting to such a change, and taking the chances of a successful issue, and losing, they cannot be permitted to repudiate the proceedings and avail themselves of the chances of a more favorable result on a second trial.

Appellant claims that the Judge of the Sixth District having taken charge of the case with the consent of the prisoner, it was incompetent for the Judge of the Fourteenth District to again sit in the case without his consent.

After the rendition of the verdict, the Judge of the Fourteenth District resumed his seat, and acted in the subsequent proceedings. Defendant prepared his statement and moved for a new trial before said Judge, and the motion was heard and decided without any objection to his acting. No objection was made to the Judge of the Fourteenth District resuming his functions in the case—although his leaving the bench was made one of the grounds of the motion for a new trial—until the time for passing sentence had arrived, and all other resources had failed, when the objection was taken for the first time on motion in arrest of judgment.

These proceedings taken and voluntarily prosecuted by the defendant himself before the Judge of the Fourteenth District operated as a waiver of any objections to his acting further in the case, and, upon defendant's own theory, it would have been improper for the Judge of the Sixth District, after the denial of the new trial, to again resume a seat on the bench for the purpose of passing sentence; and had he in fact done so, the defendant would, doubtless, have again interposed an objection on that ground. But we think on other grounds the Judge of the Fourteenth District did not err in passing sentence. As before stated, the Court was properly organized. It was a legal Court, and had jurisdiction of the case. The

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question is one of regularity, or perhaps only of propriety, and not of jurisdiction. The Judge was the Judge of that Court. There was a legal verdict, and it only remained to pronounce the sentence of the law. Had the case been tried before the Judge of the Court, and had the Judge died or resigned after the rendition of the verdict, and before the time for passing sentence had transpired, and another Judge been appointed or elected to fill the vacancy, there can be no doubt that it would have been competent for the Judge newly appointed or elected to pass sentence. The Court is the same, although a different person occupies the position of Judge. This must be so, or no sentence in such cases could be passed. What else could be done? There is no provision for discharging a person under such circumstances, and there would be no propriety in so doing, or in trying him again; for there is already a valid verdict of conviction standing against him, which cannot be got rid of. If the judgment should be reversed, it could only be sent back for the purpose of giving an opportunity to the Judge of the Sixth District to review the proceedings and pass sentence upon the verdict. Nothing arising subsequent to the verdict can vitiate it, if valid when rendered. A Judge who did not try the case, then, may have jurisdiction to pronounce the sentence. In this case the Judge was possessed of all the facts necessary to enable him to intelligently exercise the discretion conferred upon him by law, in fixing the term of punishment. He had heard, at the trial, all the testimony except that of the deceased witness, which was in writing, and was before him on motion for new trial in the same form in which it was presented to the jury. He did not hear the argument to the jury, but he heard the same questions re-argued after more thorough preparation on the part of counsel on the motion for a new trial, where the insufficiency of the evidence was one of the grounds. The Judge who passed the sentence was evidently, then, better prepared to fix the term of punishment than the Judge who read the written charge to the jury and received the verdict could well have been.

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We think the principle of the last two points has been directly decided against appellant in *People v. Hobson*, 17 Cal. 429. A question as to the propriety of changing the *personnel* of the Court had been suggested, but not decided in *People v. Eckert*, 16 Cal. 113. But the suggestion was reconsidered and the point determined in *People v. Hobson*. We quote here the observations of Mr. Justice Baldwin upon both points. He says:

"The first error assigned is that the proceedings were irregular in this: That the motion for a new trial was passed on by a Court composed of different members from those before whom the trial was had. This fact only appears by the minutes, in which the names of the Justices composing the Court on the motion and in the previous stages of the trial are recited. No objection to the hearing of the motion by the Justices then present and acting was made by the prisoner.

"We intimated in a previous case the danger of a reversal of a judgment of conviction for this cause, though no express decision was made upon the point. The question has been more fully argued. We think, under the circumstances here, that the defendant cannot maintain the error assigned. His failure to object to the Justice not sitting before, was itself a waiver of exception for this cause. The objection does not go to the power of the Justice to act, but is merely in the light of an exception to him because it was more proper that the Justice who sat during the trial, and who, therefore, may be supposed to be better acquainted with the history of the case, should pass upon the final motion which involved a review of the previous proceedings. If the defendant was willing that the Justice should sit, he should not be allowed the double advantage of trying his motion before him and of appealing from the decision if adverse, and also the advantage of contesting the propriety of his sitting. Besides, we think that the rule we have recently laid down in *People v. Conner*, and other cases, covers this assignment. We there held that the proceedings of the Court of Sessions were to be construed

like those of the District Court, and that the same presumptions attach to them as to those of the District Court. If, from resignation or other such cause, one of the Justices, after a trial, should not be able to sit on the motion for a new trial, unquestionably this would not prevent the matter from being passed upon by another Justice acting in the place of the one thus incapacitated. We must presume that a sufficient reason existed to justify this change in the Bench—in other words, that the Court acted properly in the premises, when nothing is shown to the contrary. These remarks are made upon the assumption that the point, in the absence of these matters of explanation, is well taken. But upon a reconsideration of the subject we are not disposed so to hold. We think that the ends of justice might generally be better subserved if all the members of the Court who heard the case on the trial should sit on the motion for a new trial; but this is not a statutory right or obligation; and it would be going too far if we were to avoid the action of a Court legally constituted, and having full jurisdiction of the subject, merely upon the suggestion that it was not so constituted as to the particular members as more probably to insure an intelligent and satisfactory decision. Cases might arise where this point alone, or in connection with other matters, would entitle a party to a new trial or to a hearing of his motion before the Justices presiding on the trial; but in the absence of a showing of some special cause, we think this single circumstance does not constitute a ground of reversal of the judgment.”

These views meet our approbation. It follows that the judgment must be affirmed, and it is so ordered.

Mr. Justice CURREY expressed no opinion.

OCTOBER TERM, 1865.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OCTOBER TERM, 1865.

C. E. GORHAM AND R. S. RAYMOND v. L. GILSON AND
E. M. HAMPTON.

TO COMPEL A RECONVEYANCE OF PROPERTY OBTAINED BY FRAUD.—If a corporation is induced by the fraudulent representations of a part of its stockholders to make a conveyance of its property, and the grantee, in pursuance of a previous arrangement, conveys the property to the stockholders who committed a fraud, the innocent stockholders cannot maintain an action in equity to compel a conveyance to them of such portion of the property as they owned of the stock of the corporation.

Query?—Could the innocent stockholders maintain an action against those committing the fraud for damages?

Query?—Would equity compel a reconveyance of the property to the corporation in an action in the name of the corporation, or if the corporation refused to act in an action commenced in the name of the innocent stockholders in which the corporation was made a party defendant?

How EQUITY WILL RELIEVE AGAINST FRAUD.—If the title to property has been acquired through fraud, equity will grant relief by undoing what has been done, and placing the title where it was before.

APPEAL from the District Court, Fifth Judicial District,
Tuolumne County.

The facts are stated in the opinion of the Court.

John T. Doyle, and Robert F. Morrison, for Appellants.

If a bill in equity had been filed by the corporation, alleging the fraud, and praying to have the deed set aside, it would necessarily have sought to avoid the transaction *in toto*, and to do this should of like necessity offer to pay the Kryster mortgage, principal, interest, and costs, in full, or to restore his judgment for the deficiency, and his lien on the property (with the right to mesne profits pending redemption) acquired under Sheriff's sale. The property, when conveyed back under a decree made on such a bill, would belong to the corporation, and constitute the fund from which to pay its corporate debts, and distribute any surplus to its stockholders. Such a bill should of necessity have charged that Kryster was privy to the fraudulent representations, else the transfer to him could not have been set aside.

If the corporation brought an action for deceit, the measure of damages would be the difference between the value of the property and what the company obtained for it; and this sum when recovered would also be a fund, first for the payment of its creditors, and thereafter for distribution among its stockholders.

These propositions we deem clear on elementary principles. But neither of these remedies has been sought by the plaintiffs in the present instance. They have filed a bill in equity, alleging acts which they claim constitute a fraud upon the corporation, and *praying in effect to be admitted to a participation in the fruits of such fraud.* The property was corporate property; the consideration for which it was sold was received by the corporation; whatever loss was sustained by parting with it at less than its value was a loss to the corporation, and hence the damages or redress which the law awards for wrongfully procuring such result can only be awarded to the corporation. The rule is well settled that so long as a corporation exists it must be the plaintiff in an action to obtain redress for an injury to the corporate rights of property. The

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only exception is that where the Trustees or Directors dishonestly, unfaithfully, or by collusion with the other party, refuse to do their duty to the stockholders by bringing a suit. There, to prevent a failure of justice, an individual corporator is permitted to sue, not for the benefit of himself alone, but for that of the corporation. (*Hersey v. Veasie*, 11 Shepley, 12; *Smith v. Hurd*, 12 Metc. 385; *Abbott v. Merriam*, 8 Cush. 589; *Foss v. Harbottle*, 2 Hare, 494; *Robinson v. Smith*, 8 Paige, 232.) So that in the present case, after the defendants shall have satisfied the present judgment against them, they will, on precisely similar allegations to those contained in the complaint, be liable to respond to the corporation for the whole of the property acquired by the transaction here complained of as fraudulent. (See *Smith v. Hurd et al.*, 12 Metc. 371; *Painter v. Henderson*, 7 Barr. 50.)

H. P. Barber, for Respondents.

If two of these by fraud induced the remaining two to assent to a conveyance of their interest, and afterwards, through such fraud, obtained possession of the entire corporate property, holding it as individuals, equity will treat them as *trustees* for the benefit of their co-corporators thus defrauded to the extent of the interest of the latter in the former corporate property thus fraudulently obtained. (*Barbour on Parties*, 201; *Putnam v. Sweet*, 1 Chand. Wis. 286; *Silk Co. v. Campbell*, 3 Duch. N. J. 539; *Sears v. Hotchkiss*, 26 Conn. 171; *Dennis v. Kennedy*, 19 Barb. 518; *Tiffany & Bullen on Trusts*, 169.)

Plaintiffs are not seeking to *set aside* the sale of this property by the corporation, and possibly could not, for the reason suggested by appellants, that Kryster is an innocent purchaser for value. But although a Court of equity might not have power in such case to vacate the sale, it has ample power to compel the fraudulent parties to make restitution by suffering the sale to stand, and allotting to those who possessed an

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equitable interest in the property, the quantum of such interest so fraudulently obtained from them.

The complaint alleges that at the time of the execution of the Kryster mortgage, "plaintiffs and defendants were the *sole owners, in equal proportions*, of the entire stock and property of said corporation.

In *Bayless v. Orne*, Freeman's Chy. R. 161, and *Robinson v. Smith*, 3 Paige, 233, the stockholders of a corporation are designated as the *real parties in interest*.

By the Court, SANDERSON, C. J.

The complaint in this case alleges in substance: That a corporation called the Gilson Quartz Mining Company was duly formed in 1858, which subsequently, in 1861, became indebted to one John Kryster, and to secure the payment of the debt, mortgaged to him its entire corporate property, consisting of a certain quartz vein and quartz mill situated thereon. That subsequently, in 1862, the corporation being unable to pay, Kryster foreclosed, and became the purchaser at the sale at a price less than the amount of his judgment by some three or four hundred dollars. That in consequence of certain false and fraudulent representations as to the condition and value of the corporate property made by defendants, plaintiffs were induced to assent to a sale and conveyance by the corporation of its equity of redemption to Kryster, in consideration of a release of his entire claim. That at the date of the mortgage and deed by the corporation to Kryster, the plaintiffs and defendants were the only stockholders, and each owned a fourth of the stock of the corporation. That after Kryster became vested with the title, the defendants purchased the corporate property from him in pursuance of a previous understanding with him to that effect, but it is not pretended that Kryster was a party to the alleged fraud. That the defendants took possession of the mine and mill under the title thus obtained, and worked the same, making therefrom large profits. Plaintiffs ask a decree directing defendants to convey one half

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of the mine and mill to them upon the payment by them to the defendants of one half of the sum paid by them to Kryster for the property, and requiring the defendants to account with and pay over to the plaintiffs one half of the profits.

No demurrer to the complaint was interposed, but an answer was filed putting in issue all the material allegations of the complaint so far as the *gravamen* of the action is concerned. The case was tried, and plaintiffs obtained the relief for which they prayed. A motion for a new trial was made and denied, and the defendants have appealed from both the judgment and the order.

Several points have been made which we shall not notice, because in our judgment the first, which is to the effect that the plaintiffs cannot maintain this action, is conclusive of the case.

This action proceeds upon the theory, (and it could be maintained upon no other,) that in equity the defendants, by reason of their fraudulent acts, have become the trustees of the plaintiffs to the extent of an undivided half interest in the property in question, holding and working the same for their use and benefit. But we think it clear that the facts set out in the complaint do not sustain that theory. Where, by fraud and deceit a party is induced to do that which, but for the fraud and deceit, he would not have done, equity will interfere, and, so far as it can be done, restore him to his original rights. If the defrauding party has obtained by such means the title to property, equity will convert him into a trustee for the defrauded party, and will compel the execution of the trust by ordering the deed so obtained to be cancelled or the property reconveyed, thus replacing the property and the parties where they were originally; thus undoing what has been done, and putting the title where it was before, or, in other words, adjudging that the title remains unchanged and unaffected by the conveyance, because the same is in equity null and void, by reason of the fraud and deceit by which it was obtained.

Such relief, however, the plaintiffs are not in a position to

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claim. They never had any title, legal or equitable, to the property in question. They have not only not conveyed anything to the defendants, but they had nothing to convey. The property belonged to the corporation and not to them, and the corporation and not they conveyed it away under the fraudulent inducements in question. So far as any right to the form of relief sought in this action is concerned, the fraud was committed against the corporation and not against them. It may be that they could maintain an action sounding in damages, but we think it clear that they are not entitled to the kind of relief which they are now seeking. That they can only obtain indirectly through the action of the corporation. Should the corporation refuse to act, however, it is possible that the plaintiffs might maintain an action for the relief in question, by alleging that fact and making the corporation a party defendant, in which case the Court (the requisite parties being before it) might direct an account and transfer of the property to the corporation for the benefit of all concerned. But upon this point we express no opinion. (*Hersey v. Veasey*, 24 Maine, 9; *Smith v. Hurd*, 12 Metcalf, 385; *Abbott v. Merriam*, 8 Cush. 589; *Robinson v. Smith*, 3 Paige, 232.)

The judgment is reversed and the Court below directed to dismiss the action.

H. W. CARPENTIER v. M. MENDENHALL *et al.*

OUSTER OF TENANT IN COMMON BY CO-TENANT.—A finding, in a special verdict, in an action of ejectment brought by a tenant in common against a co-tenant who is in the occupancy of the land held in common, that the plaintiff demanded of his co-tenant to be let into the immediate possession of the same, and that the co-tenant refused, is not a finding of an ouster, either in terms or by legal conclusions.

THE FACT OF OUSTER OF A CO-TENANT MUST BE FOUND.—The law will not presume from acts of ownership by one tenant in common, nor from his refusal to allow a co-tenant to enter, nor from both combined, that there was an intent to oust, but the intent to oust must be established as a fact by the finding of the jury.

OUSTER OF CO-TENANT MAY BE INFERRED FROM DEMAND AND REFUSAL.—If a tenant in common demand of his co-tenant, who is in the occupancy of the

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common property, to be let into possession, and the co-tenant refuses and does not give any explanation of his refusal, the Court would be justified in directing or advising the jury to infer an ouster.

PURCHASE OF AN INTEREST IN LAND BY ONE WHO HAS TAKEN POSSESSION WRONGFULLY.—If one who takes possession of land unlawfully afterwards becomes a tenant in common in the ownership of the same, the moment he becomes such tenant in common his possession loses its hostile character, and the presumption is that it remains amicable until the contrary is made to appear.

DAMAGES IN EJECTMENT.—In ejectment by a tenant in common against a co-tenant who took possession wrongfully, but afterwards became a co-tenant, plaintiff cannot in that action recover damages for the period while the defendant was unlawfully in possession.

DAMAGES IN EJECTMENT AGAINST CO-TENANT.—A tenant in common, in ejectment against his co-tenant, cannot in that action recover damages or mesne profits for the period during which the possession of the co-tenant was not adverse.

DAMAGES AFTER OUSTER OF CO-TENANT.—A tenant in common who is ousted by a co-tenant, may recover damages in ejectment from the time of the ouster, according to his right.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

E. B. Carpentier, for Appellant.

Thomas A. Brown, and *John Reynolds*, for Respondents.

By the Court, **SHAFTER, J.**

This is an action of ejectment. The trial was by jury, who returned a special verdict upon issues submitted to them by the Court. Judgment was entered upon the findings in favor of the defendants. The plaintiff appealed, and at the July term, 1864, the judgment was reversed by this Court and a new trial ordered, on the authority of *Carpentier v. Webster*. The appellant moves that the order be vacated, and for judgment in his favor upon the special verdict.

The jury have found: First—That the plaintiff, on and prior to the first day of September, 1858, was, and that he still is, the owner in fee of the equal undivided half of the Rancho of San Ramon, embracing the premises described in the complaint, and of a further undivided interest equal to three hundred and twenty acres. Second—That all the

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defendants, with the exception of Stout, Slankard and White, entered into possession on the day before named. That Stout took possession July 14, 1862, White on the 14th of May, 1860, and Slankard on the 3d of January, 1863—the day when the complaint was filed. That all the defendants have continued in possession since the date of their respective entries. Third—That none of the defendants had any title to the demanded premises prior to the 9th of March, 1860, nor any right to the possession of the same nor any part thereof; but that on that day they, with the exception of Stout, White and Slankard, became tenants in common with the plaintiff. That Stout became such tenant July 14, 1862; White, May 14, 1860; and Slankard, January 3, 1863. Fourth—That the plaintiff, prior to the commencement of the action, and between the 15th and 20th of December, 1862, served upon each of the defendants, personally, the following written demand:

“SAN RAMON, December 20, 1862.

“SIR: You will please to take notice that the lands and premises now occupied by you are part and parcel of the Rancho San Ramon, of which I am the principal owner, and that I demand to be let into the immediate possession and enjoyment of the same, and every part and parcel thereof.

“Respectfully yours,

“H. W. CARPENTIER.”

Fifth—The rental value of each of the parcels occupied by the respective defendants.

Two questions have been discussed by counsel—first, is the plaintiff entitled to judgment on the special verdict? and if so, then, secondly, for what amount by way of damages?

The second question it will be unnecessary for us to consider, for we are satisfied that the special verdict does not lay an adequate foundation for a judgment in the plaintiff's favor on the main question involved.

The trouble with the verdict is, that it does not find an ouster, either in terms or by legal conclusion. A demand is found, and a refusal matching the demand; but “demand and

refusal" does not fall within any definition of "ouster," as that term is used in the law governing the relation of tenants in common. Neither acts of ownership by one tenant in common, nor refusal to allow co-tenants to enter, necessarily work a disseizin. The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover; but it is settled that "demand and refusal" is not conversion, but only evidence of it for the consideration of the jury. In the absence of all explanation, the Court would be justified in directing or advising the jury to infer a conversion, or an ouster in a case like the one at bar, from the fact of demand and refusal; but the inference is to be made by the jury and not by the Court. (2 Stark Ev. 683; *Prescott v. Nevers*, 4 Mason, 330; *Cummings v. Wyman*, 10 Mass. 468; *Carpentier v. Webster*, 27 Cal. 524.)

But it is insisted that the verdict finds an ouster of the plaintiff by all the defendants, except Stout, White, and Slankard, prior to the demand and refusal, and independent of it, to wit: their unlawful entry upon the premises in September, 1858—a year and a half before the rights of the defendants as tenants in common were acquired.

It is said, in support of this position, that the possession acquired in 1858 was by disseizin, and it is added, "that the possession never lost its hostile character;" and it is upon this assumption of fact that the whole argument turns. But the verdict demonstrates that the possession unlawfully taken in 1858 did lose its hostile character, *prima facie*, on the 9th of March, 1860, when, as the verdict finds, they became tenants in common with the plaintiff. The moment the defendants became tenants in common with the plaintiff, their possession lost its hostile character by the legal effect of the fact; and it cannot be presumed that the possession was otherwise than amicable thereafter, until the contrary is made to appear.

It is further claimed that an ouster is manifested on the face of the answers; and here we are referred to *Harrison v.*

Taylor et al., 33 Missouri, 211. The doctrine of that case is that when a defendant, sued in ejectment by a tenant in common, states in his answer that "he holds the premises adversely against all persons," the action will not fall on the ground that there was no demand made previous to the action. The case at bar is not within the rule. The answers here contain no averment or admission of adverse possession on the part of any of the defendants, but deny the ouster alleged in terms.

Though we have declined to pass upon the question of the amount of damages to which the plaintiff is entitled, for the reason that on this record it does not appear that he is entitled to any, still, as the case must go back for a new trial, under the order already made, we deem it proper to state the principles by which the question of damage must be controlled.

As to damages which accrued prior to March 9th, 1860, traceable to the ouster of 1858, they cannot be recovered in this action. For the reasons already stated, that ouster has become unavailable as a basis of recovery in chief, and it is therefore unavailable in this action as a ground for the recovery of damages resulting from it. A party may recover specific real property, "with damages or without them," (Prac. Act, Sec. 64,) but when he sues to recover such property with damages, he cannot recover damages if he fails to recover the property. The Practice Act states an exception to this rule, but the case at bar is not within it. (Prac. Act, Sec. 256.)

As to damages during the interval between the 9th of March, 1860, when the defendants, or most of them, became tenants in common with the plaintiff, and the demand and refusal of December, 1863, neither damages nor rents and profits can be recovered in this suit, for in legal judgment the possession of the defendants during that time was not adversary, but amicable, and in strict keeping with the title.

As to damages that have accrued since the demand and refusal, if it shall turn out as matter of fact that the refusal was not supported by some legal right to refuse — having in

fact no other or better basis than the assumption that the plaintiff had no right of entry on the premises—then the plaintiff will be entitled to recover damages according to his right, and the plea of the Statute of Limitations will not bar the claim.

Motion for judgment on the verdict denied.

Mr. Justice RHODES expressed no opinion.

J. T. HICKINBOTHAM v. P. MONROE *et al.*

FAILURE TO FILE BRIEFS OR POINTS.—When the time for filing briefs has expired, and no briefs or points have been filed, and the case is taken up for decision in its proper order, the judgment will be affirmed.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the Court.

Tyler & Cobb, for Appellant.

John C. Byers, for Respondents.

By the Court, SAWYER, J.

The time for filing briefs having expired three months ago, and none having been filed, and there being no points on file, as required by rule seventeen, the judgment is affirmed, on the authority of *Edmondson v. Alameda County*, 24 Cal. 349, and *Hutton v. Reed*, 25 Cal. 488. A like disposition will be made of all cases similarly situated, when taken up for decision in their proper order.

THE PEOPLE v. J. F. SHULER.

INDICTMENT FOR ROBBERY.—An indictment for robbery is not bad because it charges that the property was forcibly and violently taken from one person and against his will, and that another person was the owner of it, though it fails to aver that it was taken without the consent or against the will of the owner, and also fails to aver the character of the possession of the person from whom it was taken.

CHANGE OF VENUE.—Bias or prejudice of the presiding Judge is no legal ground for a change of the place of trial of a criminal action.

SAME.—An affidavit for a change of venue in a criminal action made by defendant, which states that he is informed by his counsel and believes that the Sheriff and his deputies are biased and prejudiced against him, is insufficient.

AFFIDAVIT FOR CHANGE OF VENUE.—An affidavit for a change of venue in a criminal case, which states upon information and belief that the people of the county are prejudiced against the defendant, is insufficient.

CIRCUMSTANTIAL EVIDENCE.—Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other reasonable hypothesis consistent with the proof.

CHARGE OF COURT IN CRIMINAL CASE.—The presumption in the appellate Court is that the charge of the Court to the jury in a criminal case was in writing, unless the record shows it was not.

APPEAL from the County Court, Butte County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

Coffroth & Spaulding, for Appellant.

It is not charged that Wyckoff was the bailee of Whiting. The ownership is in the latter, while the felonious taking was from the former. It does not aver the character of the possession of Wyckoff, or that he was the agent or servant of the owner of the property. In fact, the indictment charges two distinct and positive offenses. First, in terms, it is complete for an assault upon the person of Wyckoff; and secondly, it charges a larceny of the property of Whiting, and then, to fill up the interstices of bad pleading, technically designated the whole wrongdoing as highway robbery. We hold that to make the indictment sufficient for robbery, the character of the possession of Wyckoff of the property should be fully and substantially set out. The indictment must give the particu-

lar circumstances of the offense charged. (Wood's Digest, p. 288, Sec. 239.)

One of the "particular circumstances" in this case is, the character of the possession of Wyckoff of the property alleged to be stolen. As the indictment is drawn, all the averments may be true, and yet the defendant not be guilty of robbery. The money alleged to have been stolen may have first been taken unlawfully by the party put in fear. If so, the forcible retaking of them from him by the defendant would not be the offense of robbery. (*Commonwealth v. Clifford*, 8 Cushing, 216, 217; *Rex v. Hall*, 3 Car. & P. 409.) The indictment does not state that money or property was taken against the will of the owner. In fact there is nothing shown whereby we can ascertain how Wyckoff obtained possession of the property from the owner.

J. G. McCullough, Attorney-General, for the People.

There was no error in overruling the demurrer to the indictment. It was not necessary to set forth the facts and circumstances showing the bailment. It was only necessary to set forth such facts in an indictment for the special statutory offense created by section seventy-one of the Act concerning crimes and punishments where the bailee of goods converts the same to his own use, etc. (Wood's Digest, 339; *People v. Poggi*, 19 Cal. 600.) This indictment was a good common law indictment for robbery. The two cases referred to by counsel for the appellant are not applicable to such a case as this. The case of *Rex v. Hall*, 3 Car. and Payne, 409, simply decides that the question whether the defendant entertained a bona fide impression that the property was his or not should be left to the jury. And the case of *Commonwealth v. Clifford*, simply decides that the indictment must allege that the stolen goods were the property of the defendant or the property of some third person. Here it is alleged that the property was taken from the person of Wyckoff, and that the same was the property of B. F. Whiting, the third person. In the Massachusetts case the property was not alleged to be the property

of anybody at all. Certainly it was not necessary for the pleader to set up in the indictment *negatively* that the defendant was not the agent of Whiting, not even under the common law, and much more so not under the liberal provisions of our statute. (See especially, *People v. King*, 27 Cal. 507.)

By the Court, CURREY, J.

The defendant was indicted with several others by the Grand Jury of Butte County for the crime of robbing Charles A. Wyckoff of three hundred dollars in money and eighty-five ounces of gold dust of the value of fifteen hundred dollars, and three leather purses of the value of seventy-five cents, which the indictment alleges was the property of one B. F. Whiting. To this indictment the defendant demurred on the ground that the facts stated therein do not constitute a public offense, specifying particularly wherein. The demurrer was overruled and the defendant pleaded not guilty. He was afterwards tried and found guilty, and sentenced to be imprisoned in the State Prison for the term of ten years.

I. The objection made to the indictment the defendant's counsel insists should have been sustained by the Court. The fifty-ninth section of the Act concerning crimes and punishments defines robbery as follows: "Robbery is the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation." This in no material respect is different from the common law definition of the crime of robbery. If the offense is charged essentially and substantially as it is defined by the statute then the indictment must be regarded as sufficient. The Act to regulate proceedings in criminal cases requires that the indictment shall contain a statement of the acts constituting the offense. The party accused must be charged directly, and the offense must be charged in the same unequivocal manner, together with the particular circumstances of it when necessary to constitute a complete offense. (Laws 1851, pp. 237, 238.)

The indictment charges that the defendants, on a certain day, at a particular place in Butte County, "upon Charles A. Wyckoff did feloniously make an assault and put him in fear and danger of his life, and from his person and control, and against his will, did feloniously, forcibly and violently steal, take and carry away certain property and money" which is particularly described of a specified value, alleging the same to be "the property and money of B. F. Whiting." It is claimed on the part of the defendant that the indictment is bad because it is not stated therein that the property was taken from the person or presence of the owner or against his will, or without his knowledge and consent; and further, because it is not stated that Wyckoff had the right of possession of the property, or was in the peaceable possession of it, when it was taken.

The indictment does not state that the property which the defendant with others was charged with feloniously, forcibly and violently taking from Wyckoff was taken from Whiting, or without his knowledge and consent. The statute does not require that the indictment shall in terms contain such a statement, nor a statement in terms that the bailee of it had the right of possession. The indictment does state that from the person and control of Wyckoff, and against his will, the defendants did feloniously, forcibly and violently steal, take and carry away the money and property described. It thus appears that Wyckoff had possession of the property when it was taken, for it was taken from his person and control. Having possession of it, the law deems that possession rightful, and therefore the right of Wyckoff to the possession need not be stated in the indictment. (Laws 1851, p. 289, Sec. 248.)

When money or goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of either bailor or bailee. (*State v. Somerville*, 21 Maine, 14.) The cases usually given as an illustration of this rule are those of goods left at an inn; cloth given to a tailor to manufacture, and linen to a laundress to wash; chattels intrusted to a person for safe keeping; goods levied upon by a Sheriff

or Constable, and in his custody. In such cases the property may be laid in the indictment as the goods and chattels of the bailee or of the owner, at the option of the prosecutor. (Wharton's Prec. of Indictments, 192, and the authorities there cited.) In *People v. Vics*, 21 Cal. 345, the Court held that an indictment for robbery must contain an allegation as to the ownership of the property of which the party named was robbed, or that it did not belong to the defendant. The Court then say: "It is not necessary that the property should belong to the party from whose possession it was forcibly taken." We think the indictment was properly sustained.

II. Before the trial was commenced the defendant, with his co-defendants, made an application to change the place of trial on the ground that they could not obtain a fair and impartial trial in the Court in which the case was pending. The reasons assigned in support of the ground stated, were that the Judge of the Court and the Sheriff and his deputies were biased and prejudiced against the defendants, and had at divers times and occasions expressed to many citizens of the County of Butte their opinions that the defendants were guilty of the offense with which they stood charged; by which the public, and particularly the citizens of said county, were biased and prejudiced against the defendants. That the newspaper published at Oroville in said county, and the press of the State generally, had teemed with articles of abuse and slander against the defendants, which had been spread broadcast over Butte County to such an extent that the citizens thereof had unanimously become biased and prejudiced against the defendants, and therefore were not qualified to give the defendants a fair trial. The allegation of the defendants respecting the bias and prejudice of the Judge and Sheriff and his deputies, and the people of the county, against them was, as appears from the defendant's affidavit, upon information which they deposed they believed to be true. This application was denied by the Court.

In respect to the bias and prejudice of the Judge, which the defendants deposed to exist, as informed by their counsel, the


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cases of *The People v. Williams*, 24 Cal. 33, and *The People v. Mahoney*, 18 Cal. 185, are decisive and adverse to defendants' position.

The charge made by the defendants that the Sheriff and his deputies were biased and prejudiced against them and had expressed opinions of their guilt, is made upon information derived from their counsel. If the charge was admitted to be true, we are not satisfied, notwithstanding the impropriety of those officers indulging in the expression of opinions which might contribute to defeat the due administration of justice, that it would be a good and sufficient ground to authorize the Court to change the place of trial. But the charge cannot be regarded as sustained. The affidavit pointed to the source of the defendants' information, which was conveniently accessible. In such cases the party relying upon facts and circumstances of which he is informed and which he believes, should produce from the source or sources of his information, when he can conveniently do so, evidence of their truth. A rule requiring less than this would be attended with great inconvenience and operate in many instances to defeat the ends of justice.

The defendant's affidavit does not establish the fact that the people of the County of Butte were so prejudiced against him as to become disqualified to act as jurors in this case. The statement in this respect was upon his information and belief, which, standing alone, no Court in the exercise of a proper discretion could regard of sufficient probative force to authorize a change of the place of trial.

III. In the general charge of the Court to the jury, it is stated that the evidence in the case is mostly of a circumstantial nature. The defendants' counsel seems to have so considered it, and afterwards requested the Court to instruct the jury in these words: "In the application of circumstantial evidence the utmost caution should be used; it is always insufficient to convict or warrant a verdict, when assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true."



The rule on the point to which this requested instruction seems to have been directed, is that where a criminal charge is to be proved by circumstantial evidence, the proof ought to be consistent with the prisoner's guilt, but inconsistent with every other rational conclusion. (1 Greenleaf's Ev. Sec. 34.) The instruction requested is obscure if not without any definite meaning whatever. The hypothesis supposed to be found in the sentence as the antithesis of the words "other hypothesis" is indefinite, and quite too obscure to serve as a guide to a jury in such cases. If the requested instruction was intended to inculcate the rule above stated, then the hypothesis to which it was sought to refer the proof should have been qualified as reasonable and consistent with such proof. In our judgment the Court properly refused to give to the jury this requested instruction.

IV. The defendant assigns as error that the instructions of the Court to the jury were not in writing. That they were not in writing this Court is, in effect, asked to presume, because it does not appear that they were in writing. But as we held in *People v. Chung Lit*, 17 Cal. 322, and in *The People v. Garcia*, 25 Cal. 531, we hold in this case, that in the absence of evidence to the contrary, the presumption is that the instructions of the Court to the jury were in writing. If the Court erred in this respect, it was the business of the defendant to show it. It will not be presumed.

We have examined the several points which the defendants' counsel have deemed of sufficient importance to present for consideration, and are of the opinion the judgment should be affirmed.

Judgment affirmed.

Mr. Justice SHAFER and Mr. Justice RHODES expressed no opinion.

**W. H. STONE *et al.* v. BUNKER HILL COPPER, GOLD,
AND SILVER MINING COMPANY.**

COURT COMMISSIONER.—A Court Commissioner has no jurisdiction to hear a motion or make any order in reference to the dissolution of an injunction, unless the motion is referred to him by the Court.

Query?—Can an appeal be taken from an order of a Court Commissioner dissolving an injunction, without first applying to the District Court to correct the error.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The defendant was a corporation organized for mining purposes in El Dorado County, having its place of business at the Penobscot House, in said county.

The plaintiffs, who were stockholders in the corporation, commenced the action to enjoin the corporation from removing its place of business to San Francisco.

A preliminary injunction was granted. The defendants gave notice that they would move the Court Commissioner of El Dorado County for a dissolution of the injunction. The injunction was dissolved. The plaintiffs appealed from the order dissolving the injunction.

S. & G. E. Williams, for Appellants.

Blanchard & Hornblower, for Respondent.

By the Court, **SAWYER, J.**

The only point made by the appellant is, that the Court Commissioner had no jurisdiction to dissolve the injunction. The powers of Court Commissioners are prescribed by the Act of 1863, "concerning the Courts of justice of this State, and judicial officers" (Laws 1863, p. 338, Sec. 40.) This was a contested motion brought before the Commissioner on notice, and not "referred to him by the Court for determination." We think the Commissioner had no jurisdiction to hear the motion, or make the order without a reference by the Court

in pursuance of the second clause of section forty. No question is made as to the regularity of the appeal without first applying to the District Court to rectify the action of its subordinate officer.

Order reversed.

CHARLES COMBS *v.* ANDREW JELLY.

CERTIFICATE OF PURCHASE OF SEMINARY LAND.—An unintentional mistake or misrepresentation in an affidavit made by an applicant to purchase land of this State as a portion of the seventy-two sections granted by Congress to this State for a seminary of learning, does not render the certificate of purchase void, so that it may be attacked collaterally by one who brings an action against the purchaser to recover possession of the same, and does not connect himself with the title of the Government.

WHEN STATE CERTIFICATE OF PURCHASE VOID.—The question discussed in the opinion whether a certificate of purchase of land, being a contract between the Government and the purchaser, will be declared void for fraud, unless under similar circumstances a contract between two private persons would be held void.

CAN STATE LAND CERTIFICATE BE ATTACKED COLLATERALLY.—Question discussed in opinion whether a State certificate of purchase of land, if not absolutely void, may be attacked collaterally.

STATE CERTIFICATE OF PURCHASE OF LAND.—A certificate of purchase of land from the State is *prima facie* evidence of legal title in the purchaser.

APPEAL from the District Court, Second Judicial District, Tehama County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant, argued that the defendant could not be treated as the trustee of the plaintiff for one half the land in an action at law. He also contended that the defendant could never be treated as the trustee of the plaintiff, unless he could force the plaintiff to pay one half the cost of procuring the title, and cited *Flagg v. Mann*, 2 Sumner, 487. He also contended that a purchase of public land never inured to the benefit of a person other than the purchaser, unless there was an express contract to that effect, and cited *Bryant v. Hendricks*, 5 Clarke, Iowa, 257.

W. S. Long, for Respondent.

By the Court, RHODES, J.

It appears in this case that on the 24th of March, 1862, the plaintiff commenced an action against Elijah Shepherdson and M. D. Shepherdson to recover a certain sum of money, and on that day caused an attachment to be issued and levied upon the premises in controversy. Judgment was afterwards entered, execution was issued, the premises were sold and conveyed by the Sheriff to the plaintiff, the deed being executed September 12, 1863. In 1858 Elijah Shepherdson and M. D. Shepherdson were in possession of the premises, and so remained up to September, 1861, when M. D. Shepherdson left the premises. On the 25th of February, 1862, Elijah Shepherdson sold and conveyed the premises to the defendant. The conveyance purports to be executed by E. and M. D. Shepherdson, but was in fact executed only by Elijah Shepherdson. On the 8th of December, 1863, the defendant made an application to the State Locating Agent to locate the premises as a portion of the lands to which the State was entitled under the grant of seventy-two sections of land by Congress to the State for a State Seminary. Such proceedings were thereupon had that the location was made, and was approved by the proper officers on the part of the State and by the Register and Receiver of the United States Land Office at Marysville, and on the 5th of October, 1863, the Register of the State Land Office issued to the defendant a certificate of purchase.

The plaintiff sued in ejectment to recover the possession of the premises. The Court below found for the plaintiff as to the undivided half of the premises. The defendant appeals from the judgment and from the order denying his motion for a new trial.

The Court found, among other things, that the Shepherdsons were tenants in common of the premises; that by the deed from Elijah Shepherdson to the defendant he became a tenant in common with M. D. Shepherdson, and that by the execution of the Sheriff's deed the plaintiff became the owner

of the half of the premises held by M. D. Shepherdson, and thereupon became a tenant in common with the defendant. In respect to the selection and location of the lands as State Seminary lands, the finding is as follows: "His (the defendant's) first proceeding in that case was a fraud that will vitiate everything that it touches. He was compelled to make an affidavit that there was no valid claim to the land adverse to the one he held, and that there were no improvements upon the land other than his own. He probably believed this to be true, from his deed from E. Shepherdson, not knowing the legal effect of it. But the legal fact was that he was the owner of only an undivided half, and M. D. Shepherdson the other half, as well as of the improvements, and of the share of M. D. Shepherdson plaintiff is now the owner. Defendant's present claim is not a title, but a certificate of location which may ripen into a title hereafter. But an absolute title from the State or United States would place him in no better position."

The defendant, in his motion for a new trial, specifies several particulars in which the evidence is insufficient, as he alleges, to justify the findings; but as we are not apprised of the positions taken by the plaintiff, and have not the assistance of a brief or points and authorities in his behalf, we shall confine our attention to one point, and that is, whether the defendant's certificate of purchase was fraudulent, and therefore void.

No complaint seems to have been made as to the regularity of any of the proceedings, and there is no room for doubt that the land was public land of the United States, subject to be selected on behalf of the State, in part satisfaction of the grant of Congress. We understand the finding to mean that the defendant acquired no right or title in or to any portion of the premises by means of the certificates of location and purchase, but that the whole proceeding was void *in toto* because of the fraud of the defendant. This fraud consists of the single circumstance that the information upon which the officers of the State acted, which was derived from the affi-

avits of the defendant and of two other persons, made in connection with the application for the location and purchase of the land, was not true in fact. The defendant stated in his affidavit that, to the best of his knowledge and belief, there was no valid claim existing upon the land adverse to the claim he held, and that there was no improvement on the land other than his own. He is not found guilty of positive fraud, for it is said in the finding that he probably believed his affidavit to be true; and if his proceedings can be held to be fraudulent, he is responsible only for constructive fraud.

Admitting, for the purposes of the argument, that at the time of the application for the location of the land, M. D. Shepherdson was a tenant in common with the defendant, of the possession of the premises as a parcel of public lands; that such tenancy in common constituted a "valid claim existing to said land *adverse* to his (the defendant's) own," within section four of the Act of 1863 (Statutes 1863, p. 593); and that the one half of the improvements on the land were the property of M. D. Shepherdson; the question recurs, did the mistake in these respects of the defendant — his unintentional misrepresentations — his constructive fraud in making the statements in his affidavit, render the certificate of purchase void, so that the sale might be attacked collaterally? It appears very plainly that it did not. The proceeding amounted to a contract between the State and the purchaser, the State standing in the position of a private proprietor, but simply conducting the negotiations and expressing her assent to the contract in a mode differing from that employed by a private person; and such contract will not be held void, unless, under similar circumstances, a contract between two private persons would be so held. It is evident that a mistake, an unintentional misrepresentation, or any fraud falling short of positive or actual fraud, will not avoid a contract *ab initio*. If not absolutely void, it may not be attacked collaterally. Those may be proper grounds upon which an action may be brought to set aside the contract and cancel the certificate; and perhaps one who shows a better right than that held by the

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defendant, entitling him to the preference in making the purchase of a portion or all of the lands, may avail himself of those grounds in proceedings brought by him to have a trust established in his favor in a portion or all of the lands, and to have the defendant declared a trustee holding the legal title for his benefit. But it will be noticed that the parties to this action rely upon the legal title alone; that there is no claim for relief on the ground of fraud, and no equity set up in the complaint; that the State does not complain of the contract, that she is not a party to the action, nor does the plaintiff represent her or in any manner connect himself with her right or title. The issuing of the certificate of purchase completed the contract for the purchase of the lands, and the certificate not being absolutely void, vested in the defendant such legal title in the premises, as it was intended by the Act, should pass prior to the execution by the State, of the patent for the land. The seventeenth section of the Act declares that the certificate of purchase shall be deemed *prima facie* evidence of legal title to the land for which the certificate of purchase was issued, and conceding that the selection was properly made on behalf of the State, the holder of the certificate will prevail in ejectment over one who does not produce a better title derived from the State.

Judgment reversed, and cause remanded for a new trial.

PEOPLE *ex rel.* VANTINE *v.* ISAAC N. SENTER, COUNTY
JUDGE OF SANTA CLARA COUNTY.

ADMINISTRATION ON ESTATES.—The Mexican system of administration upon the estates of deceased persons was superseded by the adoption of the common law in this State, April 13th, 1850.

PROBATE ACTS RETROACTIVE.—The estates of deceased persons in this State, who died prior to the passage of the Probate Act of 1850, and subsequent to the adoption of the common law, can be administered on in accordance with the provisions of the probate Acts in force.

CASES COMMENTED ON.—*Grimes v. Norris*, 6 Cal. 621; *Tools v. Pitcher*, 10 Cal. 477; *De la Guerra v. Packard*, 17 Cal. 193; *Soto v. Kroder*, 19 Cal. 87; and *Downer v. Smith*, 24 Cal. 114, commented on.

THIS was an original proceeding commenced in the Supreme Court.

On the 26th of March, 1864, Joel Harlan and Elisha Harlan, two sons of George Harlan, the deceased, filed a petition in the Probate Court of Santa Clara County, praying that letters of administration be issued to Lucien B. Huff upon the estate of the deceased. The prayer of the petition was granted, and on the 12th day of March, 1864, letters were duly issued and the administrator qualified and entered upon the discharge of the duties of his trust.

The other facts are stated in the opinion of the Court.

Eugene B. Drake, for Relator.

The probate law of May 1st, 1851, (Statutes of 1851, p. 448,) also repeals *in toto* the Probate Act of 1850, and makes no provision by which it can be held to operate retrospectively upon the estates of deceased persons who died in 1850. (2 Bouv. Law Dic.—word retrospective, N. 5, on page 475, and authorities there cited.)

The right (and remedy) to probate an estate are the creatures of statutory law, and derive all their vitality and power from legislative enactments; and the moment that our Probate Act of 1850 was repealed, all rights and remedies thereunder were lost except in cases where proceedings were already had or commenced; and it seems to us that the question has already been fully decided by this Court in the cases of *Grimes v. Norris*, 6 Cal. 624; *Tevis v. Pitcher*, 10 Id. 477; *De la Guerra v. Packard*, 17 Id. 193; *Soto v. Kroder*, 19 Id. 87; and *Downer v. Smith*, 24 Id. 114.

By these decisions it is well settled, that the Act of 1850 did not operate retrospectively, to include the settlement of estates of deceased persons who died prior to its adoption and *pari ratione*; neither can the probate law of 1851 be held to include within its purview the estates of decedents who died in 1850, or prior to its passage.

Clarke & Carpentier, for Respondent.

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The relator seems to regard certain Acts of our Legislature of 1850 and 1851, "concerning Courts of justice and judicial officers," and "An Act to regulate the settlement of the estates of deceased person," as the *source* from which our Probate Judges derive their powers, when, in point of fact, neither of those Acts, as we think, confer any jurisdiction *additional* to that conferred by the Constitution. The Constitution says that the County Judges "shall perform the duties of Surrogate or Probate Judge," while the Acts "concerning Courts of justice and judicial officers," declare that those officers shall have power to do certain acts, enumerating them, which acts constitute the duties of a Surrogate or County Judge. And the "Act to regulate the settlement of the estates of deceased persons," merely prescribes the *manner* in which a jurisdiction *already conferred* shall be exercised; in a word, it is a "Probate Practice Act," or "Code of Procedure."

The very decisions cited by relator, from that of *Grimes v. Norris*, in 6 Cal. 624, down to and including *Downer v. Smith*, so far from giving any support to the views of the relator, seem clearly to indicate that the estates of all persons who have died since the organization of our State Government are within the jurisdiction of our Probate Courts.

The question presented here is *res adjudicata*. (See *Estate of Harlan*, 24 Cal. 182.)

By the Court, SHAFER, J.

This is a petition for a writ of prohibition to the County Judge of the County of Santa Clara, restraining and prohibiting him from exercising probate jurisdiction in the matter of the estate of George Harlan, who died intestate on the 8th of July, 1850.

It is insisted on behalf of the petitioner that the estate of Harlan is not subject to administration under the Probate Act of 1850, in force at the date of Harlan's death, for the reason that no proceedings were taken under that Act prior to its repeal, May 1st, 1851, (Acts of 1851, p. 489,) for the settle-

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ment of the estate; and it is further insisted that the estate is equally unaffected by the Act of 1851, that Act being, as is claimed, prospective and not retroactive in its operation.

The counsel for the petitioner relies, in support of these positions, upon *Grimes v. Norris*, 6 Cal. 621; *Tavis v. Pitcher*, 10 Cal. 477; *De la Guerra v. Packard*, 17 Cal. 193; *Soto v. Kroder*, 19 Cal. 87; and *Downer v. Smith*, 24 Cal. 114.

It is to be observed that the owners of the estates referred to in those decisions all died before the organization of the present State Government, while in the case at bar the death was not only subsequent to that event, but occurred while the Act of 1850 was in full operation. It is true that the Court, in the cases cited, say, generally, that the Act of 1851 is not retroactive; still nothing can be considered as having been adjudged by those cases except that estates, the owners of which died under the Mexican system, were not within the purview of the Act. The particular question raised upon this record is now presented for the first time in the Court of last resort.

The Mexican system was superseded in this State by the adoption of the common law on the 13th of April, 1850. (Acts 1850, p. 219.) But the common law method of administration on the estates of persons deceased was opposed in some of its features to the principles upon which our institutions are based and to our long settled habits of public action; and, furthermore, it must necessarily have failed here for the want of the needful agencies to conduct it. Hence the Probate Act of 1850.

We consider that the Legislature intended that all estates whose owners had deceased prior to the passage of the Act, and subsequent to the abrogation of the remedial system of the Mexican law, should be settled according to the method of the Act. To that extent at least the statute was intended to be retroactive. The intention could not have been that this class of estates should be closed out according to the Mexican method, for the Mexican system had been superseded

before the Act was passed; and if it was not intended to subject them to the Act of 1850. it follows that it was in the mind of the Legislature to leave their settlement to the rule of the common law — a result which we cannot regard otherwise than absurd.

As to the Act of 1851, we regard it as retroactive to the same extent as the Act which preceded it, and of which it was but a revision. We rest this conclusion not only upon the grounds on which the retroactive effect of the Act of 1850 has been argued, but on the further ground that the repeal of the Act of 1850, and the passage of the Act of 1851, were contemporaneous events; and furthermore, the Act of 1851 contains a provision saving all pending cases from the operation of the repeal. Can it be supposed that the Legislature intended to make a distinction between estates to which the Act of 1850 was in a course of application at the date of its repeal, and other estates like them in every historic and meritorious particular, turning the latter over for settlement to the imperfect and objectionable methods of the common law?

There is nothing in the language of the Act which forbids us to consider it as retrospective. The Act does no more than change the common law mode of administration, and, therefore, it may well be intended that the legislative purpose was that the Act should apply to the "settlement of the estates of deceased persons," irrespective of the dates at which the deaths occurred. (Smith's Com. 308; *People v. Tibbets*, 4 Cow. 384, *Dash v. Kleeck*, 7 John. 447; *Galland v. Lewis*, 26 Cal. 48.) To hold that no estate can be settled under the Act of 1851 where the owner died in advance of its passage, would be to hold in effect, that the numerous amendments which have from time to time been made to the Act, applied only to the estates of persons who deceased subsequent to their adoption. A certain class of estates has been withdrawn from the operation of the Act of 1851, by the decisions upon which the petitioner relies; but the case at bar is not within the scope of those judgments. Those cases can neither be appealed to as precedents nor be used in argument as starting an available analogy.

The other points urged by counsel are not of jurisdictional consequence.

The petition is denied.

Mr. Justice RHODES being disqualified, did not sit in this cause.

THE PEOPLE v. MOSES FRANK.

INDICTMENT CHARGING A SERIES OF ACTS.—Where a statute in defining an offense enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count in the indictment.

INDICTMENT FOR FORGERY.—An indictment for forgery which charges the defendant, in the same count, with having forged an indorsement on a draft, and also with having uttered and passed the draft knowing the forged indorsement to have been written thereon, does not charge two offenses.

SAME.—An indictment for forgery which charges that the defendant forged an indorsement on a draft, and that it was afterwards indorsed by other persons, and that after the true indorsement the defendant uttered it, does not charge two offenses.

FORGING INDORSEMENT UPON AN UNSTAMPED DRAFT.—The crime of forgery may be committed by forging an indorsement upon an unstamped draft.

UNSTAMPED INSTRUMENT AS EVIDENCE.—A forged instrument, though unstamped, may be used as evidence against the person charged with committing the forgery.

EVIDENCE ON TRIAL FOR FORGERY.—On a trial for uttering an instrument with a forged indorsement on it, other instruments claimed to have been forged and uttered by defendant about the same time may be used as evidence for the purpose of proving guilty knowledge, notwithstanding they had been the subject of other indictments on which the defendant had been tried and acquitted.

SAME.—An indictment for forging an indorsement on an instrument and uttering it with a forged indorsement on it, knowing it to have been forged, and a trial and acquittal, does not estop the People from using it as evidence on a trial for forging an indorsement on and uttering another instrument about the same time, unless it appear from the evidence offered in support of the estoppel that the jury by their verdict decided that the defendant did not commit any of the several acts charged as constituting the forgery.

VERDICT OF ACQUITTAL AS AN ESTOPPEL.—A trial and acquittal upon a charge of forging an indorsement on an instrument, and uttering it knowing an indorsement on it to have been forged, does not necessarily make the judgment of acquittal of itself an estoppel upon any matter except the forgery of the indorsement by the defendant.

EVIDENCE TO SHOW GUILTY KNOWLEDGE ON TRIAL FOR FORGERY.—On a trial for forgery no precise rule can be laid down with regard to the distance of time between the offense charged and the occurrence of collateral facts offered in evidence to prove guilty knowledge.

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OBJECTION TO TESTIMONY.—A general objection to testimony offered that it is irrelevant is not sufficient if the real ground of objection is that no proper foundation has been laid for its introduction.

EVIDENCE OF ACTING AS A CORPORATION.—Upon a trial for forging a draft on a corporation, evidence that it was acting as a corporation is sufficient.

INTERLINING IN FORGED INSTRUMENT.—If, on a trial for forgery, it appears that an interlineation was made in the instrument after the forgery, by the consent of the defendant, and the indictment sets forth the instrument as interlined, there is no such variance as to entitle the defendant to an acquittal.

APPEAL from the County Court, City and County of San Francisco.

The indictment charged that the defendant, on the 17th day of August, 1864, had in his possession a draft, the tenor of which was as follows:

“UTAH MINING COMPANY,
“Aurora, N. T., August 10th, 1864. } ”

“Ten days after sight, pay to the order of H. Bloomingdale & Co., in United States gold coin, seven hundred and fifty dollars, value received, and charge the same as advised.

“F. J. BAUM, Sup't.

“To Edward Conner, Esq.,

“Sec'y Utah Mining Company, San Francisco.”

And that he feloniously made, forged, and counterfeited, and aided and advised and encouraged another to make, forge, and counterfeit, on the back of the draft, an indorsement in writing in tenor following, “H. Bloomingdale & Co.,” with intent to defraud said Utah Mining Company, a company duly incorporated under the laws of California, and also one James L. Howard, and other persons; and also that the defendant, on the 17th day of August, 1864, had in his possession said draft—the same before the uttering and passing thereof having on its face been accepted by one Edward Conner, then the Secretary of the Utah Mining Company, and having been indorsed on the back thereof “F. J. Baum & Co.,” and then having said forged indorsement thereon—and did feloniously utter, publish, and pass as true and genuine said forged indorsement of said

draft with intent to defraud said Utah Mining Company, and said Howard, and that defendant at the time well knew the forged indorsement was false and forged.

On the trial it appeared that defendant took the draft to James L. Howard to be discounted, and that Howard refused to discount it unless it was made payable in gold coin, and that he then, with the consent of defendant, interlined the words "in United States gold coin," and purchased it.

Defendant by his attorney objected to the draft being received in evidence, because the draft offered in evidence and set forth in the indictment was not the same one the indorsement was forged on, having been changed by the interlineation. The Court overruled the objection. The defendant by his attorney also objected to the draft being received in evidence because it was not stamped, and this objection was overruled.

The People called as a witness Charles Oppenheimer, and showed him draft number three, which was as follows:

"\$600.	"UTAH MINING COMPANY,	}
[Stamp 10 cts.]	"Aurora, N. T., Sept. 2d, 1864.	

"Ten days after sight, pay to the order of H. Bloomingdale & Co., six hundred dollars, value received, and charge the same as advised, payable in U. S. gold coin.

"F. J. BAUM, Sup't.

"To Edward Conner, Esq.,

"Sec'y Utah Mining Company, San Francisco."

Which draft was indorsed as follows:

"H. Bloomingdale & Co.,

"F. J. Baum & Co."

And offered to prove by him that the signature of H. Bloomingdale & Co. was not the signature of any member of that firm, or of any one authorized by them; and also offered to prove that defendant, on the 6th day of September, 1864, passed draft number three to J. L. Howard with the forged

Statement of Facts.

indorsement of Bloomingdale & Co. thereon. Defendant objected to the testimony.

It was admitted in open Court by the District Attorney, such admission being taken as proof of the fact, that defendant had been indicted in this Court for writing the alleged forged indorsement of H. Bloomingdale & Co. on the back of number three, and for passing it with such alleged forged indorsement, knowing it to be forged; that he had been tried on such indictment and acquitted, and a judgment of acquittal duly entered in this Court thereon.

Defendant objected to any evidence tending to show that such draft, number three, was either forged or uttered by defendant, on the ground of his said acquittal, and to its admissibility in evidence against defendant, as irrelevant and incompetent, and tending to contradict the verdict and judgment of acquittal. That this draft, number three, is dated long subsequent to the date of the instrument set out in the indictment, and cannot tend to prove guilty knowledge of a prior date.

The Court overruled the objections. Testimony was then given tending to prove the matters proposed, and the draft was received in evidence. The People, by R. Newby, a witness, then gave evidence to the effect following:

Witness produced a draft, number nine. "I found this draft with the vouchers of the Utah Company. I am President of that company."

Draft number nine was then offered in evidence, to the admissibility of which the defendant objected, on the ground that it was irrelevant and incompetent. The objection was overruled, and the defendant excepted, and his exception was entered. The draft, number nine, was then read in evidence, and is as follows:

"UTAH MINING COMPANY,
"Aurora, N. T., Sept. 18th, 1864. }

"\$334.56. Ten days after sight, pay to the order of
H. Bloomingdale & Co. three hundred and thirty-four fifty-six

one hundredths dollars, value received, and charge the same as advised.

"F. J. BAUM, Sup't.

"To M. Frank, Esq.,

"President Utah Mining Company, San Francisco."

On the back of which draft was indorsed "H. Bloomingdale & Co.," and across the face of which draft was written, "Accepted, payable in thirty days. Edward Conner."

The defendant was convicted and sentenced, and appealed.

Alexander Campbell, and *A. Campbell*, for Appellant.

We do not question the correctness of the decisions of the Court in *People v. Shotwell*, January term, 1865, or *People v. Thompson*, ante, 214, but distinguish this indictment from these respectively, in this: That here, in the charge of forging the indorsement, the draft is set out *without* the acceptance of Conner upon it, and *without* the indorsement of F. J. Baum & Co. on the back; while the charge of uttering, alleges that defendant, on the 17th August, having in his possession, etc., the same before the uttering, etc., and having on the face thereof been accepted in writing by Conner, thus: "Accepted, August 16, 1864. Edward Conner, Secretary U. M. Co." and indorsed on the back thereof, "F. J. Baum & Co.;" uttered the said forged indorsement knowing it to be forged, etc. We contend, therefore, that on the indictment it appears that the forging of the indorsement was *before*, and the uttering *after* the acceptance by Conner and the indorsement by Baum & Co. That this acceptance, and the indorsement by Baum & Co., intermediate the alleged forgery and uttering, makes the forgery and uttering two distinct and separate offenses. The draft could not have been enforced for want of a stamp, and no one could have been defrauded by paying it. (2 East, P. Crown, 958, 954.)

The defendant had been acquitted on the very charge of forging the indorsement, and of uttering No. 3, knowing such

forged indorsement. The jury said, and the judgment held, that he did neither; and these points are allowed to be again agitated between the same parties in the same Court. (*Outram v. Morewood*, 3 East, 346; 2 Smith's Leading Cases, 663, 667; 3 Cowen, 120; *Gardner v. Buckley*; 1 Iowa, 421, *George v. Gillespie*; 7 Comstock, 71, *Doty v. Brown*; 26 Maine, 555, *Chase v. Walker*. *Vide* also, *Bell v. Raymond*, 18 Conn. 91.)

The true rule would probably be found to be, that if a subsequent uttering be made the subject of a distinct indictment, it cannot be given in evidence to show guilty knowledge of a former uttering. (Wharton, 1,457; 2 Car. & P. 633; 4 Car. & P. 411; 10 Metcalf, 256; 29 Eng. L. and E. 548.)

J. G. McCullough, Attorney-General, for the People.

The forging and the uttering were one continuing act. It is alleged that the uttering was "on said 17th day of August," which just before was alleged to be the time of forging. Clearly under our statute and decisions, and we think at common law, the indictment is sufficient. (*People v. Shotwell*, 27 Cal. 394.)

Though the instrument was insufficiently stamped, it was still the subject of forgery, and properly admissible in evidence. (1 Harrison's Digest, "Forgery," 2,091, 2,092; 2 Russell on Crimes, 346, 347, 348; Roscoe's Criminal Evidence, 489; Byles on Bills, star page 84.) And since our stamp laws have been passed, the same cases have been adopted in this county. (Edwards on the Stamp Act, 243.)

To prove guilty knowledge it was admissible to introduce in evidence draft No. 3. It was made about eighteen days after defendant uttered the draft on which the indictment was found. (Roscoe on Criminal Evidence, 90 to 95, and 515; 2 Russell on Crimes, 403 to 407; 1 Whart. Am. Crim. Law, Sec. 631 *et seq.*; 1 Phillipps on Evidence, Cow. & H. Notes, 768, 769; 3 Greenleaf on Evidence, Sec. 15.) Nor does it matter that draft No. 3 was the subject of a separate indictment, nor does it affect the question of the *admissibility* that defendant had been tried and acquitted for forging draft No. 3. (2 Russell

on Crimes, 406; 1 Phillipps on Evidence, C. & H. Notes, 768; 2 Wharton on Crim. Law, Sec. 1,457; *State v. Houston*, 1 Bailey Rep. 303; *Commonwealth v. Percival*, Thacher, 294; *Commonwealth v. Stearns*, 10 Metcalf, 257.)

By the Court, SANDERSON, C. J.

I. The indictment is good, whether it be regarded as containing two counts or but one. Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. To illustrate our meaning, take the statute against forgery, under which the indictment in this case was found, where we find several acts enumerated, all of which are declared to be forgery. Thus "the falsely making," "altering," "forging," "counterfeiting," "uttering," "publishing," "passing," "attempting to pass" any of the instruments or things therein mentioned, with the intent specified, is declared to be forgery. Now, each of those acts singly, or all together, if committed with reference to the same instrument, constitute but one offense. Whoever is guilty of either one of these acts is guilty of forgery; but if he is guilty of all of them, in reference to the same instrument, he is not therefore guilty of as many forgeries as there are acts, but of one forgery only. Hence an indictment which charges all the acts enumerated in the statute, with reference to the same instrument, charges but one offense, and the pleader may therefore at his option charge them all in the same count, or each in separate counts, and in either form the indictment will be good. (Wharton on Crim. Law, Sec. 390, 5th edition; *People v. Shotwell*, 27 Cal. 394; and *The People v. Thompson*, ante, 214.)

But it is claimed that this case is distinguishable from the

cases of Shotwell and Thompson, because intermediate the alleged forgery and uttering, the draft in question was accepted by the drawee and indorsed by F. J. Baum & Co., thereby becoming a different instrument, and making, therefore, two offenses instead of one. To this proposition we cannot assent. The mere adding of other parties did not destroy the identity of the instrument nor the unity of the transaction, under the rule in Shotwell's case, and the act of forging and the act of uttering were therefore both committed with reference to the same instrument. And we may add, that so long as the various acts mentioned in the statute are committed with reference to the same instrument, they must be regarded as constituting one continuous transaction within the meaning of Shotwell's case, notwithstanding the lapse of time or the intervention of acts, which do not destroy the identity of the instrument.

II. Upon the point that the indorsement upon the draft in question cannot be the subject of forgery, for the reason that the draft was insufficiently stamped, we are disposed to adopt the rule which is now well settled in England, that the forged instrument, though unstamped, is evidence against the defendant, and that the offense is complete whether the instrument be stamped or not. It has there been repeatedly held that in order to constitute forgery, it is not necessary that the forged instrument should be available. That though a compulsory payment by course of law cannot be enforced for the want of a proper stamp, yet a man may be equally defrauded by a voluntary payment being lost to him; and that the Acts of Parliament touching stamp duties, being mere revenue laws, do not make any change in the law of forgery, but only provide that the instrument shall not be available for the purpose of recovering on it in a Court of justice, and that it may be used as evidence for collateral purposes. (*Rex v. Hawkeswood*, *Rex v. Morton*, *Rex v. Roculist*, and *Rex v. Davis*, East's Pleas of the Crown, 955, *et sequens*; Edwards on the Stamp Act, 243.) We do this the more readily because our Stamp Act is substantially a copy of the English statute under which the foregoing cases were decided.

III. The exception to the admission of certain other drafts claimed to have been forged and uttered by defendant about the same time, for the purpose of proving guilty knowledge, on the score that they had been the subject of other indictments upon which the defendant had been tried and acquitted, is not in our judgment well taken. It is well settled that in cases like the present it may be shown that the defendant uttered, at or about the same time, other forged notes or bills, whether of the same kind or a different kind, or that he had in his possession other forged notes or bills, tending to prove that he knew the note or bill in question to be forged. (Roscoe on Criminal Evidence, 90 *et sequens*; 1 Phil. on Ev., Cowen & Hill's notes, 768; 8 Greenleaf on Ev., Sec. 15.) Nor does it matter if such other notes or bills are the subjects of other indictments pending at the time. (*Commonwealth v. Sterns*, 10 Met. 256.) And in Houston's case, 1 Bailey, 300, it was held that the principle upon which such evidence is admitted is unaffected by the fact that the defendant has been tried and acquitted upon the notes or bills produced in evidence, although the force of the evidence may be thereby weakened. But it is earnestly claimed by counsel for the appellant in this case that the rule declared in Houston's case nullifies the doctrine of *res adjudicata* and is not law.

The soundness of the doctrine to the effect that the judgment of a Court of competent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive upon the same matter coming directly or incidentally in question in another action between the same parties, cannot be doubted, but a strict application of this rule to the case before us does not, as it will be found, exclude the evidence in question.

In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those facts were directly and necessarily found by the verdict in that case in favor of the defendant; or in other words that

the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and found them against the prosecution; for if it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either. (*Wood v. Jackson*, 8 Wend. 40; 2 Smith's Leading Cases, 575; *Kidd v. Laird*, 15 Cal. 182.) No evidence as to the estoppel, either by the record or by parol, was offered, and the whole question as to what facts were directly determined by the verdict in the first case is to be determined upon the bald admission of the District Attorney that the defendant had been indicted for forging the indorsement upon the draft in question, and for uttering the draft, knowing the indorsement to be forged, and that he had been tried upon such indictment and found not guilty by the jury, and that a judgment in accordance with the verdict had been entered by the Court.

Leaving out of view the question of estoppel, the District Attorney was at liberty to prove all of the following propositions in connection with the draft offered in evidence for the purpose of showing guilty knowledge: First—That the indorsement upon the draft offered in evidence was forged by the defendant. Second—That it was forged, though not forged by him. Third—That he had it in his possession, knowing it to be forged; and, Fourth—That knowing it to be forged, he uttered or passed it to another with fraudulent intent. Now if all these propositions were directly and necessarily decided in favor of the defendant by the verdict and judgment in question, then the District Attorney was estopped from making the proof; or if either of them was so decided, as to such he was estopped, upon the principle that matters which have been once judicially determined cannot be again drawn into controversy as between the parties and privies to the determination; but if the verdict may have been founded upon one or more of those propositions without determining the others, and it is impossible to determine from the evidence offered in support of the estoppel, upon which proposition the verdict was founded, the District Attorney was not estopped

from making the proof in question; for the law does not favor estoppels, and a party cannot be precluded from giving evidence touching matters directly or collaterally involved in the issue upon the mere suspicion that they have already been determined against him by competent judicial authority; before that can be done it must appear with certainty that such matters have been so determined.

Upon the evidence offered in support of the estoppel in this case it cannot be affirmed with certainty that the jury passed upon and determined any of the propositions above specified except the charge that the defendant forged the indorsement. If he did forge the indorsement the verdict must have been guilty, hence a verdict of not guilty is conclusive upon that allegation. But this cannot be affirmed of either of the other allegations. It cannot be affirmed of the allegation that the indorsement was actually forged, though not forged by him; or that he had it in his possession; or that he knew it to be forged; or that he uttered it with intent to defraud; for it may be true that the indorsement was forged and that he knew it and had it in his possession but did not utter it, and the verdict would be right; or it may be true that he uttered it not knowing it to be a forgery and the verdict would be right. It cannot therefore be determined with certainty what the jury did decide, and hence as we have seen the verdict cannot operate as an estoppel except as to the allegation that the defendant forged the indorsement. Upon that allegation the prosecution offered no evidence. Evidence that the indorsement was forged was offered, but none was offered to show that the forgery was committed by the defendant. Thus it seems that the doctrine of *res adjudicata* which counsel has invoked has not been violated in this instance; for under a just application of that doctrine he fails to sustain by his evidence the estoppel for which he contends.

Nor do we think the points made by counsel for appellant grounded upon the claim that the drafts offered in evidence were not sufficiently connected, in point of time or otherwise, with the forgery charged in the indictment in this case to

create the presumption of guilty knowledge, well taken. In regard to the distance of time between the principal fact and the collateral facts proposed to be shown in proof of guilty knowledge no precise rule can be established so far as the question as to the admissibility of the evidence is concerned. To prove guilty knowledge in a charge of forgery, evidence of facts transacted three months before and one month afterwards has been received. But evidence of facts occurring five weeks afterwards has been rejected. (*Rex v. Ball*, 1 Camp. 324; *Rex v. Smith*, 4 C. and P. 411; *Rex v. Taverner*, 4 C. and P. 418, note a.)

Doubtless subsequent facts should appear to have some connection with the principal fact charged. But in a charge of forgery evidence of the subsequent uttering of other forged notes which are of the same manufacture is admissible. (*Rex v. Taverner*, *supra*.) Here the forged drafts offered in evidence may be said to be of the same manufacture as the one which is the subject of the indictment, for they were all drawn by the same party. In conclusion upon this point, it is sufficient to say that, from the very nature of the question, the admissibility of this character of evidence must be left in a great measure to the discretion of the Judge who tries the case. The inference of guilty knowledge to be drawn from such evidence may be safely intrusted to the jury, who will hardly fail, under the arguments of counsel, to discover whether such knowledge is fairly deducible from the facts in evidence or not.

The foregoing remarks apply alike to the exceptions to the admission of "drafts Nos. 2 and 3," as they are called in the record. The mere fact that "draft No. 2" was drawn in favor of other parties makes no difference in the rule under which this character of evidence is admitted.

IV. Undoubtedly "draft No. 9" was inadmissible unless accompanied by proof tending to connect the defendant with it in some manner, and the further proof that it was a forgery. etc. With such proof, however, it was admissible. The order in which this evidence ought to be received is a matter

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resting in the discretion of the Court, and the fact that the draft was admitted in advance of the other evidence would be of itself no ground of error. The only objection made to its admission by counsel for the defendant was the very broad and general one that it was "irrelevant and incompetent," which the Court doubtless understood as covering not only the draft, but the other evidence of forgery, etc., which had been introduced in connection with "drafts Nos. 2 and 3," and which the Court, doubtless guided by the previous course of the trial, supposed at the time he ruled upon the objection would follow the admission of "draft No. 9." At the time of the ruling the Court undoubtedly supposed that such evidence would follow, and upon that hypothesis his ruling was correct. When it appeared that there was no such evidence to be given, counsel should have renewed their objection on that ground. Had they done so, the Court would undoubtedly have struck out the draft as evidence or instructed the jury to disregard it. We have repeatedly held that counsel must make their objections in such a manner as to leave no doubt as to the precise ground upon which it is placed. We do not think that was done in the present case, and we do not think that we should be justified in reversing the judgment on this ground, especially as it is more than probable that "draft No. 9" had no effect on the result.

The other two points made by counsel to the effect that the Utah Mining Company is not a corporation as alleged, and therefore could not be defrauded, and that the interlining of the words "payable in U. S. gold coin" by Howard before he discounted the draft and after the defendant had forged the indorsement, made the draft other and different from what it was at the time of the forgery, are also untenable. Whether the Utah Mining Co. was a corporation *de jure* or not was not an issue in this case. If it was acting as such that was sufficient. (*Spring Valley Waterworks v. San Francisco*, 22 Cal. 434; *United States v. Amedy*, 11 Wheat. 392; *Dannbroge Gold Quartz Mining Company v. Allment*, 26 Cal. 286.) But admitting that the Utah Mining Company is not a cor-

poration, the indictment also charges an intent to defraud Howard who certainly had a legal existence; and so far as the interlineation is concerned it was made with the knowledge and tacit consent of the defendant and may be regarded as his act and deed.

Judgment affirmed.

Mr Justice RHODES expressed no opinion.

E. P. CULVER, AND ELSIE CULVER HIS WIFE, v. W. H. ROGERS, SHERIFF OF EL DORADO COUNTY, AND B. T. HUNT.

WHEN JUDGMENT ON MORTGAGE FORECLOSURE BECOMES A LIEN.—If, in an action brought to recover judgment for a debt, and to foreclose a mortgage given to secure the same, a judgment *in personam* is rendered for the amount due, and directing a sale of the mortgaged premises and an application of the proceeds to the payment of the judgment, the judgment, even if docketed, does not become a lien on the real property of the defendant until the mortgaged property has been sold by the Sheriff, and the balance, if any, reported by him and docketed by the Clerk, and then only for such balance.

ENJOINING SALE OF HOMESTEAD.—If a judgment *in personam* and decree foreclosing a mortgage given to secure the debt, but not covering the homestead, is rendered against a husband, the Sheriff will be enjoined from a sale of the homestead on an execution issued for a balance reported and docketed after a sale of the mortgaged property, if a declaration of homestead is filed and recorded before such balance is reported and docketed.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The personal judgment in case of *Hunt v. Culver* was as follows: "Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed, that B. T. Hunt, plaintiff, have and recover of and from E. P. Culver, defendant, eight hundred and nine dollars and twenty-three cents debt, with interest thereon at the rate of two and a half per cent per month from the date hereof until paid; together with sixteen dollars and thirty-five cents costs of suit." Then followed the usual decree for the sale of the mortgaged premises.

The defendant recovered judgment in the Court below, and plaintiffs appealed.

The other facts are stated in the opinion of the Court.

George G. Blanchard, and A. C. Searle, for Appellants.

If the lien attached before the 9th day of July, 1863, (the time when the property in controversy became a homestead,) then the sale should not be restrained, and the judgment of the District Court is correct. But if no lien attached before that date, the sale should not be made, and the judgment is erroneous. In *England v. Lewis et al.*, it is determined that before the amendment of section two hundred and forty-six of the Practice Act, plaintiff might primarily pursue either the judgment or the decree at his election, but could only pursue one at a time; while in *Cormerais v. Genella*, and *Vandewater v. McRea, et al.*, 27 Cal. 596, it is held that under section two hundred and forty-six, as amended in 1861, plaintiff "must exhaust the mortgaged property before his judgment can become a lien or he can have execution thereon." These seem to be, and are decisive of the case.

A critical examination of section two hundred and forty-six, before and after the amendment referred to, will convince the most sceptical that it was the intention of the Legislature to compel the plaintiff first to exhaust the security before acquiring any lien on the other property of the judgment debtor. The amended section differs from the original: First, by providing that actions for the foreclosure of liens and mortgages shall be in accordance with the provisions of Chapter One, and section two hundred and forty-six is the only one in this chapter that treats of the judgment or decree in such cases. Second, it uses the words "decree or judgment," when in the original the word "judgment" is only used. Third, it provides for the sale of the mortgaged property, and ascertainment of any deficiency thereafter due, and the paying over of surplus, and then the docketing of the judgment for such unpaid balance. Fourth, that the judgment so docketed shall then become a

lien upon the real estate of the judgment debtor, and then for an execution for this balance. Fifth, the execution shall be issued by the Clerk of the Court in like manner and form as upon other judgments to collect such balance, etc. The statute makes a distinction between judgments rendered under this section and ordinary judgments, for it speaks of other judgments, and until after sale of the property, ascertainment of deficiency, and docketing of the same, it is not like an ordinary judgment. It is a judgment without lien attributes, as provided in section two hundred and four.

S. & G. E. Williams, for Respondents.

We think that the Legislature did not intend to restrict a party to the decree alone, and this Court, in view of the many advantages of the other system, as explained in *England v. Lewis*, would be unwilling so to decide, unless it is plain that the Legislature so intended. What the Legislature intended by the alterations made in the statute was to conform the statute to the decisions of the Supreme Court, or in other words, to make the statute express in plain language what the Courts had construed it to mean. The first two clauses of section two hundred and forty-six are not essentially different from the old section; the third clause was only intended to apply to the case of a decree alone, and not where a personal judgment had been rendered. That clause, until amended, said nothing about docketing the deficiency so as to become a lien, and you could only obtain a lien by execution. It is this third clause that appellants rely upon, but we are unable to see how it makes so great a change in the statute as to prevent a party from taking and enforcing his personal judgment.

By the Court, CURREY, J.

In January, 1863, the defendant Hunt, as plaintiff, commenced an action in the District Court in El Dorado County against the plaintiff E. P. Culver, as defendant, to recover the amount of two promissory notes, and to foreclose a mortgage

on certain real property, executed by him to secure the payment of the amount due on the notes. On the 20th of May following the Court "ordered, adjudged and decreed that B. T. Hunt, plaintiff, have and recover of and from E. P. Culver, defendant, eight hundred and nine dollars and twenty-three cents debt, with interest thereon at the rate of two and a half per cent per month from the date hereof until paid, together with sixteen dollars and twenty-five cents costs of suit;" and immediately following this, the Court decreed that the mortgaged premises be sold by the Sheriff of the county in the same manner as the sales of real property are made under execution, and that the proceeds thereof be applied to the payment of said judgment, and that if the proceeds be insufficient for the purpose, then an execution be issued for the balance remaining due and unpaid. On the day after this judgment was entered, the Clerk of the Court docketed the same in the Judgment Docket Book. The mortgaged premises were sold under the decree on the 20th of July, but not for sufficient to satisfy the amount due. The Sheriff made his return, from which the balance remaining due appeared, and this balance was duly docketed in the Judgment Docket Book on the 18th of August, 1863. On the 9th of July of the same year the plaintiff, Elsie Culver, caused to be filed and recorded in the Recorder's office of El Dorado County a declaration of homestead on certain real property belonging to herself and husband as common property, on which she and her husband and their family resided and continued to reside to the time of the trial of this action. The property thus selected by Mrs. Culver as a homestead belonged to herself and husband at the time the judgment and decree was first docketed, and was not a part of the mortgaged premises. When the same was so selected as a homestead, and when this cause was tried, it was not of the value of five thousand dollars. In January, 1865, Hunt caused execution to be issued to collect the balance remaining due him on his judgment, and the same was placed in the hands of the defendant, Rogers, Sheriff of said county, who levied the execution upon the property selected by Mrs.

Culver as a homestead, and was proceeding to sell the same thereunder when he was restrained by an injunction granted in this suit.

The object of this action was to perpetually enjoin the defendants from selling on the execution so issued the property selected and claimed as a homestead.

The appellants' counsel admit that if Hunt's judgment became a general lien on the real property of the judgment debtor in the county, before the time of the filing of the homestead claim, then it would not be proper to restrain the defendants, and we do not understand the respondent's counsel as maintaining that the judgment found for the defendants can be upheld, unless on the ground that the judgment in the foreclosure case, from the time it was first docketed, became a lien on all the real property of the debtor in the county not exempt at the time from execution. So that the question to be decided is divested of all complications.

A judgment becomes a lien on the real estate of the debtor only by force of the statute, and depends for its existence upon conditions of statutory origin. For the recovery of any debt or the enforcement of any right secured by mortgage lien upon real estate or personal property the statute declares there shall be but one action. The statute then further provides: "In such action the Court shall have power by its decree or judgment to direct a sale of the encumbered property (or of such part thereof as shall be necessary) and the application of the proceeds of the sale to the payment of the costs and expenses of sale, the costs of suit, and the amount due the plaintiff." (Prac. Act, Sec. 246.) To this extent this section is substantially as the section was prior to the amendment of it in 1860. In a foreclosure case under the statute, as it formerly stood, a judgment *in personam* might be rendered against a debtor for the amount due, as well as a decree for the sale of the premises mortgaged (*England v. Lewis*, 25 Cal. 349, 349, and the cases there cited); and when a judgment *in personam* was rendered in an action of foreclosure, it was held in *Chapin v. Broder*, 16 Cal. 422, that when such judgment was dock-

eted, it became a lien in accordance with the statute — that is, as we understand the opinion, a lien upon all the real property of the judgment debtor in the county not exempt from execution. (Practice Act, Sec. 204.)

The two hundred and forty-sixth section of the Practice Act as amended in 1861 (Laws 1861, p. 306) contains an additional provision which reads as follows: "If it shall appear from the Sheriff's return that there is a deficiency of such proceeds, and a balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall from the time of such docketing be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the Clerk of the Court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor." If it be assumed that the recovery obtained on the 20th of May, 1863, was a judgment *in personam*, followed by a decree of foreclosure and sale, the fact that the debt, to recover which the action was brought, was secured by mortgage, and the further fact that the action was to make the money due by a foreclosure and sale of the mortgaged premises, operated to limit the plaintiff to his remedy to the premises mortgaged, until the same should be exhausted. When exhausted by a sale thereof under the decree, and a balance is ascertained in the mode prescribed to be still due to the plaintiff, the judgment shall be docketed for such balance, and shall from the time of such docketing be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued in like manner and form as upon other judgments. If this was the only statutory provision relating to the creation of a lien by judgment, we apprehend no question would be made as to the point of time determining its inception. But the two hundred and fourth section of the Act, which has reference to judgments *in personam* generally, provides that from the time the judgment is docketed it shall become a lien on all the real property of the judgment debtor, etc., and that the lien shall

continue for two years, unless the judgment be previously satisfied. The section here referred to does not provide at what time the judgment must be docketed. It may be docketed immediately after the judgment roll is filed, or at any time afterwards while the judgment subsists, for aught that appears in the statute. From the docketing, the judgment encumbers the debtor's real property, and may continue a lien upon it for two years. But with respect to a judgment *in personam* coupled with a decree foreclosing a mortgage, and directing a sale of the mortgaged premises, the judgment is to be docketed for the balance which may remain due after the mortgaged property is exhausted, and from that event, that is, the docketing, the judgment shall be a lien on the debtor's real property, and may thereafter subsist as a lien for two years. If the theory of the respondents was accepted, the entire judgment might exist as a lien for two years from the time it was first docketed, and then, if the mortgaged premises were sold under the decree without satisfying the amount due, the judgment to the extent of the balance remaining due might be docketed again, and from that time the judgment for the balance would be a lien on the debtor's real estate, which would continue for two years, if not sooner paid. Besides this consequence, we should in substance determine the amendment of section two hundred and forty-six to be without purpose or effect. The statute as amended seems to have been designed to limit the remedy of the mortgage creditor to his security, in cases when a decree for sale of mortgaged premises is had, until that was exhausted, and then to give him a lien on all his debtor's real property subject to execution for the balance remaining due, from the time the same should be duly ascertained and the judgment docketed for that balance.

Until the judgment was docketed for the balance due the plaintiff, the premises in controversy did not become encumbered by the judgment, and before then it became the plaintiff's homestead, and consequently was not subject to be sold on the execution issued for the balance due on the judgment.

This action was commenced on the 13th of October, 1863. The complaint alleged, first, that plaintiff was in the quiet and peaceable possession of the premises in question on the 5th of October, 1863, and that on or about that day the defendant, with force and violence, entered upon the premises and expelled the plaintiff therefrom; and secondly, that on the same day, the plaintiff being in the quiet and peaceable pos-

session of the premises, and entitled to the possession of the same, the defendant unlawfully entered on said premises and put out and expelled the plaintiff therefrom, and took possession of the same, and has ever since illegally and unlawfully retained possession of the same from the plaintiff.

On the 1st day of October, Smith, the defendant, went on the ground and marked out a place to build a house, and on the fifth went there with his lumber and commenced its erection. On the seventh, while at work on it, Thompson came to him and objected to his building the house, and told him he claimed the premises, and that he should not allow him to build, and ordered him to remove the lumber, and upon his refusal to do so, took hold of a board to carry it away, when Smith also took hold of the board and pushed Thompson gently aside.

The defendant appealed.

The other facts are stated in the opinion of the Court.

John B. Felton, for Appellant.

The plaintiff had not that *exclusive* possession which is necessary to a recovery in this action. Of course the plaintiff's possession must be exclusive, for if the defendant also is in possession *he* necessarily has a right to maintain, even by force, his possession or part possession. The only possession, therefore, which can sustain a plaintiff in this *quasi* criminal action, is such an actual exclusive possession as is inconsistent with and negatives the idea of any use or occupation other than his own. (*House v. Keiser*, 8 Cal. 501; *Preston v. Kehoe*, 15 Ib. 318; *Cummins v. Scott*, 20 Ib. 84; *Wolf v. Baldwin*, 19 Ib. 306; *Cummins v. Scott*, 23 Ib. 527.)

If this proceeding of forcible entry is to be resorted to whenever a plaintiff has acquired a scrambling, uncertain, or secret possession, it is apparent that the issues involved in the proceeding will be changed from the questions of force and breach of the peace, which are its legitimate objects of inquiry, to nice questions of possession, more fitted for actions of eject-

ment than for these summary proceedings. The entry cannot be called forcible where the intention to proceed to violence is matter of conjecture. It must be betrayed by act, or word, or manner. And it must be an actual immediate intention to use violence, for it is only that which threatens a breach of the peace. The cases on force are: *Frasier v. Hanlon*, 5 Cal. 156; *Buckman v. Whitney*; *Polack v. McGrath*, 25 Cal. 54; *People ex rel. Niles v. Smith*, 24 Barb. 16; *Willard v. Warren*, 17 Wend. 257.

P. G. Buchan, for Respondent.

It will be observed in this case that a motion was made for a new trial in the Court below and denied. In such a case the Court says, in *Walton v. Maguire*, 17 Cal. 92: "Where the Court below refuses a new trial, asked on the ground that the evidence does not sustain the finding and judgment, the Court acts in the exercise of a sound legal discretion, and the Supreme Court will not interfere unless *there was an abuse of discretion*." (*Lewis v. Covillaud*, 21 Cal. 178; *Lubeck v. Bullock*, 24 Ib. 338.)

The object of the appellant in the case at bar was evidently to try the title, and not the question of forcible entry. "When the possession of the premises is demanded of the party, if he, by word, or act, look, or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this would be sufficient." (*Dickinson v. Maguire*, 9 Cal. 49.)

"The statute was intended to prevent bloodshed, violence, and breaches of the peace, too likely to result from wrongful entries into the possessions of others, and it would be absurd to say that to enable a party to avail himself of its provisions there must have occurred precisely the evil which it was the object of the law to prevent." (*McCauley v. Weller*, 12 Cal. 527.) Such is the opinion of Mr. Justice Field in that case, and in the opinion of the Chief Justice, in the same case, (page 529,) he quotes with approbation *Okilders v. Black*, 9 Yerg. 317; 1 Scam. 407.

Opinion of the Court.

If defendant had a right to introduce his patent, then we had a right to show it was a forgery, and we had a right to show our title, or to show that we derived title from the grantees in that grant, or were entitled by a prior grant; in short, was asking nothing more of the Court than to abrogate the statute of forcible entry and detainer in that respect, and allow the parties to contest the legal title to the land. As the Court very properly remarked in the case of *Ladd v. Stevenson*, already cited, when the plaintiff "has been restored to the possession of which he was thus improperly deprived, it will then be time to try the issue of title."

By the Court, SAWYER, J.

This is an action under the Act relating to forcible entries and detainers, to recover possession of one hundred acres of land in the vicinity of the City of San Francisco. The answer denies the forcible entry and detainer charged, and denies possession of the whole, but admits possession of a part of the demanded premises, describing said part by metes and bounds, and claims that said possession was quietly, peacefully and rightfully obtained.

Plaintiff alleges the monthly value at fifty dollars.

The Court found a forcible entry and forcible detainer, and two hundred and fifty dollars damages. Judgment was thereupon entered for restitution of the demanded premises, and for the damage found.

There was no forcible entry at the time of the interview with Thompson, for, according to all the testimony, defendant's entry had taken place several days before, and he was then actually in possession. If there was any forcible entry, it was at the time of the transactions between defendant and Weeks; and admitting that there was force at that time, it is not clear that the entry had not before that time been peaceably accomplished. The defendant had himself actually been upon the premises several hours manifesting an intent to hold the property. Weeks found him upon the premises waiting

for his teams and lumber an hour before the alleged force was employed, and at that time he informed Weeks that he claimed the premises under a lease from Bayerque, and was going to put up a house. It is at least doubtful whether the acts at the time the lumber arrived constituted a forcible entry within the meaning of the Act. But however this may be, there is no shadow of testimony to extend the entry of defendant and ouster of plaintiff to the whole premises described in the complaint. Plaintiff retained possession of his cabin. His servants were not turned out of that, or in any respect molested in its enjoyment. Such is the plaintiff's testimony, and there is nothing to the contrary. Nor does his possession, such as it was, appear to have been disturbed in any of the other portions of the hundred acres claimed, beyond the immediate vicinity of the particular spot where defendant erected his house. For aught that appears, plaintiff is still in the quiet and undisturbed possession of all besides. Nor does it appear to what extent defendant claimed possession under his lease. The evidence which the defendant himself offered on that point was ruled out on objection of plaintiff. The complaint alleges damages resulting from an entry upon, and detention of, the whole of the land claimed. The testimony as to the value of the premises and damages is applicable to the whole, and the finding and judgment award damages for the detention, as well as restitution of the whole. Clearly, if the plaintiff was only ousted from a part, he was not entitled to recover damages for the detention of the whole. In these respects there is no conflict in the evidence, and it does not support the findings. A new trial must, therefore, be had.

The defendant offered in evidence a patent of the United States, and the conveyance under it, for the purpose of showing the good faith of the entry and to define the limits of the possession of defendant's lessor. Plaintiff objected and defendant excepted. Defendant had introduced evidence tending to show that at the time of defendant's entry, his lessor, Bayerque, and not plaintiff, was in possession. In connection with such evidence we think those documents were admissible to

prove the extent of the possession, which the evidence before introduced tended to prove. (*Hoag v. Pierce, ante* 187.) It may be that for the want of sufficiently definite testimony on that point, the Court found against possession in Bayerque. If the plaintiff relied upon an unlawful entry and a forcible detainer after such unlawful entry, and not upon a forcible entry, then it was necessary to inquire into the good faith of the entry by defendant, for under the Act of 1850, which controls this action, "it is not every peaceable entry, where the right of entry does not, in fact, exist, that constitutes an unlawful entry within the meaning of the statute. There must be some ingredient of fraud or wilful wrong on the part of the party making the entry." (*Dickinson v. Maguire, 9 Cal. 48.*)

In discussing the meaning of the term unlawful entry, as used in the Act relating to forcible entries in *Janson v. Brooks, (29 Cal. 214)*, we approved of the following language of Mr. Chief Justice Cope, in *Buckman v. Whitney*: "We regard it as applying only in those cases where the entry is *mala fide* as well as wrongful, and beyond this its provisions cannot with any propriety be extended." We think the construction put upon the Act upon this point in those cases correct. In this case, then, if the plaintiff relied upon an unlawful entry as distinguished from a forcible one, and a subsequent forcible detainer—and there was a count, though insufficient, framed upon that theory—the patent and subsequent conveyances were admissible, not for the purpose of establishing title, but to show that the entry was made in good faith under claim and color of title, and therefore not unlawful within the meaning of the term as used in the Act under which the suit was brought. But if the plaintiff relied upon a forcible entry, then these documents were inadmissible. He doubtless claimed on both grounds. We think, however, that upon the pleadings as they now stand the plaintiff must recover, if at all, on the ground of a forcible entry.

The evidence to show a distinct, peaceable, exclusive possession of plaintiff as against Bayerque, defendant's lessor, as distinguished from what has sometimes been called a "scram-

bling possession," is not so clear as desirable in cases for forcible entry.

The claim that the plaintiff's possession had continued through Osborne from 1855, in view of the other testimony in the case, appears to us to be but a flimsy pretext. Such possession as the plaintiff had resulted from his own acts since his return from a seven years' residence in the mountains, without reference to his former lease for an indefinite period of time, made ten years ago to Osborne. The evidence and claim connected with the Osborne lease, however, in our judgment, afford a clue to the objects of the plaintiff. Upon a review of the evidence—and it is all in the record—it is impossible to avoid the conclusion that the plaintiff was himself acting in bad faith and endeavoring to acquire and maintain a possession by unlawful means; that he hoped, by putting up a few boards—which, to expedite the work, he had previously framed and fitted for the purpose—that he might enter, as he did, upon land which had been for a long time under the actual control and dominion of other parties, and in a single afternoon put up a cabin, without floor or other convenience for habitation, put a man in to sleep merely, while going elsewhere for his meals, and thereby acquire possession of a hundred acres of land; that he might, through Osborne, by means of the old lease of which the parties long in possession and exercising dominion over the land had never heard, connect the possession so acquired with his possession ten years before, and thereby, with the aid of the Statute of Limitations, secure the land against the parties, whoever they might be, holding the actual title. On the other hand, doubtless, as soon as this proceeding was discovered, the parties who had been exercising control and dominion over the premises under claim of title derived through a patent from the United States (for to show a claim in good faith, defendant having offered in evidence such patent and conveyance under it, and the testimony having been rejected as irrelevant, we must presume the proof would have been made,) were endeavoring through defendant to continue the control, dominion

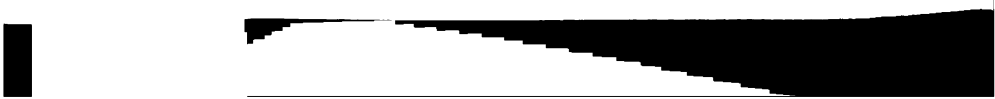
and possession which they had before acquired. Manifestly, from the evidence, no breach of the peace was contemplated in their proceedings at the time of the entry complained of by either party. But it seems equally evident that the plaintiff was manœuvring to acquire without violence, if possible, a right of action for forcible entry, while the defendant was manœuvring to avoid that result, and these objects of the respective parties were clearly manifest to each other. We cannot see from the evidence, that either apprehended, or had any ground to apprehend, any positive act of violence from the other. If the facts are really such as the evidence indicates, it would be a perversion of the action of forcible entry and detainer from its legitimate uses, and a reproach upon the administration of justice, for the plaintiff to recover. This action is, doubtless, often employed in this State in cases, and to accomplish objects, never contemplated by those who adopted it. It is highly penal in its character, and recoveries under it should be confined by the Courts to cases falling strictly within its provisions. Undoubtedly many cases will arise where it will be extremely difficult to determine whether this action should be maintained or not. But in such cases the Court should bear in mind the object and scope of the action, and determine from the peculiar facts of the case whether, upon the whole, it can be fairly brought within the provisions of the Act relating to forcible entries and detainers.

An order vacating a verdict or finding and granting a new trial, necessarily vacates the judgment resting upon the verdict or finding vacated.

Order denying a new trial reversed, and the judgment entered in the cause vacated, and a new trial ordered.

JAMES HAWKINS *v.* JOHN A. REICHERT; F. D.
COTTLE *v.* JOHN A. REICHERT.

AGAINST WHOM EJECTMENT MUST BE BROUGHT.—The action to recover the possession of real estate must be brought against the person who at the commencement of the action is the occupant and withholds possession.



SAME — WHEN OCCUPANT IS SERVANT OF ANOTHER.—Where the occupant is a mere servant or employé, his occupation may be the occupation of his employer, and if so, the employer should be made the defendant in ejectment.

PLEADINGS IN EJECTMENT.—If, in ejectment, the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action is not admitted by the pleadings, although it be not specially denied.

WHEN NEW TRIAL SHOULD BE GRANTED.—If, on the trial, the Court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and renders a judgment for plaintiff, and, upon a re-examination of the case on motion for a new trial, finds that a fact essential to plaintiff's recovery is not proved, it is the duty of the Court to grant a new trial.

FINDING FACTS ON MOTION FOR NEW TRIAL.—The Court, if the evidence is conflicting, may, on a re-examination of the same on motion for a new trial, find the facts differently from what they were found on the trial, and on an appeal from an order granting or refusing a new trial, the latter finding will be conclusive of the facts of the case.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court on the trial found the following facts: "That on the 1st day of May, A. D. 1862, plaintiff was in the actual possession as owner in fee simple of the premises described in the complaint, and that plaintiff was lawfully entitled to the possession thereof at the time of the commencement of this action; and that on said day defendant unlawfully entered and excluded plaintiff therefrom, and still withholds the possession thereof from the plaintiff;" and the statement on motion for a new trial embodied the evidence. From this statement on the argument of the motion for a new trial, the Court found that the defendant was in possession of the premises by his tenant at the commencement of the action.

The defendant appealed from the order denying a new trial.

The other facts are stated in the opinion of the Court.

Spencer & Jarboe, for Appellant.

The Court, on motion for a new trial, found as a fact that the defendant was in possession by his tenant at the time the action was commenced. The action not being against the tenant, a new trial should have been granted.

G. F. & W. H. Sharp, for Respondent.

The omission to traverse Hawkins' averment of *actual* possession on the first day of May, 1862, was equivalent to a direct admission of the fact, the complaint being verified. (*Burke v. Table M. & S. Co.*, 12 Cal. 403.)

By the Court, RHODES, J.

The facts in each of these cases being quite similar, the actions were submitted together. What we shall say of the first case will be applicable to the second also. The action was ejectment; trial by the Court without a jury, and finding and judgment for the plaintiff. The defendant's motion for a new trial having been denied, he appeals. The Court, among other things, found that on a certain day, before the commencement of the action, the defendant unlawfully entered and excluded the plaintiff from the premises, and still withholds the possession thereof from the plaintiff. The error assigned is the ground specified in his motion for a new trial, which is that the evidence was insufficient to justify the finding that the defendant, at the commencement of the action, withheld the possession of the premises.

The doctrine is very clear that as the action lies only to recover the possession of the premises wrongfully withheld from the plaintiff, it must be brought against the person who, at the commencement of the action, withholds the possession—that is to say, it must be brought against the occupant. (*Garner v. Marshall*, 9 Cal. 270; *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Dutton v. Warschauer*, 21 Cal. 609; *Fogarty v. Sparks*, 22 Cal. 148; *Owen v. Fowler*, 24 Cal. 192; *Lyle v. Rollins*, 25 Cal. 440.) The tenant—and not his landlord, unless he is also an occupant—should be made the defendant. (*Dutton v. Warschauer*, *supra*.) In this case the evidence is conflicting as to who was the occupant of the small portion of land in controversy at the commencement of the action. Some of the evidence tended to prove that the

defendant resided on another portion of the one hundred vara lot that includes the premises in controversy; that he moved the small wooden building back on to the premises—which seems to have been the beginning of the ouster—and was in possession and claimed the premises as his own at the commencement of the suit; that Mr. Klatt, who lived in the house that was moved upon the premises was but the servant of the defendant; that he was working upon the premises under the direction of the defendant, and moved the house under his orders. On the other hand, the testimony tended to prove that Klatt was the tenant of the defendant, the defendant testifying positively that Klatt was his tenant, and other testimony tending to the same conclusion. It will be readily seen that a mere servant or employé may, in one sense, have the occupation of the premises of which he has no control, and in which he claims no right, but his occupation is the occupation of his employer, within the meaning of that term, as employed when treating of the action of ejectment. Conceding that Klatt was personally present and living in the house, it was still a question of fact for the Court to determine whether he was there in his own behalf or only and solely as the employé of the defendant. In view of the apparent conflict in the testimony, we would not be justified, under the oft repeated rule applicable in such case, in disturbing the finding, although we might be of the opinion that the evidence, as it comes to us in the record, preponderated against the finding.

When the cause came up on motion for a new trial, the order was made by the successor in office of the Judge who heard the testimony, and on denying the motion he filed an opinion in which he says: "From the agreed statement it appears that the defendant was in possession by his tenant, at the commencement of this action; consequently the tenant was the person who should have been sued; yet under the pleadings the plaintiff was entitled to judgment for the possession of the premises without costs," and he ordered that a new trial be granted unless the plaintiff should enter a satis-

fraction of the judgment and
quently finally denied.

We think the learned
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the alleged entry and out
by the answer; and the
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has found that the evidence fails to establish the essential fact in question, the Court is bound to grant a new trial, and has no discretion to refuse it. Such we understand to be the case here. The Court, upon the hearing of the motion for a new trial, finds that the defendant was not the occupant of the premises at the time of the commencement of the action, but instead of granting a new trial on that ground, refuses a new trial for a reason, which we are of the opinion is not a sufficient reason. The Court had no discretion under such circumstances to refuse a new trial, though it had the discretion to attach such weight and conclusiveness to the several items of evidence bearing upon the point of occupation at the given time as it might deem proper. The Court must be satisfied that the fact is as alleged in the complaint — that the defendant withheld the possession at the commencement of the action — otherwise the plaintiff is not entitled to a recovery; for, as we said in *Owen v. Fowler*, 24 Cal. 194, "in order to entitle a plaintiff in ejectment to recover, he must show a right to the possession in himself, and a possession in the defendant at the time the action is brought; and if he fails to establish either proposition he cannot recover."

Order reversed and new trial ordered.

EDWARD LALLY v. MORRIS WISE AND M. STERN.

WHO MAY SUE FOR DAMAGES ON AN INJUNCTION BOND.—M., a Sheriff, had in his hands money belonging to L., which he had collected on an execution in favor of L. and D., and against S. W. and C. commenced an action against M. L., and others, to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action, and defended. The injunction bond ran to all the defendants. *Held*, that L. could maintain an action for damages on the injunction bond.

SEVERAL ACTION ON INJUNCTION BOND.—Each of the parties to whom an injunction bond is made payable may sue on the same for his several damages, even if the bond is made payable to the obligees jointly.

DAMAGES FOR DETAINING MONEY WHEN ENJOINED.—Where an officer is enjoined from paying over money in his hands, legal interest only can be recovered as damages for its detention in an action on the injunction bond.

ADMISSION OF ERRONEOUS EVIDENCE.—If erroneous evidence is admitted, and

the record does not negative the presumption that injury was sustained thereby, the judgment will be reversed.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The execution on which the money was collected was in favor of Lally and Day, and against Schwartz. Murphy, the Sheriff, suffered default in the injunction suit, but Lally defended, and judgment was entered upon the merits, dissolving the injunction and dismissing the complaint as to him.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellants.

Respondent was never enjoined. The writ was never served upon Lally, and without personal service upon him the injunction was not effective. (*Becker v. Hagar*, 8 Howard's Pr. 69; *Watson v. Fuller*, 9 Howard's Pr. 426; *Coddington v. Webb*, 4 Sandford, 639; *Eden on Injunctions*, 93; *Summers v. Farrish*, 10 Cal. 347; *Mallice v. Gifford*, 16 Abb. 247.)

The only damages which the law allows for the detention of money under its process is the legal interest. Ten per cent per annum is the only rate of interest recoverable in actions upon undertakings on injunction for moneys detained. (*Heyman v. Landers*, 12 Cal. 107; 2 Parsons on Cont. 489.)

Edward Tompkins, for Respondent.

It is alleged in the complaint, and not denied by the answer, that by the injunction Murphy was prevented from paying and Lally from receiving the money. So soon as an action was commenced against him, Lally had a right to appear and defend. When his money was enjoined he was damaged. The undertaking recites that the injunction is to prevent his getting his money. The record shows the character of the suit. This point, then, if it has any force whatever, involves this absurdity: that Lally's money could be enjoined in the Sheriff's hands, who, as between the parties, was a mere stakeholder, and had no interest in defending, and so long as the

plaintiff did not choose to serve Lally personally, he could take no steps to get his money released, and is entirely without indemnity for the damages he sustains. The learned counsel for the appellants have apparently confounded this case with the cases where the only question involved was whether a party could be punished for contempt who had not been personally served. *Becker v. Hagar* only decides that a defendant who has appeared and not answered, is not entitled to notice of a motion for an injunction. *Watson v. Fuller* decides that an injunction only affects persons named as parties to the action. *Coddington v. Webb* establishes that personal service of an injunction is necessary to put a party in contempt for disobeying it.

Legal interest in California is whatever parties fix by their contracts, except when they fail to agree in writing, and then it is ten per cent per annum. In New York and other States a different rule prevails. There the rate of interest is fixed, and it is made an offense to take more than the prescribed rate, and the Courts there have adopted as a rule to mulct the wrongdoer in the very highest rate that the use of the money can produce.

In California it has been attempted to adopt the same rule, but the Supreme Court, in two hastily considered cases, cited by the counsel for the appellants, have failed in its application. They decide in substance that "interest" and "damages" are synonymous — that in matters of contract, "legal interest" is what the party can get for his money, but in cases arising out of wrongs his damages are not what he is thus prevented from getting; that torts are cheaper than breaches of contract; that the man whose contract makes two per cent a month "legal interest" has only to get the payment stayed by injunction, and the rate is forthwith reduced to ten per cent per annum; that the law thus offers a premium to fraud and wrong, and that compensatory damages no longer mean compensation for direct injury, but an arbitrary rule by which he who has sustained damages to ten per cent shall be paid in full, and he who has been injured in the same direct manner

one hundred per cent shall be cut off by the administration of the law with ten cents on the dollar of his loss.

By the Court, SHAFER, J.

This is an action on an injunction bond executed by the appellants in the suit of *Uhlfelder et al v. Schwartz, Murphy, Lally, et als*. Murphy was Sheriff of the County of Santa Clara, and he, amongst other things, was restrained by the injunction from paying over to Lally the sum of one thousand six hundred and seventy-five dollars forty-one cents collected on an execution in favor of Lally against the said Schwartz. It was thereafter determined that the injunction had in that particular been improperly granted. The plaintiff herein, recovered a judgment for one thousand forty-two dollars as damages sustained by reason of a breach of the undertaking declared on. The defendants moved for a new trial, and the appeal is from the order denying the motion.

First—It is claimed that the respondent was never enjoined, for the reason that the injunction was never served upon him.

The undertaking was entitled in the suit of "*S. Uhlfelder & L. Cahn v. Henry Schwartz, Edward Lally, Henry Heilburner, Samuel Day and John M. Murphy, Sheriff of the County of Santa Clara*". It appeared from the judgment roll in that action, given in evidence in this, that the only injunction asked for was against Murphy, restraining him, so far as Lally was concerned, in the manner before mentioned. Lally, though served neither with the injunction, nor in the action, appeared; and it was through his intervention that the injunction was dissolved as to the money belonging to him. The appellants, by the very terms of the undertaking, "acknowledge themselves to be indebted to the defendants in the above entitled action, and to each or either of them, in the sum of two thousand dollars; for the payment of which, well and truly to be made, they jointly and severally bind themselves and their heirs, executors and administrators firmly by these presents." The condition, after reciting the pendency of the action and

that the County Judge was about to order an injunction restraining Murphy from paying over to "said defendant Lally and to said Day certain moneys now in his hands by the sale of property under execution in favor of said Lally and said Day severally," provides "that if the plaintiffs in said action above entitled shall pay to said parties so enjoined such damages not exceeding two thousand dollars, as such party may sustain by reason of said injunction, if the Court having jurisdiction thereof shall finally decide that the plaintiff was not entitled thereto, then this undertaking shall be void; otherwise of full force." Lally was not personally enjoined, nor was there any occasion for restraining him. By the service of the writ upon the Sheriff, Lally's money was effectually intercepted, and the plaintiffs in the proceeding had no motive to go further. Though there may be some question, in view of the fact that Lally was not personally enjoined, as to whether the strictly legal right is in him, yet it is apparent on the face of the undertaking that the bond was given for his and not the Sheriff's protection; and as the party beneficially interested in the damages claimed herein, Lally is competent to sue for their recovery. (Prac. Act, Sec. 6; *Baker v. Bartol*, 7 Cal. 551.)

Second—It is further insisted that Day should have been joined as a party plaintiff.

The indebtedness confessed in the undertaking is to "each and every" of the defendants in the action in which it was given, as well as to them all jointly. But if the undertaking did not run to the obligees severally still each could sue for his several damages. (*Summers v. Farrish*, 10 Cal. 351.)

Third—At the trial the plaintiff offered to prove that money was worth one and a half per cent per month during the time that the payment of it was restrained by the injunction. The defendants objected to the evidence; the objection was overruled and the defendants excepted.

The question of the admissibility of the evidence is concluded by *Heyman v. Landers*, 12 Cal. 107. It is now more than six years since that decision was made, and it has been

steadily followed during the interval as a correct exposition of the law. We are far from being convinced by the very able argument submitted by counsel for the respondent, that the decision is erroneous; but, if it be so, the rule which it establishes must be changed, if at all, by the Legislature.

But it is insisted for the respondent that it does not "appear" that the finding of the referee was at all influenced by the evidence in question.

It was held in *Grimes et al. v. Fall et als.*, 15 Cal. 63, that "injury is presumed from evidence erroneously admitted, and the adverse party must show clearly that no injury accrued or the judgment cannot stand." The record in this case does not negative the presumption named. Should it be admitted that the answer does not deny effectually the grounds or causes of damage laid in the complaint, still it is not pretended that an issue is not well taken upon the question of the amount of the damages. Aside from the testimony relating to the counsel fee, and the current rates of interest, there was no evidence bearing upon that issue; and we must therefore intend that the damages found by the referee (\$1,042) were made up of the counsel fee and interest on the plaintiff's money during the time it was enjoined in the Sheriff's hands. There was no conflict in the evidence concerning either of these items, and the counsel fee as claimed and proved, together with ten per cent interest upon the one thousand six hundred and seventy-five dollars and forty-one cents during the period of its detention would amount to only seven hundred and ninety-three dollars and twenty cents. The record then not only fails to show that the testimony erroneously admitted was not prejudicial to the appellants, but shows affirmatively that they were in fact prejudiced thereby.

The judgment is reversed and a new trial ordered, unless the respondent within twenty days file a release of the judgment to the extent of two hundred and forty-eight dollars and eighty cents, parcel thereof, in which event the judgment will stand as affirmed, but the respondent must pay the costs of this appeal.

T. D. JOHNSON AND J. N. BROWN v. THE COUNTY OF SANTA CLARA.

LIABILITY OF A COUNTY FOR MEDICAL CARE OF SICK.—A complaint in an action against a county, to recover for medical care and treatment of sick persons, fails to state a cause of action if it does not aver that the sick persons treated were both indigent and residents of the county.

LIABILITY OF COUNTY TO COUNTY PHYSICIAN.—Physicians who contract with a county to attend and treat all the inmates of the County Infirmary, whether afflicted with contagious diseases or not, and to receive a stipulated price therefor, cannot recover anything beyond the stipulated price for attending persons sick with contagious diseases and placed in a building apart from the one usually used as a County Hospital, by order of the county authorities.

COUNTY HOSPITAL.—The County Infirmary or Hospital may consist of different buildings used by the county for hospital purposes.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The plaintiffs were physicians and surgeons at San José, and on the 3d day of January, 1862, entered into a contract with the Board of Supervisors of Santa Clara County and ex officio Directors of the Santa Clara County Infirmary, to prescribe for and attend all the inmates of said Infirmary who might be subjects of medical and surgical treatment for one year thereafter. In February, 1862, the small pox appeared in San José. The building used as a County Hospital was outside the limits of the City of San José, and the Board of Directors of the County Infirmary procured another building to which the persons sick with the small pox were removed. Plaintiffs, as physicians, attended on these persons. No new contract was made with the Directors of the Infirmary. The present action was brought to recover for the value of plaintiffs' services as physicians upon the persons who had been removed to the pest house. The complaint averred an indebtedness of the county to plaintiffs for the medical treatment and care of forty-three persons who were sick with the small pox at Santa Clara County, and for the vaccination of other persons, but contained no averment that the persons treated were indigent or residents of the county.

Defendant demurred to the complaint and the demurrer was overruled. Defendant then answered, and plaintiffs recovered judgment, and defendant appealed.

The other facts are stated in the opinion of the Court.

F. E. Spencer, for Appellant.

The complaint is bad in not stating that the persons treated were indigent, and residents of the county, and the Court should have sustained the demurrer. (Supervisor Act, 5th clause, Wood's Dig. Art. 3,319; Act to provide for the indigent sick, Ib. Art. 3,279.)

The Supervisors cannot create a debt or liability on the part of the county for any purpose except as provided by law. (*Foster v. Coleman*, 10 Cal. 278.) Every fact which, if controverted, the plaintiff will be compelled to prove in order to maintain the action must be stated. (*Jerome v. Stebbins*, 14 Cal. 458; *Green v. Palmer*, 15 Ib. 415; Practice Act, Sec. 66.) The complaint is verified. (*Green v. Covillaud*, 10 Cal. 322.) A county is not bound to support persons who are not paupers. (*Alton v. Madison*, 21 Ill. 115.)

J. M. Williams, and *S. O. Houghton*, for Respondents.

The Boards of Supervisors have general power under the statute to provide for the preservation of the public health. They are the agents constituted by law to take care of the health of the indigent, "to take care of and provide for the indigent sick of the county, to do and perform all such other acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the Board." (Wood's Digest, Art. 3,319.) It was the duty then of the Board of Supervisors to take care of these small pox patients, and to take measures to arrest the progress of the disease and prevent its spreading over the county. In employing the respondents as physicians for that purpose they only performed a duty imposed on them by law, and created a liability on the

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part of the county to pay for those services what they were reasonably worth, as no price was stipulated.

By the Court, SANDERSON, C. J.

The demurrer to the complaint should have been sustained upon the ground that it does not state facts sufficient to constitute a cause of action. The power of "The Board of Directors of the County Infirmary of Santa Clara County" to provide for the care and medical treatment of sick persons, is limited to such as are indigent and are also residents of the county. A contract providing for the care and treatment of sick persons not indigent, or if indigent not residents of the county, would be void for the want of power in the Board to make it. A county is not liable generally for the care and treatment of sick persons, and therefore when it is sought to make it liable it must appear from the complaint that the care and treatment was bestowed upon the class of persons described in the twentieth section of the Act concerning County Infirmaries for the relief of the indigent sick. (Laws 1860, p. 217.) No recovery can be had in such an action except upon proof, if the facts are controverted, that the persons so treated are indigent and are residents of the county; and it is a familiar rule of pleading that every fact which, if controverted, the plaintiff would be compelled to prove in order to sustain his action, must be alleged in his complaint. (*Jerome v. Stebbins*, 14 Cal. 457; *Green v. Palmer*, 15 Cal. 411.)

This error alone makes it necessary to reverse the judgment. But as there is another point which is, in our judgment, fatal to the plaintiff's cause of action, and which no amendment of the complaint can obviate, we deem it advisable to pass upon it now, in order that the parties may be spared further and useless litigation.

We are of the opinion that the services sued for in this action are covered by the contract between the plaintiffs and the Board of Directors of the County Infirmary of the 3d of

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January, 1862, set out at length in the defendant's answer. In that contract the plaintiffs "covenant and agree to attend the County Infirmary and County Jail of said county as physicians and surgeons, and as physicians and surgeons to prescribe for and attend all the inmates of said Infirmary and Jail who may be subjects of medical and surgical treatment, and perform all surgical operations upon any and all of the inmates of said Infirmary and Jail who may require the same." Under this agreement the plaintiffs were bound to attend and treat "all inmates of the County Infirmary," whether afflicted with contagious diseases or not. What, then, is the "County Infirmary?" Is it one building, or may it be more, and if more, must they all be adjacent, or may they be distant from each other, and yet altogether constitute the "County Infirmary?" That the "County Infirmary" is not necessarily limited to one building is apparent from the eleventh section of the Act under which it was created and established, which provides that "when necessary, it shall be the duty of the Board of Directors to provide a suitable building or buildings for the *separate* accommodation of the indigent laboring under contagious disease." Obviously buildings so provided are as much a part of the "County Infirmary" as any building previously provided for the accommodation of those who are not laboring under contagious disease; and the inmates of the former buildings are in every sense as much inmates of the "County Infirmary" as are the inmates of the latter. This contract must be read by the light of the statute by which it was authorized to be made. Thus read, it is clear that the services sued for in this action are covered by the contract in question, and if, as alleged in the answer, the plaintiffs have been paid the price stipulated therein, they have no cause of action.

Judgment reversed and cause remanded.

Mr. Justice RHODES, being disqualified, did not sit in this cause.

A. ST. CLAIR DENVER v. C. H. BURTON, JOHN E. P. SPILLMAN, JEFFERSON WILCOXSON, JACKSON WILCOXSON, REDDINGTON & WILLIAMS, JOHN BURTON, AND ED. McCARTY.

AVERTMENT OF FACT IN PLEADING.— It is not sufficient to state a material fact in a complaint by way of recital; it should be directly averred.

SAME.— A judgment creditor, made such by confession of judgment, who seeks to reach money of the judgment debtor in the hands of junior judgment creditors, upon the ground that he has a prior lien on the same, must aver in his complaint that at the time his judgment was rendered, the amount for which it was rendered was unpaid and due.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The complaint averred that John Burton and Ed. McCarty, who were engaged in the mercantile business in Sacramento, on the 2d day of October, 1861, confessed two judgments, one in favor of C. H. Burton, a brother of John Burton, for twenty-four thousand dollars, and the other in favor of E. P. Spillman, for about ten thousand dollars, and that executions were issued on the judgment and immediately levied on the goods of Burton & McCarty, and that later in the same day, Burton & McCarty confessed a judgment in favor of plaintiff for the sum of one thousand eight hundred dollars, and that an execution was issued and levied on the same goods, and that Jefferson Wilcoxson and Jackson Wilcoxson, later in the same day, levied on the same goods, and also obtained judgment against Burton & McCarty, and that the judgments in favor of C. H. Burton and E. P. Spillman were fraudulent. That the goods levied on had been sold by the Sheriff for six thousand dollars, by consent of parties litigant in the case of *Wilcoxson v. Burton*, 27 Cal. 228, and the money deposited in Court and paid over to the County Treasurer, and that the Wilcoxsons had obtained the money. That plaintiff had a lien on the money prior to the Wilcoxsons. Plaintiff prayed that the Wilcoxsons might be adjudged to hold the money in trust for

him, or sufficient thereof to satisfy his judgment, and for judgment against them for that amount.

The averments as to the confession and entry of plaintiff's judgment, were in the following language:

"Plaintiff further shows that the said defendants, Burton & McCarty, on the 2d day of October aforesaid, in the District Court of the Sixth Judicial District, Sacramento County, upon request of plaintiff, confessed judgment in favor of plaintiff for the amount then due on said due bill, to wit: one thousand eight hundred dollars; and that judgment was thereupon regularly entered in said Court on said day for said amount, in favor of plaintiffs, and against said Burton & McCarty."

Defendants Wilcoxson demurred to the complaint. Judgment was rendered in favor of the defendants, and plaintiff appealed.

Ooffroth & Spaulding, for Appellant.

H. H. Hartley, for Respondents.

By the Court, SAWYER, J.

There is no direct allegation in the complaint that, at the time judgment by confession was entered against Burton & McCarty in favor of the plaintiff, the money for which judgment was confessed was unpaid or then due. It was assumed, but not averred, that the money was due, and on that assumption the amount stated. This mode of statement is insufficient. (*Halleck v. Mixer*, 16 Cal. 577.) In an action to secure a priority of lien over Wilcoxson, who subsequently obtained the proceeds of sale of defendants' property under his own judgment, such an allegation is, in our opinion, material. For this defect the complaint does not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained.

Judgment affirmed.

SHAFTER, J., concurring specially.

I concur. Admitting for the purposes of argument that there is a sufficient averment that the eighteen hundred dollars "was due on the 2d of October, 1861," still it is not alleged that it remained due at the point of time when, on the same day, the confession was filed. The law does not generally take notice of the fractions of a day, but in a case like the present it should appear by some form of direct statement that at the very instant when the judgment was confessed the relation of creditor and debtor was on foot and to the extent stated in the judgment.

H. M. MOORE v. W. R. MORROW.

TENANCY BY SUFFERANCE.—A tenancy by sufferance ... not by the consent but by the *laches* of the owner, and where the owner has been guilty of no *laches* there can be no tenancy by sufferance.

WHEN A TENANT FOR A TERM BECOMES TENANT BY SUFFERANCE.—A tenant under a lease for a term does not become a tenant by sufferance upon the expiration of his lease, and is only made such by the *laches* of the landlord in not re-entering, or in not giving him notice to quit.

WHEN LANDLORD MAY BRING EJECTMENT.—If the landlord give notice to quit immediately upon the expiration of the tenant's term, and the tenant hold over, the landlord may maintain ejectment without waiting one month after the notice.

EJECTMENT BEFORE TENANT BECOMES SUCH BY SUFFERANCE.—The landlord is not required to wait one month after notice to the tenant to quit before bringing ejectment to remove the tenant, unless by the *laches* of the landlord the relation of tenancy by sufferance has been established.

AN INSOLVENT MAY SUE TO RECOVER HOMESTEAD.—The husband may maintain ejectment to recover possession of the homestead during the pendency of an application on his part to be discharged from his debts under the insolvent laws.

APPEAL from the District Court, Fourteenth Judicial District, Nevada County.

The defendant set up in his answer that prior to the commencement of the action the plaintiff had filed his petition in insolvency and asked to be discharged from his debts.

During the pendency of this suit plaintiff had obtained his discharge in insolvency, and the Sheriff had been appointed assignee. On the trial defendant offered in evidence the judg-

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the lease. There were no *laches* on the part of the landlord to enlarge the term. Notice of the landlord's desire to enter and a demand for possession were immediately given. The circumstances utterly rebut the idea of permission or sufferance. The tenant became simply a trespasser. The right to notice never arises where a lease expires by its own limitation. (So held in 21 Wend. 628.) Especially is this the case where all the acts of the landlord rebut any presumption that he consented to the continuance of the holding. The tenant, by the construction contended for by appellant, could avail himself of his own wrong to extend his term. We hold that the statutory provision requiring thirty days' notice to a tenant by sufferance does not apply to this case, where no such tenancy exists. The original entry of the tenant was lawful, it being under a written lease for one year, and if he had held over under such circumstances or for such length of time as to create a presumption of acquiescence of the landlord, he would be a tenant by sufferance. The necessity of reasonable notice to quit exists in cases of uncertain tenancy, to prevent the mischievous effects of a capricious and unreasonable determination of the estate. (2 Pick. 71; 4 Kent Com. 118.)

By the Court, SHAFER, J.

This is an action to recover the possession of real estate. The complaint states a case within the Act relating to forcible entry, etc., but by the consent of parties the action was turned into an action of ejectment in the Court below. The appeal is taken from an order overruling defendant's motion for a new trial.

First—It is insisted by the appellant that the judgment should be reversed, for the reason that there was no evidence tending to prove that the plaintiff made a written demand upon the defendant to surrender the possession of the premises thirty days before the commencement of the action.

The defendant held under a lease from the plaintiff for one

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year. The term ended July 28th, 1864, and a demand in writing for a surrender of the premises was duly served by the plaintiff on the defendant the next day. The service was on the premises—the plaintiff having entered thereon for that purpose. The action was commenced on the 3d of August following.

When a tenant held over after the expiration of his lease, he was regarded at common law as a tenant at sufferance; but the estate might be destroyed by an entry on the part of the landlord, and he might thereupon proceed in ejectment. (*Uridias v. Morrill*, 25 Cal. 34.)

The Act of 1861 (Statutes of 1861, p. 514) relates to tenancies at will and by sufferance, and the first section provides that "the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove from the premises." It is further provided by the third section that "at the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant, without any other or further notice to quit;" and section five gives the landlord a right to double damages in the action.

A tenancy by sufferance is not by the consent, but by the *laches* of the owner (2 Black Com. 150), and it follows that where the owner has been guilty of no *laches* there can be no tenancy by sufferance to which the provision of the statute as to notice can apply. In this case the defendant never became tenant by sufferance, for the indispensable condition of *laches* on the part of the plaintiff is not only not found, but is shown affirmatively never to have existed. In view of the principle that the law rejects fractions of days, we consider the record as showing that the plaintiff entered upon the premises on the instant the defendant's term expired, and for the avowed purpose of asserting his rights as owner. Instead of *laches* then, we have a singular exhibition of diligence in the conduct of the plaintiff which forestalled the possibility of a tenancy by sufferance arising in the defendant's favor. It was held in

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Rowan v. Little, 11 Wend. 616, under a statute of New York from which our Act of 1861 appears to have been copied (see note in Adams on Ejectment, 145,) that there could be no tenancy by sufferance where there were no *laches* by the landlord, and that the burden of proving some degree of negligence at least, on his part, was on the party asserting the tenancy. In that case the landlord delayed proceedings for three months after the expiration of the lease; but it was held that, under the circumstances of the case, the delay did not amount to *laches*, and therefore that the tenant was not entitled to notice to quit as a prerequisite to an action of ejectment against him. In the case at bar, the question is not upon the sufficiency of delay for any given period, for there was no delay. The plaintiff entered not for the purpose of recovering from the consequences of neglect, but with a view to prevent the consequences by practising diligence, instead of its opposite, from the start.

The plaintiff filed his petition in insolvency prior to the bringing of this action, and the Sheriff was appointed assignee before the trial. The appropriate evidence of these facts was offered at the trial, but inasmuch as it appeared by the record that the plaintiff had a perfected title to the premises as a homestead when he filed his petition, which title was recognized and established by the decree in pursuance of the prayer of the applicant, the evidence was rejected by the Court; and we consider that there was no error in the ruling.

Judgment affirmed.

A. BUCKMAN v. GEORGE O. WHITNEY AND J. HENRY WOOD.

PAPERS TO BE USED ON APPEAL.—District Courts have no jurisdiction to determine what papers may be used on appeal to the Supreme Court.

HOW TO SUPPLY LOST RECORD.—If the judgment roll or any part of the record in the District Court has been lost, the District Court, upon proper proofs, may supply its place by copies, and direct that the proved copies be substituted for the lost papers, and that they shall constitute the record or portion of it lost, and here the functions of the District Court end.

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APPEAL FROM ORDER SUPPLYING LOST RECORD.—If either party is dissatisfied with an order of the District Court in supplying a lost record, it may be reviewed by an appeal from the order.

IN LOST RECORD NOT SUPPLIED NO APPEAL CAN BE TAKEN.—If the record or a portion of it in the District Court has been lost, and either party desires to appeal, an order of the District Court reciting that copies of the lost papers have been furnished, and directing that such copies may be used on appeal to the Supreme Court, is not an order substituting and supplying the lost record, and there is no record in the District Court from which a transcript on appeal can be taken.

LOSS OF MATERIAL PORTIONS OF A STATEMENT.—If material portions of the statement on motion for new trial or of the papers referred to in the statement have been lost, and are not supplied and substituted by the District Court, an appeal from the order denying a new trial will be dismissed.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellants.

J. McM. Shafter, for Respondent.

By the Court, SAWYER, J.

At the January term, 1864, a motion was made to dismiss the appeal on the ground of delay in filing the transcript in this Court. As an excuse for delay, appellants alleged an inability to make up a transcript on account of a loss of the judgment roll, and asked permission to supply the missing papers. We then said: "This Court has no control over the records of the Court below, and cannot properly make any order to supply a lost record; but that duty is within the province of the District Court. * * * Upon proper application being made, it will be the duty of the Court below to supply the lost judgment roll by the aid of copies, or by some other means under its control." It was then ordered that appellants have thirty days from and after the next term of the District Court "in which to prepare and file in this Court the transcript on appeal in this cause, and that, in the

meantime, all proceedings on said motion in this Court be stayed." (24 Cal. 267.) The object of the stay was to give appellants an opportunity, by motion in the Court below, to supply, if possible, the lost judgment roll, and restore the record of the District Court, thereby enabling them to obtain a transcript on appeal of the record thus restored, to be filed in this Court.

A document, claimed by appellants to be a transcript of the record, was filed in this Court in October, 1864, and some amendments were subsequently made in March last. Respondent now renews the motion to dismiss, on the ground that the document filed is not a transcript of the record in the Court below, and that no transcript has yet been filed in the case. A transcript on appeal is a true copy of the record, or part of a record, actually existing in the Court below. Essential portions of the record in this case having been lost, the first thing necessary to be done, to enable the party to procure a transcript was, if possible, to have the record in some way restored. And this could only be done by the Court below in the mode before indicated. Instead of applying to the Court below, upon notice to the opposite party, to restore its own record by supplying the defects occasioned by the loss, and then taking a transcript of the record thus restored, and filing it in this Court, appellants seem to have applied to the District Court to aid them in making up a record, to be used in this Court on appeal. And the Court after certain proceedings were had, accordingly ordered as follows: "But to the end that said defendants may be able to perfect an appeal to the Supreme Court of this State, it is hereby ordered by the Court that the defendants, in order to perfect an appeal, to the Supreme Court of this State, may substitute and use copies of all or any papers in said cause which may be necessary for or requisite to the perfecting of said appeal as aforesaid, with like force and effect as the originals.

"And it is further ordered by the Court, that in the event copies of said judgment roll, or any part of the same, or any of the lost papers in said cause necessary to be used in said

appeal, cannot be produced, then that the said defendants may, from such data as may be at their command, make out the necessary papers, containing and embodying as near as may be the several matters contained in the originals lost herein as aforesaid, and that said papers and each thereof may be used on said appeal with like effect as the original."

The Court not only directs what kind of papers may be used on appeal, but intrusted appellants with the duty of making out the necessary papers from such data as might be at their command. Appellants, however, are, by further order, required to file such papers with the Clerk within thirty days, and serve copies on respondent's counsel, and respondent's counsel are authorized within thirty days thereafter, in like manner, to file and serve appellants' attorneys with such papers as they may desire to supply; and in case of any disagreement, the same is to be settled on five days notice.

Afterwards, on the 21st of September, 1864—the appellants appearing to the motion, and the respondent failing to appear, and without any legal notice having been served on him—further proceedings are had. After reciting the prior proceedings, and that, "It further appearing to the Court that the defendants have furnished the originals and copies of the originals necessary to make up the transcript on appeal to the Supreme Court," etc. * * * * *

"It is therefore ordered and adjudged by the Court that the papers so furnished as aforesaid be used in said appeal to the Supreme Court, and that all copies or other papers so furnished be used with like effect as the originals on said appeal, inasmuch as the originals cannot, after due diligence, be found or produced in Court, to be used on said appeal." The proceedings, therefore, were not to restore the record of the Court below, but an effort to make up a case for this Court, and the order merely directs what papers shall be used on appeal in this Court. The District Court is not authorized to say what papers shall be used on appeal in this Court. The law designates what shall constitute the transcript on appeal. It consists of a copy of the record, or a part of the record, of the

case in the Court below; and, when the appeal is from the judgment, it must include a copy of the judgment roll, or a part of the judgment roll, which constitutes a part of such record. The Court below has not determined that the papers directed to be used on this appeal shall constitute the judgment roll in the District Court in this case, or form any part of it. They have not been adopted for any purpose, other than to be used on this appeal. And if for any other purpose—as to introduce in evidence on the trial of another cause—a party should require the judgment roll in this case, he would find none among the records of the District Court. These papers in the transcript, then, cannot be copies from the judgment roll, for there is no such roll. Nor do they even purport to be copies from the judgment roll. They do not, therefore, constitute any portion of a transcript on appeal.

The proceeding should have been for the Court, upon due notice to the parties, to have ascertained what particular papers should constitute the judgment roll in that Court, and to order that such papers be substituted for those which were lost; that they be attached together, filed in the cause, and thenceforth constitute the judgment roll. Here the functions of that Court would have ended. On appeal, under the law, the Clerk, without further order, would then have included a certified copy of this judgment roll, or so much of it as might be required, in the transcript. The roll thus certified up would be the only one that this Court could notice. If either party should be dissatisfied with the roll, as thus constituted, on account of errors committed by the District Court in making it up, the proper mode of reviewing the action of the Court in that particular would be to appeal from the order subsequent to judgment, and by statement on appeal from the order bring into the record so much of the proceedings resulting in the order as would be necessary to explain the ground of error relied on. But no such proceeding has been had, and the parties are now just where they were eighteen months ago, without any judgment roll in the Court below, and consequently without any certified copy of a judgment roll in the

document filed as a transcript, and without any record in the District Court from which a proper transcript can be made up.

The appellant, then, has failed to furnish the papers requisite on an appeal from the judgment.

It is claimed, however, that the necessary papers on appeal from the *order denying a new trial* have been furnished, and that the appeal from the order must be retained. Upon looking into the transcript we find a part of a statement on motion for new trial, but portions of it essential to the consideration of the grounds specified have also been lost from the files of the Court, and consequently omitted in the transcript. Among the absent papers is the charge of the Court, which is excepted to, and which it is also necessary to have to enable the Court to determine the question whether the case was properly submitted to the jury upon the law applicable to it. Most of the other grounds assigned for new trial are the erroneous admission and rejection of evidence because it is "inadmissible under the pleadings." And the pleadings are repeatedly directly referred to in the objections, and also in the instructions asked, and must necessarily have been referred to in the argument of the motion, and have been considered by the Court below in deciding it. The pleadings are not in the transcript, and it contains no statement in any form of the issues. It is impossible to determine, except inferentially, what the issues were, or even the general object and scope of the action, and without knowing something of the issues it is impossible to tell whether the rulings complained of are correct or not, or whether the points in which it is claimed that the evidence is insufficient to support the special verdict are material to a determination of the rights of the parties. There was, also, a general verdict. There is not, it seems to us, a single ground of error that can be intelligently determined upon the transcript presented. But we cannot undertake to determine important rights upon records manifestly so largely mutilated in material parts.

Section one hundred ninety-five provides, among other things; that "the statement thus used in connection with such

pleadings, depositions and minutes of the Court as are read or referred to on the hearing, constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial." "The statement thus used" is not here, as many material portions appear to be wanting, and only a mutilated statement is brought up. The pleadings were necessarily used on the hearing below, as we have seen, and they are wanting. Section three hundred forty-six requires the appellant to furnish "a copy of the papers used on the hearing of the Court below;" and further provides, that "if the appellant fails to furnish the requisite papers, the appeal may be dismissed." Of course, immaterial portions of the record in the Court below may be dispensed with in the proper mode. But in this case much that is material to an intelligent determination of the propriety of the order appealed from is wanting.

We think the appeals both from the judgment and the order should be dismissed, and it is so ordered.

Mr. Justice SHAFTEE, having been of counsel, did not participate in the decision of this action.

Mr. Justice CURREY expressed no opinion.

J. N. RANDOLPH v. L. B. HARRIS.

ACTION ON LOST NOTE.—In an action upon a lost note the better practice is to tender indemnity before suit and allege the same in the complaint; but such a course is not absolutely necessary. A failure to do so is not fatal to the cause of action; it only affects the question of costs. In other respects, a tender at the trial is sufficient.

COSTS IN AN ACTION ON LOST NOTE.—Where there has been no tender of indemnity before suit, the plaintiff is not entitled to costs unless the defendant has waived a tender, in which case the costs are in the discretion of the Court.

NOTE DESTROYED BY FIRE.—On the question of indemnity no distinction can be made between a note which has been destroyed, and one which has been merely lost.

INSUFFICIENT DENIALS.—Where the pleadings are verified and the complaint contains an allegation that the note in suit was assigned by the payee to

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And whether the note is known to be destroyed or not, the maker is entitled to his indemnity. (Story on Promissory Notes, Sec. 449; *Welton and Wife v. Adams & Co.*, 4 Cal. 37.)

Coffroth & Spaulding, for Respondent.

When a note has been destroyed by fire, no indemnifying bond is required. (Story on Promissory Notes, Sec. 449.) The authorities cited by appellant have no application in this case, and none of them go so far as to say that an indemnifying bond must be tendered before suit is commenced. The evidence shows that an indemnifying bond was tendered or offered in this case before the commencement of the suit, and that defendant stated substantially that he did not require any bond. But a good and sufficient bond was tendered (though not required by law) before the entry of judgment, and filed amongst the papers in the case.

Appellant's counsel contends that there was not sufficient proof of the assignment. The answer to this is, that there is no sufficient denial of the assignment. The denial in the answer is in the alternative, and the pleading bad. (*Porter v. Hermann*, 8 Cal. 624; *Woodworth v. Knowlton*, 22 Cal. 168.)

By the Court, SANDERSON, C. J.

This is an action upon a lost promissory note, by an assignee against the maker—or, as averred in the complaint, a note which had been “totally destroyed by fire.” There is no averment in the complaint to the effect that the plaintiff had tendered to the defendant a good and sufficient bond of indemnity before bringing the action. The only averment upon that subject is in the following words: “Plaintiff avers that he has offered, and now offers, to indemnify defendant against any loss or damage he may sustain on account of the destruction of said note.” The action was commenced on the 27th day of June, 1864. On the 13th of August following the plaintiff filed a bond of indemnity with the Clerk of the Court, and at the trial tendered the same to the defendant, who refused to accept it

because it was insufficiently stamped and because it had not been tendered before suit. No objection was made to the form of the bond or the sufficiency of the security. The Court held that the plaintiff was not bound to tender indemnity before suit, but that the bond was insufficiently stamped, and permitted the plaintiff to add the requisite amount of stamps. In this connection the record contains the following: "The plaintiff also testified that he offered an indemnity bond before the suit was commenced, and that the defendant made some remark that amounted to a waiver of such bond." The case was tried by the Court, but no findings were filed. Judgment was for the plaintiff for the amount claimed, but is silent upon the subject of indemnity.

It is first insisted that the complaint is fatally defective in not averring that a proper indemnifying bond had been prepared and tendered before the commencement of the action.

It was held in *Wellon v. Adams & Co.*, 4 Cal. 37, and reaffirmed in *Price v. Dunlap*, 5 Cal. 483, that where it appears that a negotiable security has been lost or destroyed, the maker has a right to require indemnity against all future claims under it before its payment can be enforced. In the former case, as in this, the security had been destroyed by fire, but it was held that there was no distinction to be made between a lost instrument and one proved to have been destroyed. We are satisfied with the doctrine of that case, but we do not understand that it goes to the length of holding that the bond must be prepared and tendered in advance of suit. The complaint in that case did not aver the tender of a bond, nor, as in the present case, contain an offer to give one, but on the contrary sought to excuse the plaintiffs from giving a bond on the ground of their inability to do so. The Court held that they must give one before the defendants could be compelled to pay, and the judgment of the Court was that "the judgment (which was for the plaintiffs) be reversed and the cause remanded." No direction was given to the Court below to dismiss the action, on the ground that the complaint contained no cause of action, which would doubtless have been

done had the Court been of that opinion. We therefore regard the case as merely establishing the rule that the law will not enforce the payment of a lost note or bill without first requiring the holder to indemnify the maker if he demands it, and that, contrary to some American authorities, there is no difference in this respect between a merely lost bill and one which the evidence shows has been destroyed.

The only question, then, which we are called upon to determine is whether it is absolutely necessary for the plaintiff to tender a bond before he brings his action.

With the question as to which forum, whether a Court of law or equity, can afford relief in a case like the present, we have nothing to do, for under our system the two are blended, except so far as that question may be collaterally involved in the one before us. In England a suit at common law cannot be maintained in such a case, but resort must be had to a Court of Chancery, which always decrees indemnity (*Hansard v. Robinson*, 7 Barn. & Cress. 90,) upon the ground that upon the payment of a note or bill the maker or acceptor is entitled by the law merchant to its possession as a voucher of its payment, or, if that cannot be had, to an equivalent in the shape of reasonable indemnity against all future claims upon him. The English doctrine was in effect, as we understand it, adopted in *Welton v. Adams & Co.*, *supra*. Treating the case, then, as one of equitable cognizance, we think the failure to tender indemnity before suit is not fatal to a recovery, and only affects the question of costs.

The tender of indemnity cannot be considered as any part of the plaintiff's cause of action or as a fact or event upon which his right of action accrues. It is merely a condition which the law imposes upon his right to enforce his cause of action, the performance of which is exacted as a substitute for the delivery of the note or bill, which otherwise he is bound to make upon payment. But it is inequitable to subject the defendant to costs when he may be willing to pay upon reasonable indemnity and before he is placed in the wrong by a tender and refusal. Hence, if the plaintiff desires

to recover costs, he must make the tender before suit or show a waiver of indemnity on the part of the defendant. On the other hand, all that the defendant can rightfully ask is that he be not required by the Court to pay the money or subjected to costs until reasonable indemnity has been furnished.

The proper course to pursue in such cases is for the plaintiff to prepare and tender before suit reasonable indemnity. If it be refused he can then sue, alleging the tender and refusal, and keep the tender good by filing the bond in Court. If, at the trial, the Court shall be of the opinion that the indemnity is reasonable and sufficient, he will be entitled to judgment with costs. But he may sue and offer in his complaint to give such indemnity as the Court may adjudge reasonable, and upon complying with the order of the Court in that respect, take his judgment, but without costs. This last course was adopted in *Tersey v. Gary*, commented on by Lord Chancellor Hardwick in *Walmsley v. Childs*, 1 Vesey Sr. 345, and sustained. The same principle was recognized in *Gray v. Dougherty*, 25 Cal. 282. In cases like the present the costs are regulated by the four hundred and ninety-eighth section of the Practice Act, and are left to the discretion of the Court to be awarded or apportioned according to the equity of the case.

In this case, as before stated, there is no averment of a previous tender, and but for the fact that such tender seems to have been waived by the defendant, we should be compelled to reverse the judgment so far as the allowance of costs is concerned. We think, however, that the allowance of costs was correct in view of that fact.

The exceptions taken to the admission of the written assignment of the note by the original payee to the plaintiff are answered by the fact that the assignment was not in issue and no proof of it was therefore required. The attempted denial of the assignment in the answer is in these words: "And this defendant further answering on information and belief, denies that said Daniel Richards, for a valuable consideration, assigned, by a written instrument, the indebtedness due upon

said note, or that the said assignment was stamped with United States revenue stamps of the required amount and denomination, or that any written assignment was made." This is not a denial of the assignment. If it can be considered as a denial at all, it can only be considered as a denial that the assignment was in writing, and that it was made for a valuable consideration. Such a denial was held bad in *Burke v. Table Mountain Water Company*, 12 Cal. 407, and *Morrill v. Morrill*, 26 Cal. 292. The pleadings being verified and the assignment not specifically denied, it must be taken as admitted for all the purposes of the trial.

Judgment affirmed.

**WILLIAM T. COLEMAN, HENRY CARLTON, JR., AND
EDWARD MOTT ROBINSON, v. F. A. WOODWORTH
AND C. W. HOWARD, ADMINISTRATORS OF THE ESTATE OF
CHARLES DOANE, DECEASED.**

ACTION AGAINST ADMINISTRATOR FOR TORT OF INTESTATE.—A cause of action for the wrongful taking and conversion of personal property survives against the personal representatives of the wrongdoer after his decease.

PRESENTATION OF CLAIM TO ADMINISTRATOR.—An objection that a claim against the estate of the intestate has not been presented to the administrator for allowance or rejection, if not made in the Court below, cannot be raised in the Supreme Court.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

Charles Doane was Sheriff of the City and County of San Francisco, and as such, an execution on a judgment in favor of N. C. Lane and against Harvey Dickinson was placed in his hands. By virtue of the execution, Doane seized personal property claimed by plaintiffs, and they brought an action against him for the wrongful taking and conversion of the same. Pending the action Doane died, and plaintiffs' attorneys suggested his death, and moved that his administrators

Opinion of the Court.

be substituted as defendants in the action. The Court granted the motion, defendants' counsel excepting.

Plaintiffs recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

Jabish Clement, for Appellants.

The rule of law is, that where the wrongful act of the decedent did not result in any benefit to the estate, no cause of action survives against the administrator. This rule is laid down, and all the previous authorities upon the subject are cited and discussed in *People v. Gibb*, 9 Wend. 30. To the same effect are *Wilbur v. Gilmore*, 21 Pick. 252; *Osborne v. Bell*, 5 Denio, 370-76.

George F. & Wm. H. Sharp, for Respondents.

By the Court, SANDERSON, C. J.

I. The first point made by counsel for appellants, to the effect that the cause of action set forth in the complaint does not survive against the personal representative of the defendants' intestate, is answered by the one hundred and ninety-seventh section of the Act to regulate the settlement of the estates of deceased persons, which provides that "any person or his personal representatives shall have an action against the executor or administrator of any testator or intestate who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass upon the real estate of such person."

II. The second point, to the effect that no proof was made of the presentment of the claim to the defendants for their allowance or rejection, as provided in the one hundred and thirty-eighth section of the Act to regulate the settlement of the estates of deceased persons, is answered by the case of *Hentsch v. Porter*, 10 Cal. 555, where it was held that the objection

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in question must be made in the Court below, and cannot be made for the first time in this Court. It does not appear from the record that the defendants, either at the trial, or on the motion for a new trial, in any form objected to a recovery on that ground. For the reasons stated in *Hentsch v. Porter*, the objection cannot be entertained by us.

We cannot disturb the judgment upon the ground that the verdict is against the weight of evidence. Upon the question of title the evidence was conflicting, and we think it was fairly submitted to the jury by the instructions of the Court.

Judgment affirmed.

Mr. Justice SHAFER expressed no opinion.

WILLIAM H. DURYEA v. HIRAM BURT, JOHN DE-
PUY, AND EDWARD BURRELL.

WHAT CONSTITUTES A MINING PARTNERSHIP.—If two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners, or to share the profits and losses.

DISSOLUTION OF MINING PARTNERSHIP.—One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership.

MINING CLAIM OF A MINING PARTNERSHIP IS PARTNERSHIP PROPERTY.—The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property.

LIEN OF MEMBER OF MINING PARTNERSHIP ON ITS PROPERTY.—Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist.

PURCHASER OF INTEREST OF ONE MINING PARTNER HOLDS IT SUBJECT TO LIEN.—If a member of a mining partnership sells his interest in the mine, the purchaser takes it subject to any lien existing in favor of a copartner for debts due the creditors, or advances made for the uses of the concern, unless he becomes a purchaser in good faith for a valuable consideration, without notice of such lien.

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rules governing commercial partnership. I shall now endeavor to show that in an ordinary mining partnership, such as this is found to have been, the equitable lien in favor of the partnership is extended rather than limited. Says Story: "Thus, for example, there may be a partnership in the working of the mine, for Courts of equity constantly treat the working of a mine as a species of trade, and apply the same remedial justice to such cases as they do to ordinary partnerships," (Story on Part. Sec. 82;) and quotes with approbation the language of Lord Eldon, in *Crawshay v. Maule*, 1 Swanst Rep. 518, 523, 526: "Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them, and to a certain extent they are governed by the rules relating to partnerships, and this relation of partnership may be constituted either by express stipulation, or by implication deduced from the acts of the parties."

The case of *Fereday v. Wightwick*, 1 Russ. and Myl. 45, is precisely like the present. Said Sir John Leach: "This property was acquired by these partners for the purposes of the partnership concern; therefore, though in the nature of real property, it is subject to all the debts of the partnership, and to the claim of one of the partners incurred in the administration of the property." (Collyer on Mines, 79.) The same case afterwards appeared in 1 Tam., quoted in 2 Harrison's Digest, 3,876.

The learned Judge whose findings and conclusions of law accompany this case, states that there was no agreement between Duryea and Burt that there should be a lien upon either interest for the company debt, and his legal conclusions would seem to indicate that without such an agreement the partnership lien would not exist. With all deference, we submit that this lien does not spring from express agreement, but is created by operation of law upon the partnership relation and the equitable necessities of the case, and that where real property has been acquired with partnership funds, or for the

uses of the partnership, or where the partners by their conduct or management indicate an intention to treat it as partnership property, and do so treat it, equity will, in furtherance of justice, so consider it.

Hawley & Williams, for Respondents.

The question to be determined is, whether in an ordinary mining company, such as that in the case at bar is found to have been, the relationship of proper partnership and the equitable lien peculiar to such relation exists between the members, in the absence of any express understanding of any nature as to the relationship existing, and in the absence of any agreement or contract whatever, that the interest of either in the claims was to be held subject to a lien for the common liabilities. Were the case at bar one of proper partnership, and the interest purchased by Depuy and Burrell of defendant Burt, held by him in trust for the purposes of such partnership, yet, Burrell being a *bona fide* purchaser, without notice of the character of the property, would take to the extent of one half the interest conveyed by Burt to himself and Depuy, a title discharged of the lien of the copartnership and of the claims of the joint creditors. (Story on Part. Sec. 358: Collyer on Part. 3d Edition, 120-122; *Dyer v. Clark*, 5 Mete. 580; *Hoxie v. Carr*, 1 Sumner, 182, 183; 8 Ohio Rep. 365; *Depuy v. Leavenworth*, 17 Cal. 262.)

But we contend that a proper partnership did not exist between the parties Duryea and Burt in the case at bar, and that the facts as found are wholly insufficient to raise such relation and the equitable lien incident thereto by implication. Appellant in support of his position cites Story on Partnership, Sec. 82, to the point that there *may* be a partnership in the working of a mine, and that in such cases Courts of equity apply the same remedial justice as they do to ordinary partnerships; that is to say, that working a mine *may* be the subject of *partnership*; and where a *partnership* is shown, although its subject be the working of a mine, the same remedial justice will be applied as in ordinary copartnerships. The

case of *Fereday v. Wightwick*, 1 Russ. & Myl. 45, cited by appellant, is not in point. In that case the parties had a mere chattel interest in the mine — being lessees. Besides, they were engaged in purchasing ore from other mines, and were manufacturing large quantities of iron, as well from pig iron and ore purchased as from ore taken from their leasehold lands. Lord Eldon, upon this array of circumstances showing trade and manufacture in connection with the chattel interest of the parties in the land, after much doubt and deliberation held that a partnership had subsisted.

Jones v. Parsons, 25 Cal. 100, also cited, has no application to the facts as found in this case. There the fact of *partnership* was alleged and found by the Court. No assertion of the existence of a partnership lien is found in the case until the sale of Burt to Depuy and Burrell. Now, in the absence of the assent of Burt to a partnership relation with Duryea — and no such assent appears, but on the contrary the Court finds there was no such assent on the part of either of the parties — we know of no rule of law or equity which will enable the plaintiff to declare the existence of a partnership and assert his lien after a sale of his co-tenants' interest in the property or before such sale. Partnership is the result of an agreement, and cannot be raised by a proceeding *in invitum*. (Story on Part. Sec. 5; Collyer on Part. 3d Ed. p. 5, Sec. 8.)

The fact that additional ground was purchased with the common funds of the parties could have no bearing in raising the presumption of partnership in the land so purchased. (Collyer on Part. 3d Ed. 130; *Phillips v. Phillips*, 1 Myl. and K. 649; *Townsend v. Devaynes*, 1 Russ. & M. 45.)

Again: in no case can the equitable lien peculiar to partnership exist between tenants in common of lands unless a proper partnership be first shown, as also that such lands are held for the purposes of the partnership. Now, admitting the truth of the doctrine that the equitable lien of one tenant in common upon the interest of his co-tenant attaches in all such cases, then, in a suit against such copartnership for a common liability, if service of process be had upon one member of such firm,

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and judgment be had against all, as it may be under our practice, the whole of the lands owned by such partnership could be sold under execution issued on such judgment and the title pass by such sale. Wherever the lien of partnership exists, this result may be accomplished under our practice by a service upon one copartner in a suit against all. (Prac. Act, Sec. 32.) Yet this Court have decided in several cases, that as between members of an ordinary mining company this cannot be done; in other words, that the property is not joint, as *partnership* property certainly is, but is held as tenants in common. (*Wiseman v. McNulty*, 25 Cal. 280.)

By the Court, CURREY, J.

This action was brought to dissolve a partnership alleged to have existed between the plaintiff and the defendant Burt, from the 1st of June, 1860, to the time of filing the complaint which was on the 25th of February, 1864, and to obtain an accounting between them and a sale of the partnership property for the payment of the partnership debts. The defendants, Depuy and Burrell, on the 5th of February, 1864, purchased of Burt his interest in a portion of the property owned by him and the plaintiff, which the plaintiff maintains was purchased by them subject to a partnership lien for the payment of the partnership debts then due. The Court before which the cause was tried found in substance the following facts:

First—That early in May, 1860, Burt and five other persons, of whom the plaintiff was not one, owned a part of the property described in the complaint.

Second—That afterwards, and at different times, the plaintiff purchased the interest of all these owners, except Burt, until in December, 1861, he had acquired the undivided five-sixths of the property, at which time the other undivided sixth of the same belonged to Burt.

Third—During the period from the 1st of May, 1860, to the 1st of December, 1861, the owners of the property as a

mining company acquired by several purchases other property, consisting of a ditch and mining grounds, which is a part of the property described in the plaintiff's complaint. These purchases were paid for out of the common funds of the company. The parties owning the property, worked the ground as a mining company, and used the water of their ditch in carrying on such work. The work was prosecuted by the parties interested both before and after the plaintiff and Burt became the only parties having an interest in the property.

Fourth — The profits obtained and the losses sustained in working the mines were to be shared among the parties in proportion to their several and respective interests. Such, at least, it is found, was the tacit understanding among the members of the company, though it is found that there was no written agreement or express understanding among or between the members of the company on the subject, nor any agreement or contract that the interest of either of them in the mining claims was to be held for the company's debts, nor that there should be any lien on the undivided interests of the different owners of the land for the company's liabilities.

Fifth — That after the plaintiff and Burt became the only owners of the property, they became indebted to third parties in about two thousand dollars, that about one thousand two hundred dollars of it was to be paid for running a tunnel on a part of the company's mining ground, but the tunnel was not completed or accepted when Burt sold and conveyed to Depuy and Burrell.

Sixth — After the plaintiff and Burt became the only owners of the property, the latter used a large amount of the water from the ditch on some mining ground of his own; and it is found by the Court that upon an accounting between them as to their company business, Burt was indebted to the plaintiff in the sum of one thousand five hundred and seventy-two dollars and fifty-five cents.

Seventh — That when Burt sold and conveyed to Depuy and Burrell, he informed Depuy that he was owing plaintiff seventeen or eighteen hundred dollars on their company ac-

count, and that plaintiff claimed a lien for it. But that it did not appear that Burrell had any such notice.

Eighth — That at the time of such sale and conveyance Burt was insolvent and so had continued.

Upon the facts so found the Court came to the conclusion that as against Depuy and Burrell the plaintiff's complaint should be dismissed, and that as against Burt he should have a personal judgment for one thousand five hundred and seventy-two dollars and fifty-five cents, and judgment was accordingly so entered. The plaintiff applied to the Court to set aside the judgment entered against him, and for a new trial, which application was denied.

The defendants Depuy and Burrell controverted by answer the existence of any copartnership between the plaintiff and Burt; and as the rights of the parties depend in part upon the solution of this question, it will be first considered.

It does not appear distinctly from the findings of the Court when the mining business was commenced by the several owners of the mining grounds involved in this controversy. They are called, in the finding of the Court, and by the counsel for the respective parties, in their arguments, a company, who worked these mining grounds in the usual manner of working mining claims in California. The company made purchases of mining ground lying adjacent to that already owned by it, for which payment was made out of the common fund of the company. This company originally consisted of six persons, of whom Burt was one, but the plaintiff was not then a member of it. In May, 1860, the plaintiff first became a party in interest in the mining grounds which the company then owned, and he continued from that time until December, 1861, to purchase interests therein, by which means all the original members of the company, except Burt, became divested of their interest in the property, and the plaintiff became the owner of the undivided five sixths of it. After the plaintiff and Burt became the only parties in interest, and constituted the company or firm, it is fairly to be inferred from the pleadings and finding that they continued to work

the mines as usual, and used the ditch as a means for the purpose. They shared the profits and losses of the enterprise in accordance with their respective interests in the property; that is, the plaintiff received five sixths of the profits, and Burt one sixth of the same, and the burdens and losses were borne by them in the same proportions. Though the Court does not find that a partnership was created by express agreement, yet it is found that by a tacit understanding between the parties they were to share the profits and losses of the enterprise according to their several interests.

To constitute a partnership between parties engaged in a business there must be a communion of profit between them. A communion of profit implies a communion of loss. (Coll. on Part. Sec. 18; *Grace v. Smith*, 2 W. Black. 998; *Dob v. Halsey*, 16 John. 40; Story on Part. Secs. 18, 19; 3 Kent, 24, 25.) It is not necessary that there should be an express stipulation between the partners to share the profits and losses, as that is an incident to the prosecution of their joint business. (*Barrett v. Swann*, 17 Maine, 180.) So far then the elements of a partnership among the different owners of the property of this mining company is found to have existed.

Mining partnerships are said to possess some features peculiar to themselves which distinguish them from ordinary trading concerns. Collyer, in his treatise on the law relating to mines, at page 88, says: "A question of some nicety sometimes arises whether persons working mines are trading partners, or mere joint occupiers of land, using the mineral as a part of its produce;" and he then states as a result of the cases "that this question will turn on the consideration, whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land," and he observes that "when companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals, or license to work in pursuance of that object, the Courts of equity have long since recognized such associations as a species of trading partnerships." In *Skillman v.*

Lachman, 23 Cal. 203, it is said, "whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that when the several owners unite and co-operate in working the mine, then a new relation exists between them, and to a certain extent they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself — one of which is that one person may convey his interest in the mine and business without dissolving the partnership." Mines are often and perhaps generally owned and worked by associations more numerous than ordinary trading partnerships. Accordingly, in the language of Collyer, mining partnerships were early recognized as differing from ordinary trading partnerships, in not being founded on the *delectus personarum*, from which principle the rights and obligations of ordinary trading partners are ordinarily derived; and he observes that "the dissolution of partnerships so numerous, by the death, bankruptcy, outlawry or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his copartners," and hence it was decided, after many doubts, that a mining partner had the right to assign and transfer his share without the consent of his copartners; and that neither such assignment nor the death or bankruptcy of the owner of an interest in the mining concern operated to dissolve the partnership. (*Fereday v. Wightwick*, 1 Russ. and Myl. 49.) Another peculiarity of a mining partnership noticed by the Court in *Skillman v. Lachman*, 23 Cal. 198, is that one mining partner has not the power to bind his associates by engagements with third persons to the extent that an individual partner of an ordinary trading concern is competent to bind the firm of which he is a member. The reason for the distinction is because a mining partnership which is subject to changes in its membership, as already indicated, is not founded on the *delectus personarum*, while

an ordinary commercial partnership is—a difference which limits the powers of partners, for reasons which are obvious, to the performance of such acts in the name of the partnership as may be necessary to the carrying on of its business, or which are usual in like concerns. (*Ricketts v. Bennett*, 4 C. B. 686; *Dickerson v. Valpy*, 10 B. & C. 128.)

The plaintiff maintains that from the facts found a partnership lien existed in favor of the partnership for the debts of the firm, and also for advances made by the plaintiff beyond his share for the benefit of Burt; and that a lien for such debts and advances existed at the time of the sale and conveyance by Burt to Depuy and Burrell upon the interest so conveyed, and remained subsisting thereon when this action was commenced, and that the Court erred in deciding otherwise.

It may be laid down as a general principle that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds, and for all moneys advanced by him for the use of the concern. In the words of Lord Hardwick, “when an account is to be taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and nothing is to be considered his share but the proportion of the residue on the balance of the account.” (Coll. on Part. Sec. 125; Story on Part. Sec. 97; *Buchan v. Sumner*, 2 Barb. Ch. R. 167.) The subjection of personal property of a partnership, constituting its capital stock, to the principle stated, is generally of no difficulty; but where the property employed in the partnership enterprise is real estate, held by the several partners as tenants in common, the question has been regarded as one of more embarrassment; mainly, we apprehend, because of the nature of the property itself and the law controlling its descent, and the inability of any one of the tenants in common to charge or dispose of any greater or other

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interest in such real property than that which he may have and hold.

Without entering at much length upon an examination of the English and American authorities on the subject, we may say that the doctrine is well established in America, that real estate purchased by partners, with partnership funds for partnership purposes, is at law held by them as tenants in common; but in equity it is deemed as held in trust as a part of the partnership property applicable, in the first place, exclusive to pay the partnership debts. (*Burnside v. Merrick*, 4 Metcalf, 541; *Hoxie v. Carr*, 1 Sumner, 173; Story on Part. Secs. 91, 92; *Jones v. Parsons*, 25 Cal. 104, 105; *Pierce v. Trigg*, 10 Leigh, 406; *Sigourney v. Munn*, 7 Conn. 11; *Buckley v. Buckley*, 11 Barb. 74, 76; *Buchan v. Sumner*, 2 Barb. Ch. R. 197, 206; *Divine v. Michum*, 4 B. Monroe, 488; *Dyer v. Clark*, 5 Metcalf, 562.) In the case last cited, at page 577, Mr. Chief Justice Shaw said: "It appears to us, that considering the nature of the partnership and the mutual confidence in each other which that relation implies, it is not putting a forced construction upon their act and intent, to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him." And in *Howard v. Priest*, the same learned Judge decided that real estate thus acquired is held in trust, "each holding his property in trust for the partnership, until the partnership account is settled, and the partnership debts paid." (Id. 585.)

In *Buchan v. Sumner*, Chancellor Walworth, in an elaborate opinion in which he reviewed the English and American cases on the subject, considered the American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, as establishing these two principles: "First—That such real estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm. Second—That as between the personal representative and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate, (2 Barb. Ch. 200, 201;) and at page 206 he said: "Although a Court of equity considers and treats real property as part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the firm therein." In *Pierce v. Trigg*, the Court of Appeals of Virginia held that land purchased by two partners with partnership funds, for partnership purposes, and used as part of the stock in trade, is to be regarded in equity as partnership property; and though, if the conveyance has been made to both partners, there will, upon the death of one, pass to his heirs a legal title, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale and dispose of the proceeds as he would of the personal estate of the firm. The principles declared in these cases, it is said by Collyer, "are founded in sound policy and obvious justice, and the correctness of them appears to be incontestible." (Coll. on Part. Sec. 135, and of this opinion was Chancellor Kent, 3 Kent's Com. 39.) The case of *Jones v. Parsons*, 25 Cal. 100, accords in doctrine with the cases from which we have quoted.

In *Smith v. Jackson*, 2 Edw. Ch. 28, the Vice Chancellor held that, though real estate be purchased with joint funds

for partnership purposes, there is no survivorship as to the real estate, and that upon the death of one of the partners, his share, as a tenant in common, decends to his heirs, unless it is agreed by the partners themselves to consider it as personalty, and then the agreement works the change. That when real property is acquired by partners with partnership funds, and used for partnership purposes, it will not be deemed partnership property, liable to partnership debts, by the mere taking of the deed in the joint names of the partners. To render it partnership property, and liable as such, he held it must appear that it was acquired for the purposes of the partnership by some express act or understanding of the partners; in which case equity would apply the lands to pay the partnership debts. This decision, and others to the same effect, Chancellor Kent observed, appeared to him to be a sacrifice of a principle of policy, and, above all, a principle of justice, to a technical rule of doubtful authority. There is no need, he said, of any other agreement than what the law will necessarily imply from the fact of the investment of partnership funds by the firm in real estate for partnership purposes. If the partners mean to deal honestly they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts. (3 Kent's Com. 39, note.) Chancellor Kent evidently favored the doctrine held by Lord Eldon in *Selkirk v. Davies*, 2 Dow Parl. R. 231, 242, and in *Townsend v. Devaynes*, reported in 1 Mont. on Part. 97, and by Sir John Leach in *Fereday v. Wightwick*, 1 Russ and Myl. 45, and *Phillips v. Phillips*, 1 Myl. and K. 649, and *Broom v. Broom*, 3 Myl. and K. 433, that all property involved in a partnership ought to be considered as personalty, even in the absence of any special agreement in respect to it. In the case of *Thornton v. Dixon*, 3 Bro. C. C. 199, Lord Thurlow held that in the absence of any agreement or other act affecting its general character, real estate, held as part of the partnership property, retained its original character as real estate, and upon the death of one of the partners, his share passed to his heir or devisee, and Sir William Grant, (in *Bell v. Phyn*, 7

Vesey, 453, and *Belmain v. Shore*, 9 Vesey, 501,) adopted the same opinion. While the doctrine of the cases is somewhat conflicting, we think the principles stated by Chancellor Walworth, in *Buchan v. Sumner*, as rules deduced from the American decisions, are a sound and just exposition of the law on the subject, (2 Barb. Ch. 200, 201,) and as a corollary of these rules, the real property of the partnership may be considered and treated as part of its capital stock, leaving the legal title undisturbed, subject to the law controlling as to its alienation, descent and distribution, except in so far as may be necessary to protect the rights of creditors and of the several members of the firm. We do not think the jurisdiction of a Court of equity depends for its exercise, subjecting real estate thus acquired and used by a partnership to the payment of the debts of the concern upon an express agreement of the parties to that effect. That real property shall be subject to the purposes for which it was purchased or brought into the partnership, involves the assumption that the partners understood among themselves and intended that it should be held in trust for the uses of the partnership by the several tenants in common. This understanding may be implied from the acts or conduct of the parties. The circumstance that property, whether it be real or personal, is invested in a partnership enterprise, affords cogent evidence of intention that it shall constitute a part of its capital stock. Therefore we do not deem it essential that such intention must be manifested by an express agreement. The agreement is implied from the circumstances, by the rules of law and logic; and it is only equitable to the creditors and members of the partnership that the property should not be withdrawn until the affairs of the association may be adjusted and each of its members shall have his just due. (3 Kent Com. 39, note.)

A portion of the real estate involved in the controversy, as we understand the case, was acquired by the persons originally interested prior to their actually engaging in the business of mining, and it may perhaps be supposed the authorities cited do not therefore apply. If such mining ground was obtained

by the parties solely for the purpose of extracting gold from it, and for that object was brought into the partnership as its capital, it must be regarded as partnership property in the qualified character already expressed. The land being obtained for the sole object of mining, and invested in the mining partnership, it is impossible on principle to distinguish it as resting upon any other footing in its relation to the partnership than mining land acquired by the partnership for mining purposes after the joint enterprise is fully in operation. (*Crawshay v. Maule*, 1 Swanst. 523; Coll. on Mines, 88; Rockwell on Mines, 578.) Mr. Rockwell, after noticing what was said by Sir John Leach in *Fereday v. Wightwick*, observes that "it may be concluded that when persons acquire interests in lands apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial partnership. There does not appear," he continues, "to be any ground for distinction in such cases, if the parties have even acquired a permanent and absolute interest in the property." But he submits it as a general rule in such cases that "there must not only be an express intention to work the mines, but this object must have been either solely contemplated by the parties, or of such paramount consequence as to effectually overbalance any other advantages anticipated from the estate." This, in our judgment, refers the rule to a principle just in itself and easily to be understood.

In support of the right of the plaintiff to the relief which he seeks, as well as to the doctrines which, it may be, are already sufficiently sustained by the foregoing authorities, we may refer more at length to the judgment of the Court in the case of *Fereday v. Wightwick*. From the report of that case it appears that six persons had taken a lease for years of mines, and also another lease of the surface of the property, and had worked the mines as a joint concern. One of them mortgaged his interest or share for money borrowed, and then became bankrupt, at which time he was greatly indebted to the concern, of which he had been the manager. A bill was filed by such of the original parties as continued to be interested in

the concern, and by other persons who were either representatives of deceased original partners or claimed as purchasers of shares. The plaintiffs sought a decree directing the shares of the partner, who had become bankrupt, to be applied in repaying the debt due from him to the partnership. The defendants, who claimed under the bankrupt partner, insisted that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property. In deciding the case, the Master of the Rolls, Sir John Leach, said: "The mines and surface were used with a communion of expense and a communion of profit. The first question is, whether this is partnership property, liable to be sold and disposed of to pay the partnership debts; and whether a partner, having sold part of his share, his interest is to be considered, subject, in the first place to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purposes trading concerns, but they are not so to all. They are not so in this particular, viz: that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the partners. In these particular instances they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have. Now, it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired, is, upon the dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts—that is a universal principle. To apply the rule to this particular case, the property was acquired by these partners for the purposes of the partnership concern. Therefore, though in the nature of real property, it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property. There can be no doubt, therefore, that the plaintiffs have a right to make this claim." (Taml. 250; Coll. on Mines, 128.)

In the case before us, the plaintiff had a lien upon the partnership property for the debts due the creditors of the concern, and also for moneys advanced by him for its use, and such lien subsisted after the conveyance made by Burt to Depuy and Burrell, unless it was lost by reason of their having become purchasers in good faith, for a valuable consideration, without notice on their part of the existence of such lien. In their answer they claimed the benefits accruing to innocent purchasers in such cases.

It appears from the finding of the Court that Depuy had actual notice at the time from Burt that he was in debt on the partnership account in a considerable sum, though it did not appear that Burrell had such notice. It also sufficiently appears that at the time of Depuy's and Burrell's purchase, the plaintiff and Burt were prosecuting the mining business upon these mining grounds. While we do not undertake to say in this place that one partner may not convey or charge his interest in mining ground, on his private account, to the extent of his legal title, provided the purchaser or mortgagee deals with him in good faith and without notice of the partnership rights, and there is nothing in the transaction or in the circumstances connected with it or the subject matter of it from which notice might be inferred, (Coll. on Part. Sec. 135,) yet if a purchaser or mortgagee in such case is apprised of facts sufficient to put him on inquiry and to lead him by a diligent investigation to a discovery of the truth, he will be deemed to have notice of the truth as it may be. Here the defendants Depuy and Burrell were necessarily aware of the working of these mining grounds by plaintiff and Burt as mining partners, and it was their duty to ascertain, as they might have done, the condition of the affairs of the concern, and whether or not there existed upon the property which they purchased a lien resulting from the relation of the partners to each other and to the creditors of the partnership. Besides this, one of the parties had actual notice of the existence of the partnership lien of the plaintiff. They must therefore be deemed to have taken the property *cum onere* — subject

to an adjustment of the account between the partners and the payment of the partnership debts, and also of the amount due the plaintiff on the partnership account.

The judgment must be and is hereby reversed, and the cause remanded for further proceedings.

SAWYER, J., concurring.

The determination of the rights of the parties to this suit depends upon the question whether the property was held in the ordinary mode of holding ditches and mining ground in this State, as tenants in common, or held as partnership property in the strict sense in which these terms are used in relation to mercantile transactions. I have no doubt that mining claims, ditches and lands may be held as partnership property, as well as any other, and when so held, for the purposes of discharging the partnership obligations or settling the partnership affairs, that such property will be subject in equity to all the incidents of other partnership property. The title to claims may be held by parties as tenants in common, while there may be a strict partnership for the purpose of working them; or there may be a partnership both in the ownership and in the working of the claims. Whether the relationship of the parties is one or the other, or neither, must depend upon the facts of each particular case. These principles are distinctly indicated in *Bradley v. Harkness*, 26 Cal. 76. Parties purchasing the interest of one of the copartners in partnership property acquire such interest only as the vendor had, and that is, his share of the residue, after the affairs of the concern are wound up and the debts paid, including the balance due one partner from the other on the partnership account. (*Jones v. Parsons*, 25 Cal. 104.) And this rule in equity applies to real estate constituting a part of the assets of the firm, as well as to personalty. True if the record legal title to realty be in one of the partners alone, and he should convey to an innocent party for a valuable consideration without notice of the trust, such party might take a title under the recording Acts; but

whether he would or would not, would depend upon principles having no peculiar relation to partnership rights. In such case, also, all the rules of law relating to possession, as affecting the question of notice, would, doubtless, be applicable as in other cases between individuals having no connection with partnership transactions. And these rules would, doubtless, obviate many of the difficulties suggested by the learned Judge who tried the case.

The finding in this case is an opinion rather than a finding, and liable to the criticisms suggested in *Hidden v. Jordan*, 28 Cal. 305; but from the facts stated, I think there was a partnership in working the mines, and that a large portion at least of the property in question was partnership property. Much of it—including a considerable portion of the claims and of the water rights—was purchased by the two parties interested with the common funds resulting from the joint working of the claims and from the common proceeds of sales of water. The profits and losses were to be shared according to their respective interest. This state of facts, without any specific agreement modifying the rights of the parties, would constitute the property so purchased, and the proceeds of the same, and of their joint labor, partnership property. As to this portion of the property the judgment is, therefore, erroneous.

It may be that the claims before owned and purchased in severalty in undivided interests were held by them throughout their connection as tenants in common. Whether they were or were not is not distinctly found as a fact, and we should not be justified in determining the question from the facts found. Those interests were, doubtless, originally purchased as tenancies in common; but whether from the evidence before the Court, and the manner in which the parties blended their interests in those claims with their subsequent purchases and in working the whole, the Court would be justified in finding that they put in the claims originally held, with the new purchases as partnership property, it is not our province now to determine. This will be a fact to be determined on the new trial. If so, it became partnership property and subject to

all the incidents of such property. If not, and it was originally held and still continues to be held as a tenancy in common, then it was not partnership property, and the plaintiff has no claim to have the sum due him from his cotenant or co-partner in other matters charged upon it.

The complaint alleges a partnership, and seeks a dissolution and settlement of the affairs of the concern. It avers all the property to be partnership property. On the next trial it will devolve upon the Court to determine the facts whether a partnership existed or not; and if so, whether the whole, or only a part, and in that event, what part of the property described in the complaint is partnership property, and, unless other equities appear requiring a different disposition, to subject that part to plaintiff's demand in case any balance shall be found due him on partnership account.

For these reasons I think the judgment must be reversed and the cause remanded.

THE PEOPLE v. DE LACEY.

MOTION FOR NEW TRIAL IN CRIMINAL CASE FOR ERROR IN REFUSING A CONTINUANCE.—Where the defendant in a criminal case moves for a new trial on the ground that the Court erred in not granting him a continuance by reason of the absence of his witnesses, he should procure the affidavits of the witnesses to show that they could testify to the facts desired to be proved by them.

DENIAL OF CONTINUANCE IN A CRIMINAL CASE.—If, on application for a continuance made on affidavit, on the ground of the absence of witnesses in a criminal case, there is a counter affidavit tending to show that the application is not made in good faith, the appellate Court will not disturb the judgment because the continuance was denied.

APPEAL from the County Court, Amador County.

The defendant was indicted for robbery. When the cause was called for trial he moved for a continuance on the ground of the absence of witnesses. The defendant stated in his affidavit that the desired witnesses resided at Sacramento, distant about forty-three miles from the place of trial. There was a counter affidavit filed by the District Attorney for the

purpose of showing that the application was not made in good faith. The Court denied the continuance, and the defendant was convicted. He then moved for a new trial, and assigned as error the refusal of the Court to grant the continuance, and filed a new affidavit setting up what he expected to prove by the witnesses, but did not procure the affidavits of the witnesses. A new trial was denied, and the defendant appealed.

M. W. Gordon, and J. W. Coffroth, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SAWYER, J.

On the motion for continuance there was a counter affidavit tending strongly to show that the application was not made in good faith. And on the motion for new trial no effort appears to have been made to procure the affidavits of the absent witnesses to show that they could testify to the facts desired to be proved by them. One of the witnesses appears to be a police officer, and the other a keeper of a public house in Sacramento, and their affidavits could doubtless have been obtained. If not, the fact could have been made to appear. This ground of the motion, under the circumstances, should have been supported by the affidavits of the absent witnesses. Such is the imperative requirement of the statute where the defendant moves for a new trial on the ground of newly discovered evidence. (Laws 1863, p. 161, Sec. 440, clause 7.) Then there is no reason why the same rule should not be adopted where a continuance has been denied; and particularly so when, as in this case, there is reason to suspect that the affidavit for continuance was not made in good faith. There was no abuse of discretion in this case. (11 Cal. 163; 8 Cal. 47; 20 Cal. 180; 9 Cal. 212.) No other point requires notice.

Judgment affirmed.

JAMES H. LUCAS *et al.* v. CITY OF SAN FRANCISCO.

DECISION OF APPELLATE COURT BECOMES THE LAW OF THE CASE.—The judgment of an appellate Court upon a point in issue involved in the case becomes the law of the case in all its stages, not only in the Court below, but in the appellate Court whenever the cause is again brought before it.

FAILING TO EXCEPT TO A FINDING OF FACTS.—If a cause is tried by the Court, the losing party cannot object in the appellate Court that there is no finding of facts, or that the facts found are defective, unless he asks for a finding, or that the facts omitted may be found, and excepts to the refusal of the Court below to do so.

FAILURE TO ASK THAT AN OMITTED FACT BE FOUND.—When a cause is tried by the Court the judgment will not be reversed because the findings omit some fact necessary to be proved to warrant the judgment, unless the Court below was requested to find the fact omitted, and failed to do so, and an exception was taken on that ground.

SECTION ONE HUNDRED AND NINETY-ONE OF PRACTICE ACT.—The one hundred and ninety-first section of the Practice Act allowing an exception to the decision of a Court or referee does not do away with the necessity of asking the Court to find the facts, or the omitted facts, and actually excepting to the refusal to do so.

FACTS FOUND NOT WARRANTING A JUDGMENT.—If a finding of facts is inconsistent with the judgment, it is fatal to the judgment without an exception being taken in the Court below.

ONE GOOD COUNT IN COMPLAINT SUSTAINS JUDGMENT.—If the complaint contains one good count, and the findings of fact are defective, but the Court below is not asked to find the omitted facts, the judgment will not be disturbed.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. W. Dwinelle, and Delos Lake, for Appellant.

A. C. Whitcomb, for Respondent.

By the Court, RHODES, J.

This action was brought by the plaintiffs as the assignees of one Wetmore, to recover a certain sum of money for improving Powell street in San Francisco, which it is alleged was performed by Wetmore under a contract made between him and the city. The cause was formerly appealed by the plaintiffs, and this Court reversed the judgment for the defend-

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ant, and remanded the cause for further proceedings. (See 7 Cal. 463.) After the return of the cause to the Court below, it was referred to a referee to try all the issues, whether of law or of fact, and report a judgment; and the cause having been heard by the referee, he reported his findings of fact and conclusions of law, together with a judgment in favor of the plaintiffs, and they were filed and judgment was entered October 9th, 1861. The appeal is taken from the judgment alone, and there is neither a statement nor bill of exceptions in the record.

The propositions presented on the part of the defendant are substantially that the judgment is erroneous, because no count in the complaint discloses a sufficient cause of action; and because the findings of fact reported by the referee do not sustain any good count in the complaint, (if it is held that any count is sufficient,) but apply only to those counts which do not state a sufficient cause of action.

Upon the first proposition, the case is in such a condition that the task of investigation and decision is far from being agreeable; and upon the second, it may not be improper to say, that the statute which we shall have occasion to comment upon, can scarcely be regarded as conducive to the precision and certainty that should characterize judicial proceedings.

When the case was formerly before the Court, it came up on appeal from the judgment sustaining the demurrer to the complaint. The defendant filed a general demurrer to the whole complaint, and to each count separately. Mr. Justice Burnett entered into a very elaborate discussion of the principal questions arising in respect to the contract, and matters growing out of it, upon the idea that they must arise in the future progress of the case, and would have to be settled by the appellate Court. At the outset of his opinion, after having stated what the judgment appealed from was, he says: "The objections raised by the demurrer can only apply to some of the counts, and for that reason, if for no other, the judgment of the Court below must be reversed. But it was evidently the intention of all parties to obtain the decision of this Court.

upon all the points raised, as they involve interests of great magnitude that must be settled sooner or later on appeal." The learned Judge, after holding that the corporation had power to ratify or adopt, in proper form, an act which was within the legitimate powers of the corporation, but which had been done informally and not in the mode prescribed by law; and that an ordinance would estop the city, while acts *in pais* would not, stated as the only questions in the case: "First— Was it (the contract) made in the proper mode? and, second—if not made in the proper mode, was it afterwards affirmed in the proper manner?" The conclusion attained was that the contract was made in the proper mode. The remainder of the opinion is devoted to the discussion of two questions: whether the city was responsible for the cost of the entire work, under the circumstances of the case; and whether she was liable upon the warrants issued to the contractor, on account of the work performed under the contract; and the first was answered in the affirmative, and the second in the negative. Mr. Chief Justice Murray and Mr. Justice Terry, who joined in a special concurrence, said: "We concur in reversing the judgment of the Court below on the first ground stated in the opinion of Judge Burnett, but differ with him as to the other questions passed upon in his opinion." We understand them to mean that their concurrence in reversing the judgment was placed on the ground that the alleged contract was made in the mode prescribed by law, for that is first the ground, and the general statement that the objections raised by the demurrer were not applicable to all the counts, is certainly not one of the grounds assigned why the demurrer should be overruled, but is rather the result, the consequence—necessarily following from the first and second grounds maintained in the opinion.

Mr. Justice Cope when referring to the case in *Argenti v. San Francisco*, 16 Cal. 255, has not given a different interpretation to the language of the special concurrence, but he evidently regarded the first ground discussed by Mr. Justice Burnett, that the city had entered into the contract in the proper

mode, but could not be estopped by matters *in pais*, as the ground upon which all the Justices concurred. He was maintaining that the city could be thus estopped, and his citation of the case, with the statement that on that point it was in "direct antagonism to *Seale v. The City of San Francisco*," would be devoid of all purpose and significance, unless he understood the meaning of the special concurrence to be as we have stated.

Whatever our views might be, if the case was now before the Court for the first time, upon the questions whether under the law as it then existed, an ordinance must necessarily precede the making of the contract, after the reception of the proposals, or whether the execution of the contract was sufficiently alleged in the complaint; or upon the more general question whether the complaint states facts sufficient to constitute a cause of action against the city, is now a matter of no moment in this case, for the decision that some one of the counts in the complaint is sufficient, became the law of the case, obligatory not only upon the Court below, but also upon the appellate Court whenever the cause should be again brought before them. (*Davidson v. Dallas*, 15 Cal. 75, and cases cited; *Phelan v. San Francisco*, 20 Cal. 39.) It is the law of the case in the most exact and restricted sense, in which it can be claimed that the doctrine of *res judicata* should have application, for it is not the reasoning of the Court, nor any mere legal principles announced, but the judgment itself, which is relied on as conclusive of the question in controversy. The judgment reversed was to the effect that the complaint was insufficient, and the judgment of the appellate Court in reversing that judgment definitely established that the complaint was sufficient.

We have, then, at least one good and sufficient count in the complaint, but the case is such that we are not called upon to specify which were held to be sufficient, though we would be safe in rejecting from the number of counts based on the warrants, and including the first count, which is upon the contract, and the fourth count, which is, in substance, for

money had and received by the defendant to the use of the plaintiffs. The counsel for the defendant substantially admit the fourth count to be sufficient, when they say: "This count is probably good, but not sustained by the finding of fact." There is no one of the counts which, if it is held to state a sufficient cause of action, will not support the judgment. The only material defect that counsel claim is found in the first count is, that the making of the contract is not well alleged — that the allegation in that count, in fact, showed that the city did not execute the contract. If it is held that the count does properly and sufficiently state the making of the contract, it is in all other respects sufficient to support the judgment; and the same may be said of the fourth count, which alleges that the money sought to be recovered was collected by the city to be applied to the payment of the work in the first count mentioned. Upon its being determined that any one of the counts states facts sufficient to constitute a cause of action, the only other question that could arise upon the pleadings and judgment is, whether such count authorizes a judgment for the amount for which it was rendered, and upon that point it is enough to say that the judgment does not exceed the amount claimed in either of the counts.

The second proposition has relation to the findings of fact filed by the referee. The counsel for the respective parties are at issue upon almost every point that is presented; but we find it unnecessary to pass upon many of the points that have been so very ably and ingeniously argued. It may be conceded for the purposes of the case, that the finding filed by the referee occupies the same position and has the same value as if made by the Court, and that, though it did not, under the statute then in force, form a part of the judgment roll, it became, according to the doctrine of *Reynolds v. Harris*, 8 Cal. 617, matter of record, and that as such it properly came up in the record on appeal from the judgment, without a statement or bill of exceptions, for we do not consider it necessary to dispose of the findings upon the authority of *Connor v. Morris*, 23 Cal. 447, in which it was held that it was unneces-

sary to examine the findings reported by the referee, because he was ordered to try all the issues both of law and of fact, and report a judgment, but was not ordered to report the facts; nor do we express any opinion upon the authority of that case, or say that it is or is not applicable to the facts of this case. It may be further conceded, also, for the same purpose, that the defendant's counsel are right in the point, that objections to the transcript in respect to the findings, should, under Rule 18, have been taken at the first term after the transcript was filed, and at least one day before the argument.

But accepting the finding, as the finding of the Court, and as such, subject to examination in the appellate Court in connection with the pleadings and judgment, it falls within the provisions of the Act of 1861 to regulate appeals. (Statutes 1861, p. 589.) This Act has worked a material change in the practice in relation to the findings of fact. Previous to the taking effect of the Act, the judgment, in cases tried by the Court, without a jury, was not only required to be warranted by the pleadings of the prevailing party, but also to be supported by a finding of the facts in issue between the parties. Every fact essential to the support of the judgment, if controverted, was required to be stated in the finding, and a failure in this respect was visited with the penalty of a reversal of the judgment. The finding was in most respects similar to a special verdict of a jury, and like the verdict in cases tried by a jury, it served as the basis of the judgment. (*Russell v. Amador*, 2 Cal. 305; *Semple v. Burkey*, Id. 321; *Swift v. Maygridge*, 8 Cal. 445; *Breeze v. Doyle*, 19 Cal. 101.)

The Act provides that the judgment, when the case has been tried by the Court without a jury, shall not be reversed because of the entire absence of a finding of facts, nor because material facts are wanting from the finding, unless objections were made in the Court below to the want of a finding or to the defective finding, and the Court failed to supply the finding or remedy the defect, on its being pointed out. There must, of course, be a decision in favor of the prevailing party, but no finding of the facts is required, and if one is made it

need not respond to all the issues unless the party complaining of the decision requires that a finding shall be made, or that the one already filed shall be perfected by inserting the omitted facts. All the facts necessary to the support of the judgment, and which are embraced within the issues, will, in the absence from the finding of any facts inconsistent with the relief granted, or the allegation upon which it is based, be presumed to have been proven, if no exception is taken to the finding or the want of a finding. (*Lyons v. Leimback*, decided at the present term.) No exceptions were taken to the findings in the Court below, within the meaning of the Act. The defendant is not assisted by section one hundred and ninety-one, of the Practice Act, for the exception there interposed by the law, without having been actually taken, stands merely as the foundation for the appropriate proceeding to set the finding aside. It could not by any possibility fill the place designed for the exception in the Act of 1861, for the Act is framed on the theory that upon the want of a finding, or a defect in the finding being brought to the attention of the Court, the finding or the missing fact in the finding will be supplied. This could not be accomplished by an exception interposed by the law itself. It results, that if there be no exception, as provided for in the Act, the finding, if there happened to be one, may bear a very faint resemblance to a special verdict of a jury. The party who is satisfied with the decision, is concerned, not in seeing that the finding sets forth any of the controverted facts which being proven in his favor, serve as the basis of the decision and judgment, but only in excluding from it any facts that might sustain the case of the opposite party, and militate against the decision and judgment. The Act renders a defective finding, to which no exception has been taken, harmless; and it is, of course, of no conceivable value, for if it is wanting in one material fact in issue, that is requisite to sustain the judgment, it is no better than if it lacked every fact in the case, and the Act itself places it on that footing but the Act has not provided against the consequences arising from a finding, that is inconsistent with the judgment. In the latter case, the rules

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appeal that the city was liable on the contract and might be held responsible for the whole amount, a judgment for an amount less than the contract price would not be deemed erroneous unless it should appear from the findings that it should have been entered for a still less amount.

Judgment affirmed.

Mr. Justice SAWYER, and Mr. Justice SHAFER, having been counsel in the case, did not participate in the decision.

FRANCES M. BENNETT v. EDWARD L. BENNETT.

SIX MONTHS' RESIDENCE REQUIRED FOR A DIVORCE.—The Court has no jurisdiction to grant a divorce unless the applicant aver and prove that he or she has been a bona fide resident of this State six months before making the application.

IN A DIVORCE SUIT, RESIDENCE MUST BE PROVED.—An averment in a complaint for a divorce, that the applicant has been six months a resident of this State, and a failure to deny the averment in the answer, does not do away with the necessity of proving the residence.

APPEAL from the District Court, Thirteenth Judicial District, Mariposa county.

The facts are stated in the opinion of the Court.

Henry H. Hartley, for Appellant.

As a condition precedent to the right of a party to apply for a divorce, it must be shown that the applicant has been a resident of the State for a period of six months immediately preceding the application. (Wood's Digest, Art. 2,634.) This means a *bona fide* residence; not one acquired for the purpose alone of bringing the suit, for that is a fraud on the jurisdiction of the Court. The whole question is elaborately discussed in Bishop on Marriage and Divorce, Secs. 150, 709, 720, 721, where it is clearly laid down that any attempt to impose upon the Court by a fictitious claim of residence will authorize the Court to refuse the application. Residence is purely a question of intention, (4 Cal. 175,) and from the acts and declarations of the party the fact must be established.

Opinion of the Court.

J. G. McCullough, for Respondent.

Residence is a question of fact and of intent, not purely a question of intention, as urged by the appellant's counsel. The *factum et animus* must concur. It surely at this day requires no citation of authorities to sustain this doctrine, and when residence is averred in a complaint it means a *legal* residence. A residence of six months our statute requires as a condition on which the application is to be made. It is a condition precedent. It must be pleaded. It is just as necessary to allege the fact of a six months' residence, as it is to allege the fact of a lawful marriage. Both must be alleged, and if denied, both must be proved. Neither is a "ground for a divorce," and neither if admitted need be proven.


The fact of plaintiff's six months' residence in Mariposa, and her marriage to defendant, are both positively and specifically alleged in this complaint, and neither being denied in the answer, both are admitted, and admitted as fully as if the defendant had expressly alleged them to be true. It is also alleged that at the time of the commencement of the suit the defendant was residing in Mariposa County. This he is careful to deny, while he says nothing of the plaintiff's residence. This question is settled by a late decision of this Court, and is no longer an open one. (*Fox v. Fox*, 25 Cal. 590.)

By the Court, SHAFER, J.

This is an action for divorce. The defendant appeals from the judgment and from an order overruling his motion for a new trial.

It is insisted that the finding that the plaintiff had resided in this State six months immediately preceding the application is contrary to the evidence.

We have examined the evidence bearing upon the point. It came from one of the plaintiff's witnesses on cross examination, and its direct tendency was to prove that the plaintiff came to California from the State of New York, her place of



domicile, "to get a divorce," and that she intended to return to that State and reside there with her father in Otsego County, as soon as the divorce should be obtained. The main ground of reply to his objection is, that the residence is charged in the complaint and not denied in the answer, and it is claimed that the point is within the analogy of *Fox v. Fox*, 25 Cal. 587. To this position we do not agree. In that case the marriage was the fact charged and admitted; and it was held that under the statute, the Court was bound to require proof only of the facts alleged as the "grounds of divorce," and that the marriage itself could in no sense be regarded as a ground for its own dissolution. It was further considered "that the statute was framed to prevent collusion between the parties," and that the question of marriage was one upon which there could never be any motive to collude, inasmuch as the very object of the proceeding was to dissolve and not to establish that relation. Residence is not in itself a cause of divorce, but it is a ground upon which the jurisdiction to grant a divorce rests in all cases, both under the statute and by international law. (Bishop, Secs. 150, 720, 721.) The tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have been committed, if neither of the parties has an actual bona fide domicile within its territory. A divorce granted here without this prerequisite would not be binding in the State of New York, nor in any third State or country. While marriage does not go to the causes of divorce, it is also true that it is not a fact of jurisdictional consequence. Its relations to the question are not only distinct from, but are much more comprehensive than either; for it goes to the possibility of a divorce on any ground by any tribunal in any country. But residence, though it does not enter into the statute causes of divorce, does enter into the "grounds" of divorce, or constitutes rather the sole ground upon which a decree dissolving the marriage relation in any given instance, can be regarded otherwise than as a piece of judicial usurpation.

Statement of Facts.

But over and beyond this, residence is palpably within the mischiefs against which it was the object of the statute to guard, and therefore it must be proved. Should the judgment in this case be affirmed, the affirmance would be but a letter of invitation to the married, domiciled abroad, who have, with or without reason, become enamored of divorce, to take a trip, one or both, to this State for the purpose of avoiding delays, or yet more serious impediments at home, with the intention to return thereto as soon as the purpose of their coming shall have been hurried to accomplishment by the aid of an accommodation answer admitting the averment of a six months' residence on the part of the applicant. Against this prostitution of the judicial power the statute interposes the only available barrier by requiring, as we construe it, not only that the causes of divorce should be proved to the Court, but the residence of the applicant also, as the sole ground on which it can take cognizance of the question.

The judgment is reversed and a new trial ordered.

ARTHUR THORNTON v. JOHN THOMPSON AND R. B. THOMPSON.

ORAL TESTIMONY TO SHOW THAT LAND IS NOT SWAMP AND OVERFLOWED.—In an action to recover possession of land, where one of the parties claims the same by virtue of some right or title derived from the United States, and the other claims the same as a purchaser from the State as swamp and overflowed land, the party claiming under the United States has a right to introduce oral testimony to show that the land is not swamp and overflowed.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

This was an action to recover possession of a tract of land in San Joaquin County. On the trial it was admitted that plaintiff had been in possession of the land from 1854 up to March, 1863, and that he claimed the same under the pre-emption laws of the United States, and had complied with said laws, and that in March, 1863, he was forcibly ejected

Opinion of the Court.

from the premises by defendants, and that since that time defendants had been in possession; that March 19th, 1863, defendant John Thompson received a certificate of purchase of the same from the State of California as swamp and overflowed land, and that the land was surveyed by the United States, and the plats returned to the Land Office on the 1st day of July, 1864, and by the survey and plats it appears that the land is swamp and overflowed.

Plaintiff then offered oral testimony to prove that the land was not swamp and overflowed within the true intent and meaning of the Act of Congress. Defendants' attorney objected to the evidence, and the Court sustained the objection.

Defendants recovered judgment, and plaintiff appealed.

Tyler & Cobb, for Appellant, cited *Kyle v. Tubbs*, 23 Cal. 442.

T. A. Caldwell, and *George Cadwalader*, for Respondents.

By the Court, SANDERSON, C. J.

The refusal of the Court to allow the plaintiff to prove by oral testimony that the land in controversy was not swamp and overflowed within the meaning of the Act of Congress ceding the swamp and overflowed lands within their borders to the several States, was error. (*Kyle v. Tubbs*, 23 Cal. 432; *Kernan v. Griffith*, 27 Cal. 87.)

Judgment reversed and new trial ordered.

THE PEOPLE *ex rel.* HENRY CARLTON, JR., v. JOHN MIDDLETON, WM. HOOPER, SAMUEL KNIGHT, AND WILLIAM M. LENT, COMMISSIONERS OF THE FUNDED DEBT OF THE CITY OF SAN FRANCISCO.

COMMISSIONERS OF FUNDED DEBT OF SAN FRANCISCO.—The Commissioners of the Funded Debt of San Francisco are not officers within the meaning of Article XI, section seven, of the Constitution, and the term during which the Commissioners are authorized to act is not limited to four years.

Opinion of the Court.

THIS was an application for a writ of mandate, commenced in the Supreme Court.

The relator averred in his petition that Charles M. Hitchcock was appointed one of the Commissioners of the Funded Debt of San Francisco, and duly qualified, more than four years prior to October 1st, 1864, and that his term of office as such expired at the end of four years after he qualified, and that after the expiration of his term the relator was appointed by the Governor of the State a member of the Board to fill the vacancy caused by the expiration of his term, and that the relator had requested the defendants to unite with him in the execution of a joint and several bond, required by the Act constituting the Board, to the end that he might enter upon the duties of the office, but they had refused to comply with his request.

The object of the suit was to compel the other Commissioners to unite with him in the bond.

G. F. & W. H. Sharp, for Relator.

H. Haight, for Respondents.

By the Court, SAWYER, J.

The Commissioners appointed under "An Act to fund the floating debt of the City of San Francisco, and to provide for the payment of the same," passed May 1st, 1851, and the various Acts amendatory and supplementary thereto, are not, in our opinion, officers within the meaning of Article XI, Section seven, of the Constitution. They exercise none of the governmental or police powers of the municipal corporation. They simply stand in the position of trustees between the city and certain designated creditors in relation to a designated class of the indebtedness of the city, to receive certain moneys appropriated by law for the payment of the interest, and to constitute a sinking fund for the ultimate extinction of the debt, and manage and dispose of the same in the mode pre-

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scribed. They are trustees of the creditors, as well as of the city, in respect to the matters committed to their charge, each being equally interested in the trust, and in having the funds managed by experienced and competent men, appointed in the manner designated before the creditors accepted the proposition of the city to surrender their evidence of indebtedness, and accept in its stead the stock issued under the provisions of the Act, and upon the terms and conditions therein provided. As soon as the debt is all paid, and the trusts assumed are discharged, the powers and duties of the Commissioners, or trustees, cease without any further legislative action. We think the term during which the Commissioners are authorized to act not limited by the constitutional provision cited.

The order to show cause is discharged, and mandamus denied.

THOMAS S. PAGE v. WELCOME FOWLER *et al.*

WHAT IS ADVERSE POSSESSION OF PUBLIC LANDS.—To constitute adverse possession of public land, it is sufficient if the party in possession and claiming that his possession is adverse as against a prior possessor, claims the right to the possession as against all the world except the United States. It is not necessary that he possess under color of title.

PROOF OF ATTEMPT TO PRE-EMPT TO SHOW ADVERSE POSSESSION.—Where one enters upon public lands in the prior possession of another, and the prior possession brings an action against him to replevy hay cut by him on the land, he has a right to prove that he has filed his declaratory statement of intention to pre-empt, and possesses the necessary qualifications of a pre-emptor, to show his adverse possession.

REPLEVIN BY A PRIOR POSSESSOR FOR HAY CUT ON PUBLIC LAND.—Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a pre-emption right when he cut the hay.

PERSONAL ACTION FOR CROPS CUT ON THE SUSCOL RANCH.—A purchaser from Vallejo of a portion of the Suscol Ranch, who entered into possession, cannot maintain a personal action for crops cut on the land by one who under a claim of a pre-emption right entered on his possession in 1862.

PERSONAL ACTION TO TRY RIGHT TO POSSESSION OF PUBLIC LAND.—A personal action cannot be made the means of litigating and determining the right to the possession of real property as between conflicting claimants to the possession where the title is in the United States.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Argument for Respondent.

The defendants appealed from the judgment.
The other facts are stated in the opinion of the Court.

Stanley & Hays, and M. A. Wheaton, for Appellants.

The defendants remaining in quiet and undisturbed possession of the land from October, 1862, (at which time the crops had not commenced to grow,) during all the time the crops were growing until they harvested them, and even at the time this action was tried, constitutes a good and sufficient defense to this action. Admitting the plaintiff proved prior possession, which would have been sufficient evidence of title to have enabled him to maintain ejectment against a mere naked trespasser, he could not upon such evidence recover the crops raised *in specie* while the defendants held adverse possession of the land, for the reason that it would change a local into a transitory action. (*Mathers v. Ministers Trinity Church*, 3 Sergt. & R. 516; *Baker v. Howell*, 6 Ib. 482; *DeMott v. Hagerman*, 8 Cow. 220; *Halleck v. Mixer*, 16 Cal. 579; *Harlan v. Harlan*, 15 Penn. 518.)

"Title cannot be decided in an action merely personal and transitory, no matter whether replevin, trover, or assumpsit. Nor can there be maintained by one not in the actual exclusive possession, whatever his title may be, against one who is in the possession, claiming right." (*Brown v. Caldwell*, 10 Sergt. & R. 118.)

Patterson, Wallace & Stow, for Respondent.

The condition of the plaintiff's title to the premises on which the hay grew is similar to that of the plaintiff in *Page v. Hobbs*, 27 Cal. 483, except that in the case at bar plaintiff had taken the necessary steps as a purchaser from Vallejo, under Act of March 3d, 1863, "to grant the right of pre-emption to certain purchasers on the Suscol Rancho, in the State of California." This fact, in connection with the proof of possession of the plaintiff, upon which defendants had entered "through the opening in the fence," showed the

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defendants to be mere *tort-feazors*, and none of the evidence offered by them tended to relieve them of this character.

Their pretended pre-emption proceedings in the United States Land Office were of no validity; they had no adverse possession in good faith, accompanied with claim of title, and therefore the hay they cut on the plaintiff's land might be recovered in this action. (*Halleck v. Mixer*, 16 Cal. 579; *McCracken v. City of San Francisco*, 16 Cal. 636; *Green v. Lighter*, 8 Cranch. 250; *Hunt v. Wickliffe*, 2 Peters, 211; *Potts v. Gilbert*, 3 Wash. Cir. Court Rep. 478; *Clark v. Courtney*, 5 Peters, 353; *Jackson v. Schoonmaker*, 2 John. 234.)

By the Court, RHODES, J.

Replevin to recover the possession of a lot of hay, or the value thereof, described as six hundred tons, more or less, of great value, to wit, of the value of six thousand dollars. The hay replevied and delivered to the plaintiff amounted to one hundred and twenty-four tons, of the value of twelve hundred and fifty dollars, and the plaintiff had verdict and judgment for that amount.

The hay was produced during the year 1863, upon a tract of land forming a part of a larger tract, known as the Suscol Rancho, in Solano County. The plaintiff was in possession of the tract, containing about two thousand acres, inclosed with a substantial fence, from some time in 1860 to August or September, 1862, when the defendants entered upon the land, the fence being down in places, so as to leave gaps from two to three hundred feet in length, and they have since resided on and had possession of the land, each of them claiming the right to enter upon and hold a quarter section of land, under the pre-emption laws of the United States. The defendants claim the right of entry and of pre-emption under the general pre-emption laws of the United States and under the Act of Congress of May 30th, 1862. (12 U. S. Statutes at Large, 410, Sec. 7.)

The plaintiff claims, by virtue of his prior possession, and

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under the Act of Congress of March 3d, 1863, granting the right of pre-emption to certain purchasers in the Suscol Rancho. It was admitted that the lands were part of the Suscol Rancho, the title to which had been rejected by the Supreme Court of the United States; that the rancho was public lands of the United States; that the plaintiff had a conveyance of about two thousand acres of land, including the lands upon which the hay was produced, made to him in 1851 by M. G. Vallejo, under which the plaintiff entered; that the plaintiff had taken the necessary steps under the Act of Congress of March 3d, 1863, to present his claim to the Register and Receiver of the proper Land Office, to pre-empt the said two thousand acres, which claim was still pending, it being resisted by the defendants, who claimed the right of pre-emption, under the general laws of the United States.

The defendants offered to prove that each of them possessed the qualifications requisite to entitle him to pre-empt public lands in California, and had filed his declaratory statement of intention, to pre-empt the quarter section upon which he entered and had resided since October, 1862, and that they had procured their several tracts to be surveyed by the United States Surveyor-General; and the evidence was rejected by the Court. It was admitted that the claims of the defendants were then pending before the United States Register and Receiver. This decision of the Court is assigned as error, and it is claimed by the defendants that the evidence was admissible for two purposes: First—to show that their entry was lawful, and that they had the right to the possession of the land until they failed to comply with the provisions of the pre-emption laws; and, therefore, the crops raised on the land during the time they so held the possession were their property. And, second—To prove that they held adversely to the plaintiff, in good faith, under claim and color of title—and for that reason the plaintiff would not be entitled to recover the specific crops raised on the land during such adverse possession.

The evidence introduced or offered in the case fails to show any legal right or title to the land in controversy derived from

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the United States, in either the plaintiff or the defendants. The Act of 1863 grants to the bona fide purchasers from Vallejo the right to purchase from the United States the lands they have reduced to possession, but the plaintiff has not yet effected the purchase from the United States. The defendants' claim of pre-emption, either under the general pre-emption law, or the Act of May 30th, 1862, has not ripened into a title. It was held by this Court, in *Hastings v. McGoogin*, 27 Cal. 84, and *Page v. Hobbs*, 27 Cal. 483, that those portions of the Suscol Rancho which had been reduced to possession by the "bona fide purchasers from said Vallejo or his assigns" were withdrawn from the operation of the general pre-emption laws by the Act of March 3d, 1863, which gave to such purchasers the right of pre-emption, upon certain terms and conditions in the Act specified. And there can be no doubt that Congress had the power to thus withdraw the lands from pre-emption and sale under the general laws, at any time prior to the acquisition, by a settler, of a right in the lands that he could maintain against the United States, so as to secure ultimately the legal title.

At the time of the entry of the defendants, however, neither they nor the plaintiff held the legal title, but both parties claimed such right and interest in and to the lands as under the laws of the United States accrues to the person who has taken the first steps to secure a pre-emption claim to the land, but which has not been approved by the proper officer; that is to say, such would have appeared to be the state of the title and claim on the part of the defendants also, had the evidence offered by them been admitted. It is unnecessary therefore for the purposes of this case to determine whether the defendants had acquired such a right to the land under the Act of 1862 and the general pre-emption laws of Congress as would preclude Congress from withdrawing the land from the operation of the pre-emption laws, or whether the Act of 1863, granting the right of pre-emption to purchasers in the Suscol Rancho, did in effect divest whatever incipient right or interest the defendants may have acquired. The title being, by

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the admission of the parties, in the United States, neither party, as has been repeatedly held by this Court, can rely upon it for a recovery, nor can they set it up as a defense, in a contest for the possession, or in respect to rights of property growing out of the fact of possession. Conceding to the plaintiff the benefit of his prior possession, and regarding him as engaged in perfecting his claim to the pre-emption, the evidence offered by the defendants to prove that they were taking the necessary steps to establish their claims to the pre-emptions was clearly admissible and competent, in connection with proof of their entry in October, 1862, and actual possession of the premises up to the time when the hay was cut in 1863, to show that during that period they were in adverse possession of the premises.

Both parties refer to *Halleck v. Mixer*, 16 Cal. 579, as authority upon the second branch of the question, defining the character of the adverse possession that the defendants must have in order to prevent a recovery of the specific crops raised on the land. Mr. Chief Justice Field, in delivering the opinion of the Court said: "The true rule is this: "The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title. In other words: The personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants." The Court referred to *Harlan v. Harlan*, 15 Penn. 513, as containing a correct exposition of the doctrine. In that case the Court commented on and affirmed the principle of *Mather v. Trinity Church*, 3 Serg. and Rawle, 509, in which the Court held that "trover for stone and gravel from land does not lie by one who has the right of possession against the person who has the actual adverse possession of the land and sets up title to it. It will be remarked that it is not the actual possession, but it is the actual adverse possession of a person who claims title to it, that is the criterion. * * * What is alone material is that

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he (the plaintiff) had the title and the right to the possession, and there was no claim of title to the realty made by the defendants. * * * The mere assertion of a title would be nothing.

The defendants' possession in this case was adverse to the plaintiff, in every sense in which that term is applicable between parties, neither of whom set up color or claim of title, but where each is diligently seeking to acquire the title of the United States to the same parcel of public lands, in the honest belief that under the laws of the United States he is entitled to the pre-emption, and will ultimately acquire the legal title. The earlier doctrine of the common law, that the possession, to be deemed adverse, must be under color and claim of title, never had any just application to cases where the parties were contesting the right to the possession of parcels of the public lands of the United States, for no color or claim of title could be shown or asserted that was not palpably inconsistent with their admission of title in the United States. To constitute adverse possession in such cases, it is sufficient if the defendant in possession claims the right to the possession against all the world except the United States. Still we think that cases of that sort may be brought within and solved by the rule in *Halleck v. Mixer*, and the case from Pennsylvania. The rule when stated as applicable to cases where the title is outstanding in the United States, is that the personal action cannot be made the means of litigating and determining the right to the possession of real property, as between conflicting claimants. The mere trespasser who casually or temporarily enters, for the purpose of severing or removing property attached to and forming a part of the realty, cannot invoke the rule, for he does not hold the adverse possession. The case of a defendant who has entered upon the public land then in the plaintiff's possession, claiming in good faith the right to pre-empt the same, and who is proceeding according to the forms of law to perfect and enforce his right of pre-emption, is clearly within the reason of the rule laid down in *Halleck v. Mixer*; for, although he does not claim title,

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he claims all the right that can be held in the land, consistent with the fact of title in the United States, and, as we have remarked, the title cannot be made use of by either party, for attack or defense. The rule is designed to prevent parties claiming conflicting rights in land, from litigating them indirectly in a personal action, and such rights as persons may have, consistently with the acknowledgment that the ultimate title has not passed from the paramount source of title, has been uniformly regarded in this State as amounting to an interest in lands — to title — and as such it evidently falls within the rule. The evidence offered by the defendants was therefore admissible, to show that their possession was adverse to the plaintiff, and thus to bring them within the rule just mentioned.

Judgment reversed and the cause remanded.

Mr. Justice CURREY expressed no opinion.

THE PEOPLE v. SNEATH & ARNOLD.

ASSESSMENT OF PERSONAL PROPERTY.—Personal property may be assessed for taxes in bulk, without any statement of the character of the property.

ASSESSMENT OF INDIVIDUAL PROPERTY TO A FIRM.—An assessment for taxes of the personal property of a former member of a firm made to the firm after its dissolution, is void. Such assessment cannot be legalised by legislative enactment.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the Court.

Henry H. Hartley, for Appellant.

The case is susceptible of illustration, thus: A. is assessed for a certain amount of personal property, supposed to be owned by him during a particular year, the assessment having been made on information to the Assessor that A. was the owner; it subsequently appears that before the assessment was made, A. had sold the property to B.; could it be held

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that B. was liable for the payment of the taxes? Again, to state another case: Suppose that A. and B. were assessed as a firm for partnership property which they did not possess at the time the assessment was made, and were not even a firm at that time, and A. had individual property, could that be levied on for the tax claimed against the firm which had no legal existence at the time the taxes were levied, and had no firm property?

But it may be urged, the suppositions cases are too broad. In the case at bar, Arnold was a member of the old firm, and possessed property of equal value to the assessment, and therefore was liable. We reply that that makes no difference. The question is, did Sneath & Arnold, as a firm, own property in 1863, and not whether Arnold did. Arnold is liable for his taxes individually, and the record nowhere shows that he has not paid them, the Court only finding that Sneath & Arnold had not paid theirs. And even if he had not, he is still liable under the general law to be re-assessed for them if they were accidentally omitted from the tax roll of that year. (*People v. Reynolds, ante*, 107.)

M. M. Estee, for Respondent, referred to Laws of 1861, p. 425, Sec. 20; and to *People v. Paine*, No. 2, 23 Cal. 125; and also to Laws of 1863, p. 436, Secs. 63-65.

By the Court, SHAFER, J.

This is an action to recover a tax on personal property levied by the City of Sacramento on the 23d day of June, 1863. The complaint alleges, amongst other things, that the property assessed was within the city limits at the date of the assessment; that it belonged to the firm of "Sneath & Arnold," and that it was valued at thirteen thousand two hundred and fifty dollars. The answer avers that the firm of Sneath & Arnold was dissolved on the 1st day of January, 1863, and that since that time it has neither owned nor possessed any personal property in Sacramento. The trial was

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by the Court, and judgment was entered on the findings against Arnold alone. The appeal is from the judgment and from an order overruling the motion of Arnold for a new trial.

The Court has found that the firm was dissolved as alleged in the answer, and that at the date of the assessment there was no personal property in the city possessed by or belonging to the defendants jointly. But it is also found that Arnold at the date of the assessment had in his possession and was the owner of personal property of the value named in the assessment.

First. It is insisted that the assessment was illegal and void for the reason that it was on "personal property" in bulk, without any more minute description of the character of the property.

By the eleventh section of the Act incorporating the City of Sacramento, passed April 25th, 1863, (Acts 1863, p. 415,) it is provided that "the manner of making the assessments and roll shall be the same as is described by an Act entitled an Act to provide revenue for the government of this State, approved May 17th, 1861." By the sixth subdivision of the twentieth section of the Act referred to, it is provided that no further description of personal property need be given in the assessment roll than that furnished by a statement of its value, and the name of its owner or owners.

The case of *People v. Holladay*, 25 Cal. 300, cited for the respondents, was an action to collect a delinquent tax under the Act of 1861, entitled "An act to legalize and provide for the collection of delinquent taxes in the counties of this State," and the Act is limited by the first section to taxes assessed for the fiscal years ending March 1st, 1859, 1860 and 1861. (Statutes 1861, p. 471.) The decision in the case of *People v. Holladay* is therefore inapplicable to this.

Second. It is further insisted that neither Sneath nor Arnold, nor the firm of Sneath & Arnold, is responsible for the tax, on the ground that everything entering into the description in the assessment is fictitious and unreal.

This objection is well taken. Though the assessment was

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copied from the assessment roll of 1862, as required by sections sixty-three and sixty-four of the Act of incorporation, (Acts 1863, p. 436,) still, for all the purposes of the question, the assessment is to be regarded as original. Under the revenue laws of 1861, an assessment of personal property is essential to the validity of a tax upon it, and a description of the property, such as the Act calls for, is essential to the validity of the assessment. By the thirteenth section of the Act, the Assessor is to make diligent search for all property, both real and personal, within his jurisdiction, and is put also upon ascertaining the name or names of its owner or owners; and is furthermore required to determine the cash value of the property; and "to list or assess the same to the person, firm, copartnership, association or company owning or having the possession, charge, or control thereof." Under certain circumstances the property may be listed to "unknown owners." An assessment not made substantially in conformity to these requirements is utterly void, no matter whether the property be real or personal. (Black. on Tax Titles, 173, 174, and cases there cited; *Kelsey v. Abbot*, 13 Cal. 617; *Moss v. Shear*, 25 Cal. 44.) It must be admitted that the assessment in this case is made in exact conformity to the statute, and therefore it is not a nullity upon its face. The difficulty with the assessment lies in the fact that it is made up entirely of false assumptions. There was no personal property in the City of Sacramento in 1863, falling within the description, as the case finds. There was not only no personal property that year in Sacramento belonging to Sneath & Arnold, but what is more decisive, there was no Sneath & Arnold there to own property of any kind; or if there was, neither of the defendants were members of the concern. It is no answer to say that Arnold owned personal property in 1863 in Sacramento of the value of thirteen thousand two hundred and fifty dollars, unless, indeed, the general doctrine that no person is to be held liable for a tax except upon the production of an assessment against him made in the manner required by law, is to be abandoned as fallacious. The object of the rule as now settled is, to

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enable the citizen to ascertain from the list itself, what property, if any, belonging to him has been listed, and to ascertain further, what tax, if any, has been imposed upon any firm or association of which he may chance to be a member, and how much upon himself individually.

But it is urged that the assessment is legalized by the Act of 1864, (Acts 1864, p. 350,) if defective in the first instance. The answer is that the assessment is not defective, but something worse. The matters which it puts forward as realities, had no existence in fact. Further, by the Act of 1864 the defective assessments referred to therein are made valid only "against the person and property assessed." All that follows from that is, that if there was any such firm as "Sneath & Arnold" in Sacramento in 1863 the tax is good as against the firm and as against its members, whoever they may have been, if the firm has been dissolved. But if there was no firm in 1863 answering the description, it would be beyond the power of the Legislature to alter the fact, even if it had attempted to do so.

The judgment is reversed, and it is ordered that a judgment be entered upon the findings in favor of the defendants.

RHODES, J., concurring specially.

I concur in the judgment.

RICHARD THOMAS v. B. B. VANLIEU AND ANDREW
SNODGRASS.

PURCHASER OF LAND WITHOUT NOTICE OF PRIOR UNRECORDED MORTGAGE.—A judgment creditor who buys at Sheriff's sale the land of the judgment debtor, and receives a Sheriff's deed without knowledge of a prior unrecorded mortgage given by the judgment debtor on the land, must show that his Sheriff's deed was first recorded, before he can claim to be a purchaser in good faith and for a valuable consideration.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

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This was an action to foreclose a mortgage executed by defendant Snodgrass to plaintiff. After the mortgage had been given, defendant Vanlieu obtained judgment against Snodgrass, and sold the mortgaged property, and received a Sheriff's deed. Plaintiff's mortgage had not been properly recorded, and Vanlieu had no actual notice of it prior to his purchase. Plaintiff claimed that Vanlieu's purchase was subject to the lien of his mortgage. Plaintiff recovered judgment, and defendant Vanlieu appealed.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

Jo. Hamilton, for Respondent.

By the Court, SANDERSON, C. J.

Upon the facts as found by the Court below we are unable to determine whether the defendant Vanlieu was or was not a purchaser in good faith and for a valuable consideration, within the meaning of the twenty-sixth section of the Act concerning conveyances, for it does not appear that his deed had ever been recorded. In order to bring himself within the provisions of that section, a party must show not only that he is a purchaser in good faith and for a valuable consideration, but he must show that his conveyance was first duly recorded. This latter fact the Court below failed to find either way. No exception was taken to the finding on the score of insufficiency, and we cannot therefore reverse the judgment on that ground. (Statutes of 1861, p. 589.) On the contrary, we must assume the facts not found would, if found, support the judgment; or, in other words, we must assume that Vanlieu had never put his conveyance upon record, because the judgment of the Court points that way.

It follows that the question as to whether the plaintiff's mortgage had been recorded in such a manner as to impart to subsequent purchasers constructive notice, and the further question

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as to whether a judgment creditor purchasing at his own sale without parting with any further or new consideration, is a purchaser in good faith and for a valuable consideration within the meaning of the Act concerning conveyances, become abstract questions, upon which it is not necessary to express an opinion in order to finally determine this case.

Judgment affirmed.

JOHN FICKEN v. FREDERICK S. JONES AND G. P. SWIFT.

LIABILITY FOR INJURIES TO A PERSON DONE BY CATTLE.—The law governing the liability of persons driving cattle through the streets of a city, for damages caused by the cattle injuring a person lawfully in the street, without any fault on his part, is the same as that by which carriers of passengers are governed.

ACTION FOR DAMAGE DONE TO THE PERSON BY CATTLE.—In an action to recover damages for injuries to the person, done by cattle of defendant while being driven through a city, when the plaintiff has proved that he sustained the injury without fault on his part, he has made a case of *prima facie* negligence, and the burden is cast on the defendant of showing that he was not at fault.

SAME.—In such case, when the cattle were driven by persons employed by the owner, the owner is entitled to show in defense that the persons employed by him were persons of competent skill in the business.

PLAINTIFF recovered judgment in the Twelfth District Court, and defendants appealed.

The other facts are stated in the opinion of the Court.

Patterson, Wallace, & Stow, for Appellants.

Baxendin v. Sharp, 2 Salkeld's Reports, is as follows: "The plaintiff declared that the defendant kept a bull that used to run at men, but did not say *sciens* or *scienter*. This was held naught after verdict, for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration." (1 Lord Raym. 109; 2 Ib. 1,583; *Hinckley v. Emerson*, 4 Cowen, 351.)

Brock v. Copeland, 1 Espinasse's Reps. 208, was an action on the case to recover damages for an injury received from

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defendant's dog. The declaration alleged that the defendant knowingly kept a dog used to bite. The plaintiff failed under the circumstances of that case; but in that case Lord Kenyon said, "that the injury which this action was calculated to redress was where an animal *known to be mischievous* was permitted to go at large," etc.

In *Vrooman v. Sawyer*, 13 John. 339, the Supreme Court of New York said: * * * "the owner is not liable to action on the ground of negligence, without proof that *he knew that the animal was accustomed to do mischief*." In *Lyke v. Van Leuven*, 4 Denio R. 128, the Court say: "The *scienter* is the gist of the action in these cases, and the principle applies to swine as it does to other animals which are *mansuetæ naturæ*."

This case went to the Court of Appeals, (1 Comstock's Rep. 515,) and the Court there say: "It is a well settled principle that in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, *without notice*, on the ground that by nature such animals are *fierce and dangerous*." The Court then cites a number of authorities sustaining this view, and adds: "But this rule does not apply where the mischief is done by such animals while committing a trespass upon the *close* of another."

In *Steele v. Smith*, 3 E. D. Smith's Rep. 322, there was some evidence to show that the defendant's servant had set his dog on the plaintiff's cattle. The Court, after observing that if it was the wilful act of the servant the master would not be liable, says: "It was not the act of the dog alone, and *if it had been, the defendant was not liable without evidence that the dog had done the like mischief before, and that the defendant knew it.*"

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In *Coggswell v. Baldwin*, 15 Vermont Rep. 412, the law is admitted by Court and counsel to be in accordance with the foregoing authorities. In *Deane v. Clayton*, 7 Taunton's Rep. 491: "Case against the owner of an ox, which was driven from Essex to London for sale; it was tranquil when it left home, but being fevered by the journey, it gored the plaintiff in Whitechapel, and held, the action *lay not*." That is precisely the case shown in the record here.

Defendant Smith was sought to be charged as employer of defendant Jones, and was sought to be held liable for the negligence of his supposed employé, Jones. It is reasonable that a party who is sued in effect for employing a negligent agent or servant may be allowed to prove if he can that the person selected by him to act for him was in fact a safe and prudent man. What employer can do more than select such a man?

Shafters & Gould, for Respondent.

Upon the first proposition contained in the argument for appellant, we may well admit the position in the abstract to be true, and the authorities cited to sustain it as sound law, but we insist that neither one nor the other is necessary to be considered for the purposes of this case.

It is true that in the complaint we allege the ferocity of the animal and the *scienter* of the defendants; and if we had rested on this ground alone, the position of the defense would be unanswerable, and we should acknowledge our failure. But it is not the fact that we relied singly upon that cause of grievance. The complaint in addition to that avers the negligence of the defendants in driving and handling the animal, and that averment is denied by the answer, and an issue distinctly formed upon it and submitted to the jury under proper instructions from the Court.

This issue, involving the charge of want of proper care and diligence, was in no sense abstract, remote, or foreign to the facts eliminated in the course of the trial; it was in every sense proper and legitimate. It seems undeniable that prior to the

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accident the ox had become unruly and unmanageable, to such an extent as to require the defendants to tie him up. Now, even if we admit the previous good character of the animal, and attribute his then ferocity to some temporary cause, such as being fevered and overheated, yet it is clear that the defendants had notice of his change of temper, and saw that he was in a condition to be dangerous.

It is proper, also, to refer to the fact that the animal was fevered and overheated, and it might well be presumed that this arose from negligent and unskilful driving. When it is taken into consideration that the ox had just arrived from a cool voyage over the waters, and the shortness of the distance he had been driven, and that the theory of the defense is that he was not of a ferocious temper, but was only overheated, it is difficult to reach any other conclusion than that his ill favored condition was produced by reckless and negligent handling.

These were facts which had to be left to the jury, and if they found the defendants guilty of negligence, then that becomes our distinct ground of recovery, and the question as to whether the beast was ferocious, and the *scienter* of the defendants, has no connection with the issue. That was at first, upon the pleadings, an issue, but it became an abandoned issue by the force of circumstances, and we recovered upon the other issue — the one involving the question of negligence.

The cases in which similar issues have arisen are frequent and familiar, and date from the earliest history of the law.

Where a carman ran over a boy in the streets and maimed him by negligence of driving his horse. (1 Raym. 379.)

Where a servant is guilty of misconduct in driving his master's horses. (*Joel v. Morrison*, 6 C. & P. 501.)

Where the defendants brought a coach with two ungovernable horses to Lincoln's Inn Fields, there drove them to make them tractable, and the horses, because of their ferocity, ran upon the plaintiff and wounded him. The defendants, master and servant, were found guilty. It was moved in arrest of judgment that no *sciens* was laid of the horses being unruly, nor any negligence alleged. Yet judgment was given for the

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plaintiff on the ground of the inappropriateness of the place. (*Michael v. Alestree*, 2 Leving, 172.)

This last case demonstrates that in cases of injury from animals, the right of recovery does not rest solely upon the owner's knowledge of the beast's ferocity, but that the right to recover exists where there is no *scienter*, and, indeed, where there is no ferocity of temper; and that this right may be enforced, not only where the injury arises from negligence, but even where there is no negligence, if the animal is taken by his owner to an improper place.

The second error complained of by the appellant is the refusal of the Court to permit a witness to be asked "Do you know whether he (meaning defendant Jones) is a safe and prudent man in that business?" (meaning the business of driving cattle.) The question was properly excluded. The character or capacity of Jones was not in issue, and could not affect the issue. The question was as to his negligence at the particular point of time when the injury was done. If his character was ever so good for safety and prudence, it could not excuse or palliate the one act of neglect; it could not even be used in mitigation of damages. It might as well be said that a man's good character for prompt payment ought to release him from a debt or reduce the recovery. Swift was not sued for employing a negligent agent or servant; no such allegation is made or attempted to be proved. He is sued simply for the negligence on one occasion of his servant; and whether that servant was on all other occasions skilful and prudent, or the reverse, is foreign to the issue.

By the Court, CURREY, J.

Action to recover damages for injuries which the plaintiff received from a steer belonging to the defendant Swift, while in the charge of the defendant Jones. While driving the steer through Brannan street, near Sixth street, in San Francisco, he became affrighted, and afterwards separated from the herd of cattle to which he belonged. In the effort to capture him

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he became wild and apparently alarmed, and escaped for a time from his keepers, and while at large he ran against the plaintiff, knocking him down and goring him in a terrible manner. The plaintiff charged in his complaint that the cattle constituting the herd, which consisted of nineteen head, and particularly the steer in question, were wild, untamed and dangerous, of which the defendants had notice. The plaintiff also averred that the cattle composing the herd were negligently driven by the defendants along certain streets named, without any precautions to restrain or prevent them from attacking and goring people passing along the streets, and that while the plaintiff was lawfully passing along the street between Harrison and Folsom streets, the steer escaped from the herd, and of his "own vicious instincts then and there attacked, threw down and gored the plaintiff," describing the injuries done, and alleging that the same were not the result of a want of ordinary care and prudence on the part of the plaintiff, but the result of the defendants' wrongs and negligence. These allegations of the plaintiff the defendants controverted.

There was no evidence on the trial showing that the cattle were wild, untamed or vicious, nor that the defendants had cause to believe they were so. The question at issue became narrowed down to the point whether Jones, who had charge of the cattle, and the persons assisting him, were guilty of negligence and want of due care in driving the cattle from the place where they were landed to the slaughter house at the outskirts of the city, and also in their endeavor to capture the steer after he became separated from the herd. Whether the defendants were negligent and careless in the conduct and management of the business in which they were so engaged, was a question in issue, concerning which the parties respectively produced witnesses, who detailed circumstances connected with the matter as they saw and understood them.

To overcome and avoid, in some degree, at least, the force of the evidence on the plaintiff's behalf, the defendants proposed to prove by a witness on the stand that Jones was a safe

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and prudent man in the business of driving and conducting cattle through the city; and this evidence was urged especially on behalf of Swift, as competent and material in his defense, as he was sought to be charged for the alleged negligence and carelessness of his subordinate, Jones; but the Court excluded it on the plaintiffs' objection that it was incompetent and irrelevant. The point is made on appeal from the judgment, which passed against the defendants jointly, that this ruling of the Court was erroneous.

In argument, the plaintiff's counsel admit that the allegation of the complaint of the ferocious and vicious disposition of the animal, and of consequence any *scienter* of the defendants of such fact was not sustained; but they say the plaintiff's grievance is attributable to the negligence of the defendants in driving and handling the animal, upon which fact an issue was distinctly formed and submitted to the jury; and it is argued that if the steer was docile and tractable previous to his separation from the herd, but then, from some temporary cause, became wild and ferocious, the defendants thereupon had notice of the change in his temper, and should have confined him by means which would have effectually prevented his escaping; that the facts show that though the method for securing the beast by tying him to the fence by the side of Brannan street was the proper one, if it had been well done, yet it was so carelessly and ineffectually done as to allow the steer to effect his escape. That, assuming the animal to have been overheated and feverish, it might be presumed this arose from negligent and unskillful driving before he became separated from the herd. These were facts, counsel say, which had to be left to the jury, and if they found the defendants guilty of negligence then that became a distinct ground of recovery, and the question as to whether the beast was ferocious and the defendants aware of it, had no connection with the issue. That was, at first, upon the pleadings, an issue, but it became an abandoned issue by the force of circumstances, and the plaintiff recovered upon the other issue — the one involving the question of negligence.

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We have thus referred to the argument for the respondent in order that the question before the jury and which they were required to pass upon, may be exhibited in the nude aspect in which it was finally submitted.

It is a matter of importance to understand what is the rule in respect to the degree of care and diligence which parties engaged in driving cattle, reared in the rural portions of the country, through the streets of a populous town or city must observe and exercise, in order to prevent the happening of injuries to those lawfully in such streets, and necessarily exposed to dangers which they may not have the power to avert, and from which there may be no way of escape. It is impossible for a person acquainted with the disposition of cattle raised upon farms or in the open country, notwithstanding they may be what are commonly known as tame cattle, to be oblivious to the fact, that when brought into and conducted through the highways of a city, they are apt to become alarmed and excited by the presence of many people and at the sight of new and strange objects, and by the noise and confusion around them on every side. From such exposure cattle often become wild and difficult of management, and not unfrequently some of them become fierce from fright, if not so before then, and dangerous to people who may not be aware of their presence.

In all cases where, by the conducting of any lawful business, the lives and limbs of human beings are placed in peril, the law requires of the proprietors and managers of that business the utmost care and diligence. The driving of cattle through the streets of a city is attended with danger to persons who are of right there, and who can justly demand that the care, diligence and skill essential to their safety shall be commensurate with the necessities of the case. It is not impossible that injuries may happen in such cases, even though the utmost care and skill which the law exacts of the managers of such business may have been exercised; and before a person can be condemned in damages by the verdict of a jury

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the party complaining of an injury resulting from negligence or want of skill in the conduct of that business must establish facts constituting a basis from which the fact in issue may be found. In the case under consideration the ultimate fact to be found was whether the defendants were guilty of negligence and want of due care, as in substance charged in the complaint. The burden was on the plaintiff to prove, in the first place, that he received the injury for which he sought redress, and that such injury was done by the animal of the defendants described in the complaint, within the City of San Francisco, and that it happened without fault on his part. These facts proved, afforded *prima facie* evidence of negligence on the part of the defendants, and then the burden of proof became cast on them to show that the injury did not occur by reason of any default on their part. How was it competent for the defendants to show this in exoneration of themselves of all liability whatever, or by way of reducing the damages? This might have been done by showing that the defendant who had the business in charge at the time performed his duty with proper care and skill; and tending to this end it was admissible to show that he was a person of experience in the business, and had therein proved himself to be prudent, careful and of competent skill, and in every respect qualified for the duties which he undertook to perform. The proof of this, standing alone, might not have been of much force, but as connected with the facts and circumstances that transpired in driving the cattle through the city, and in the endeavor to capture the steer after his separation from the herd, it might properly have had some weight. As it was incumbent on the defendants, in order to overcome the *prima facie* case made out against them, to establish that the injury to the plaintiff did not result from want of due care and skill on their part, they should have been permitted to have shown, in the first place, the important fact that Jones was competent, careful and skillful in the conduct and management of that kind of business. It was competent to make such proof because the law exacts of those engaged in the business of driving such

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cattle through a city, by which lives and limbs of people are imperiled, the utmost care and circumspection. If it had been proved that Jones possessed the qualities requisite for the business in which he was employed, then it would to that extent have appeared that the defendants exercised due care, though that alone might not have amounted to enough to have exonerated the defendants from all liability. Whether Jones' assistants were also competent and skillful and of a number reasonably sufficient, under all the circumstances, it may be, might have been a proper subject of inquiry. In addition to these matters the defendants would undoubtedly have been required to show what was done in the effort to recapture the animal, and if it had appeared that those engaged in the business were persons of competent skill, care and diligence, the jury, in the first place, would have been apt to have regarded their efforts as comporting with their established character and capacity in the management of such business; and as accidents sometimes happen, notwithstanding the utmost care and diligence may be exercised to prevent them, and damage results from causes which human care and foresight cannot avert, it is not impossible that the jury might have come to the conclusion that the defendants were not at fault in this instance, and therefore not liable in damages to the plaintiff.

The rule of law governing in the case under consideration rests for its foundation in the same principle as that by which the duties and liabilities of the carriers of passengers are governed. In the one case the proprietor of the business must exercise the care, circumspection and skill which is characteristic of cautious persons where the lives and limbs of human beings are liable to injury from exposure to the fury of excited cattle; and in the other the carrier is to convey his passenger safely and securely; and because of the value of human life and limbs, the law requires the utmost degree of care and skill in the preparation and management of the means of conveyance, and will hold the proprietor liable for the slightest negligence. If the passenger sustains injury without fault on his part, by the oversetting of a stage coach, or from a railroad

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disaster, or the like, such accidents are, in the first place, attributed to the default of the proprietor, and are *prima facie* evidence of negligence on his part. (*Boyce v. California Stage Company*, 25 Cal. 467; *McKinney v. Niel*, 1 McLean, 540; *Stokes v. Saltonstall*, 13 Peters, 181; *Ware v. Gay*, 11 Pick. 106; *Ingalls v. Bills*, 9 Met. 6; *Carpue v. London and Brighton Railway Company*, 5 Adol. and Ellis, 747; Ang. on Com. Carriers, Chap. 11.) In such case it is well settled to be competent for and incumbent on the defendant to show that those in charge of and conducting the business, were persons of good and careful habits and competent skill, and also whatever else is necessary to establish the fact of the utmost care and prudence on the defendants' part. The defendants in this case being required by the law to observe and exercise the greatest care and prudence, and reasonable skill, from the beginning throughout in a business which was attended with danger to the people lawfully in the streets of the city, ought to have been permitted to make the proof proposed.

Judgment reversed and a new trial ordered.

SANDERSON, C. J., concurring specially.

I concur in the judgment.

Mr. Justice SHAFER, having been of counsel, did not participate in the decision of this case.

Mr. Justice SAWYER expressed no opinion.

JULIA CASSACIA v. PHOENIX INSURANCE COMPANY.

PLEADINGS IN ACTION ON INSURANCE POLICY.—If a policy of insurance contains a clause that if the assured keep gunpowder, the same shall be void and the complaint avers that the plaintiff faithfully complied with the terms of the policy, and the answer does not deny the same, nor set up as new matter the keeping of gunpowder as a defense, the fact that gunpowder was kept cannot be insisted on as a defense.

JUDGMENT FOR INTEREST WHEN COMPLAINT DOES NOT ASK FOR IT.—If an answer is filed, judgment may be rendered for the principal and interest added thereto, although the complaint only pray for judgment for the principal.

Opinion of the Court.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The complaint averred that the property insured was destroyed by fire July 30th, 1863, and that immediately thereafter the plaintiff furnished the defendant with the proof of the loss as required by the policy. Judgment was rendered for plaintiff December 15th, 1864, for two thousand and thirty-three dollars and twenty-eight cents and costs, the judgment to bear interest at ten per cent per annum.

The other facts are stated in the opinion of the Court.

Shafter, Goold, and Dwinelle, for Appellant.

The Court below clearly erred in denying defendant's motion for a nonsuit. The plaintiff kept gunpowder without written permission in the policy. By the express terms of the instrument, the policy thereupon became inoperative and void.

T. J. Bergen, for Respondent.

There are two clear and well settled propositions of law upon which the action of the Court below in refusing to nonsuit may be safely rested, namely: First, that the written controls the printed portion of the policy, the former of which clearly covers the stock of which it is conceded the gunpowder formed a component part; and secondly, that the alleged violation, not having been set up in the answer, no advantage can now be taken thereof. (*Harper v. The Albany Mutual Insurance Co.* 17 N. Y. 194; *Wall v. Howard Insurance Co.* 14 Barb. 383; *The Phoenix Insurance Co. v. Taylor*, 5 Minn. 492.)

By the Court, SAWYER, J.

This is an action on a policy of insurance for the value of the goods insured destroyed by fire. The policy contained a clause that, "if the assured shall keep gunpowder * * * this policy shall be void." At the trial it appeared, that at the

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time of the fire plaintiff had in her store "eleven cans of gunpowder for sale in her business." Thereupon the defendant, at the close of plaintiff's case, moved for a nonsuit, upon the ground that the policy had become void under the provision cited. The motion was denied, and this ruling constitutes the principal ground of the appeal.

The complaint, which is verified, alleges that the "plaintiff on her part 'in all respects' faithfully complied with all the terms and conditions of the said policy on her part to be kept, observed and performed." This allegation is not denied, and if material, is admitted for the purposes of the action. And the answer does not set up the keeping of gunpowder as a defense. The contract was valid at the time it was made. If it is void, it has become so by acts of the plaintiff contrary to the conditions of the contract that have happened since it was made; and these matters should have been put in issue in some mode, and we think, set up by the defendant. The fact relied on to sustain a nonsuit was not relevant to any issue taken on the allegations of the complaint, and no issue was tendered by new matter set up in the answer. It was, consequently, irrelevant to any issue in the case. We think there was no error in denying the nonsuit.

The only other point is, as to whether the Court erred in allowing interest under the prayer of the complaint,—for the excess over the specific amount demanded is evidently interest at the legal rate from the date of filing the complaint till the verdict. The judgment was not by default, and under section one hundred and forty-seven of the Practice Act, the Court was authorized to "grant any relief consistent with the case made by the complaint and embraced within the issues." The contract was to "make good unto the assured * * all such immediate loss or damage not exceeding two thousand dollars, as shall happen by fire to the property" insured, "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured and received at the office in accordance with the terms

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of said policy." The fire was alleged to have occurred, the proofs made and notice given, more than sixty days before the commencement of suit. It was also alleged that the amount of the loss thus sustained was two thousand dollars; that the company had sold remnants of the goods for one hundred and twenty-three dollars and paid the proceeds over to the plaintiff, and that there remained due one thousand eight hundred and seventy-seven dollars, for which sum plaintiff prayed judgment, and for such other and further relief as may seem meet. Here was a contract, substantially, to pay a certain sum to be ascertained, in case of fire, in a certain mode, and payable at a time specified, also to be ascertained in a prescribed manner. The facts showing that the amount had been ascertained and become payable, and that it remained unpaid, were averred, and from the time the money falls due the statute says it shall bear interest, and the interest shall be included in the judgment. No further allegation was required to entitle the party to interest. She only recovered the amount due at the time under the contract, and subsequently accrued interest. We think the allowance of interest from the commencement of suit was consistent with the case made, and embraced within the issues. (*Lane v. Gluckauf, ante*, 292.) The cause of action in *Hooper v. Wells, Fargo & Co.*, referred to by appellant, sounded in tort, and the suit was brought to recover damages *eo nomine*, and the plaintiff alleged that the "damages" sustained by reason of the acts complained of amounted to a specified sum, and he claimed judgment for that sum. Whatever the measure of damages might have been, the amount alleged, and therefore embraced within the issue, was limited, and could not be exceeded by the judgment.

Judgment affirmed.

Mr. Justice CURREY expressed no opinion.

JAMES M. BURT, EXECUTOR OF THE ESTATE OF THOMAS B. WALKER, DECEASED v. E. P. WILSON, ADMINISTRATOR OF THE ESTATE OF JAMES C. WILSON, DECEASED, et als.

TRUSTS, EITHER EXPRESS OR BY IMPLICATION OF LAW.—If two partners are embarrassed with debts, and one executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts, there is no express trust, nor does a trust arise by implication of law.

MISTAKE AS TO LEGAL EFFECT OF DEED.—If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground for relief in equity.

WAIVER OF PROTECTION OF STATUTE OF FRAUDS.—If a defendant, sought to be charged as trustee on a contract within the Statute of Frauds, admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its protection; but if he claims the benefit of the statute in his answer, he is entitled to it.

VENDOR'S LIEN AS AGAINST ADMINISTRATOR OF GRANTEE.—If one sells land to another, and executes an absolute conveyance, and does not receive payment, the grantee holds the land in trust for the grantor to the extent of the purchase money, which trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase money will be enforced.

COMPLAINT TO ENFORCE TRUSTS.—A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien existing without any written contract.

APPEAL from the District Court, Second Judicial District, Butte County.

The plaintiff appealed from the judgment.

The other facts are stated in the opinion of the Court.

J. E. N. Lewis, for Appellant.

Conveyances without a consideration expressed in the instrument, create a resulting trust to the grantor.

The demurrer admits that the deed of January 6th, 1862, was without a consideration, and that the consideration expressed therein was never paid, and was inserted through ignorance of the parties and misapprehension as to the effect of expressing a consideration where none was paid. Those admissions put the deed upon the same footing as if no con-

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sideration had been expressed in the instrument. It is the payment of the consideration, though nominal, that creates the presumption that the grantee should have the use, and not the grantor. (Story's Eq. Juris., Secs. 1,196 to 1,200.)

The ignorance of the law, in a manner and form charged in the complaints, amounts to a mistake of fact that would warrant a Court of equity in reforming the deed to the true intent and meaning of the parties. (1 Story's Eq., Sec. 115; Id., Secs. 121, 122, 136; *vide* Note to Sec. 122; *Hunt v. Roussimaniere*, Adm'r, 1 Peters Sup. C. R. 13, 17; *Hyde v. Tanner*, 1 Barb. S. C. R. 75; *Barnes v. Carnack*, 2 Barb. S. C. R. 392; *Taylor v. Fleet*, Id. 471; *Taylor v. Luther*, Sum. 133.)

Upon the showing that the trust should be established by some instrument in writing, signed by the party sought to be charged with it, or declared in the deed, the averments in the complaints as to how the proceeds of the ditch were shared, how the books in relation to the ditch property were kept, and how the ditch property was managed, and that Wilson, during his lifetime, acknowledged the trust, and that Walker never gave possession of the ranch, but remained in the possession thereof to and at the time of his death, are evidence enough in writing to bring the case within the provisions of the statute. (*Sanderson v. Jackson*, 2 Bos. Pull. 238; *Penniman v. Hartshorn*, 13 Mass. 87; also the principle enunciated in *Taylor v. Luther*, 2 Sum. 233.)

The statute excepts trusts "arising from or being extinguished by implication or operation of law." (Wood's Digest, Art. 395.) Our statute, like the English statute, does not prescribe any particular form or solemnity in writing, nor that the writing should be under seal. Hence, any writing sufficiently *evincent* of a trust, as a letter or other writing of a trustee stating the trust, or any language in writing clearly expressive of a trust, is sufficient. (Story's Eq. Juris., Sec. 972, and Note 2.)

In those cases where the deed expresses a consideration, when in truth and fact none was paid, and it was inserted by

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fraud in fact, or by a mistake, or by a misapprehension of the parties as to the effect of the deed, and in such like cases, the Court will permit evidence to show that the deed was intended between the parties as a trust, and on proof of those facts, by intendment of law, a trust is created for the use and benefit of the grantor, subject to the mortgage given. (*Cripps v. Jee*, 4 Bro. Ch. R. 472; 7 U. S. Digest, p. 193, Sec. 108; 15 U. S. Digest, p. 203, Sec. 58; 11 U. S. Digest, p. 163, Sec. 36; 4 Kent, 306; *vide* Note 1, Sub. 12.)

On the hypothesis that it was a sale by deed absolute, the grantor is entitled to the consideration expressed in the deed. The defendants cannot hold the property and refuse to pay what they contend was the consideration of the deed, to wit: seventeen thousand dollars. If they ask equity, they must do equity. (*Leman v. Whitney*, 4 Russ. 422; *Squire v. Harder*, 1 Paige, 494; Story's Eq. Juris., Secs. 1,196 to 1,199; *Bruen v. Hone et al.*, 1 Barb. S. C. R. 586.)

The *cestui que trust* is seized of the freehold in contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land. (4 Kent, 1 Ed. 304.) A trust, in the general and enlarged sense, is a right on the part of the *cestui que trust* to receive the profits. Mr. Chief Justice Kent says that "the contrast between uses and estates at law were extremely striking. When uses were created before the statute of uses, there was a confidence that the feoffee would suffer the feoffor to take the profits, and that the feoffee, upon the request of the feoffor, or notice of his will, would execute the estate to the feoffor and his heirs, or according to his directions. When the direction was complied with it was essentially a conveyance by the feoffor, through his agent the feoffee." (4 Kent, 1 Ed. 292.) Trusts are now what uses were before the statute. (4 Kent, 1 Ed. 303.) A trust need not be created by writing, but must be evidenced by writing. (4 Kent, 1 Ed. 305, 306, and Note b, citing Lord Alvanley, 3 Vesey, 707; *Leman v. Whitney*, 4 Russell, 423; *Fisher v. Fields*, 10 Johns. 495; *Steeve v. Steeve*, 5 Johns. Ch. 1.)

Hatch & McQuaid, for Respondent.

There was no *express* trust, because there was no writing evidencing it. The Statute of Frauds of this State provides that "no estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." (Sec. 6, Act concerning fraudulent conveyances.) There can be no *express* trust without a writing, subscribed, etc. There was no *implied* trust, or such trust as results "by act or operation of law," because the deed from Walker to Wilson was absolute on its face and expressed a consideration. A trust may result by operation of law where no consideration is expressed in the deed. To constitute a trust there must either be no consideration expressed or some writing inconsistent with the fact that the deed is absolute. Walker, if living, would not be permitted to impeach his own deed, expressing a valuable consideration, nor can his representative do it. We refer the Court to *Russ v. Mebius*, 16 Cal. 350, and the cases there cited, as being conclusive upon this point.

The amendatory and supplementary complaint in the record makes the original complaint no stronger upon this trust question. It sets up ignorance of the law on Walker's part, which cannot be pleaded in this action. It also details certain facts as evidence of the trust. The pleading is bad, and might be stricken out. It does not in the least affect the case. The amendment, however, sets up a new cause of action. Taken with the original complaint there is an improper joinder of actions. The original complaint makes an action for the enforcement of a trust and the re-conveyance of real estate. The amendment makes an action for a money judgment against the administrator of Wilson, and for the enforcement of a

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vendor's lien. It charges that the plaintiff's claim for seventeen thousand dollars, the amount of the purchase money, was duly presented to the administrator of Wilson, and by him rejected.

By the Court, SHAFER, J.

This action was brought by Walker, in his lifetime, to compel the execution of a trust, or, alternatively, to enforce a vendor's lien.

The complaint alleges that on or about the 6th of January, 1862, Walker and J. C. Wilson were partners in business, and were about closing up their partnership affairs; that the firm was embarrassed with debts and that some of the creditors had commenced attachment suits against the firm; that by reason of the dissipated habits of Walker, and with a view to a more speedy liquidation of their debts, Walker executed to Wilson a deed, absolute on its face and expressing a consideration of seventeen thousand dollars, of a certain ranch, the same being the individual property of Walker; that the deed was, in fact, a trust, and was made solely for the purpose of enabling Wilson to raise money, by mortgaging the premises, to pay off the debts of the firm; and that, on the day of the execution of the deed, he borrowed several large sums for the benefit of the firm and secured the payment thereof by mortgages on the premises so conveyed to him by Walker. That Walker also, and by the same deed, conveyed to Wilson his interest in certain ditches belonging to the firm, for the purpose aforesaid, and that said ditches were included in the said mortgages. That the possession of the ranch remained with Walker after the deed, as before, and that he participated as before in the management of the ditch property. That Wilson, in his lifetime, never denied the trust; but, on the contrary, always admitted it. That the defendant, E. P. Wilson, his administrator and one of his heirs at law, admitted the trust in his answer first filed, but which he afterwards withdrew by the Court's leave. That the grantor and

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grantee were intimate friends, and that the deed was given under a misapprehension as to its legal effect. Under this aspect of the complaint the plaintiff prays that the administrator may be decreed to execute the trust by reconveying the property, subject to the aforesaid mortgages.

In a supplemental complaint, filed by leave of the Court and by the consent of the defendants, it is alleged as a further cause of action, that the aforesaid conveyance was in pursuance of a sale for the sum of seventeen thousand dollars, expressed in the deed; that the money is due and unpaid; that a claim for that amount was presented in due form to Wilson's administrator for allowance, June 21st, 1864, together with the evidence in support of a vendor's lien on the property embraced in the deed, and that the claim was rejected by the administrator on that day. On these allegations the plaintiff claims judgment for the seventeen thousand dollars and interest thereon from the date of the deed, and that the land conveyed may be sold and the avails applied to the liquidation of the debt and for other relief.

The complaint as amended was demurred to for want of facts, misjoinder of causes and for uncertainty and ambiguity. The demurrer was sustained by the Court, and the plaintiff declining to amend, judgment was entered dismissing the action.

First — The complaint not only fails to disclose an express trust but it appears affirmatively that there was none; and it sets forth no facts from which a trust would arise by implication of law. Nor can the complaint be sustained as a bill to reform the deed. However Walker may have mistaken the legal effect of its terms, there is no averment that the language of the deed is not the very language which he intended to use; and against the mistake of law alleged there can be no redress. The class of cases in which mistakes of that character are corrected in equity is very limited, and this is not brought within any recognized exception to the general rule, by the necessary averments. (1 Sto. Eq. Chap. 5; 4 Rus. 424; 16 Cal. 351.)

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The position that the trust is rescued from the operation of the Statute of Frauds by the allegation that the answer first filed by the administrator admitted the trust, is not tenable for a number of reasons, only one of which, however, need be specified here. If a defendant sought to be charged upon a contract within the Statute of Frauds, admits the contract in his answer and does not claim the benefit of the statute, he is considered as waiving its protection and as furnishing by his answer the very proof which the statute requires. But if the admission is coupled with a claim to the protection of the statute, the rights of the party stand as though the admission had not been made. (2 Story's Eq. Jud. Sec. 757.) While the complaint in this case avers the admission, it fails to fill or complete the legal proposition by an averment that the statute was waived as a defense by an omission to assert it in the answer.

Second—Under the second aspect in which the general transaction is presented in the complaint, the plaintiff is entitled to relief.

If, as the supplemental complaint alleges, Walker sold the land to Wilson for seventeen thousand dollars, and the purchase money has not been paid, then the plaintiff is a creditor of Wilson's estate to that amount, and on general principles has a lien on the land sold as security for the debt. (*Leman v. Whitney*, 4 Rus. 427.) To that extent Wilson in his lifetime held the land in trust for his vendor, and the trust has descended to his representative and heirs. The principle upon which Courts of equity proceed in establishing this lien is, that a person who has gotten the estate of another ought not in conscience, as between them, to keep it and not pay the full consideration money. (*Cahoon v. Robinson*, 6 Cal. 226; *Sparks v. Hess*, 15 Cal. 192.) Nor do we understand that these principles are disputed by the respondents; but they insist, first, that the claim in question is improperly joined in the complaint with the claim based upon the alleged trust; and second, that the money claimed and the lien as collateral thereto are barred on the ground "that more than ten months

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had elapsed after the appointment and qualification of the defendant, E. P. Wilson, as administrator of J. C. Wilson, and after the first publication of notice by said administrator to the creditors of said estate, requiring them to present their claims to said administrator for allowance, before the claim was in fact presented."

There is no misjoinder of causes. Both of the claims stated in the complaint are founded on trusts—one lying in contract and the other arising by act and operation of law. (Practice Act, Sec. 64.) And as to the second objection, it is sufficient to say that it does not appear, from the complaint, when the notice to creditors was first published; nor, in fact, that any publication has been made or ordered.

The objection that there can be no recovery of the seventeen thousand dollars, and no enforcement of the vendor's lien as collateral thereto, until the affairs of the partnership shall have been adjusted, is not well taken. The supplemental complaint treats the sale and conveyance of the land by Walker to Wilson as a matter having no connection with the business of the partnership, and as being, in short, what it purports to have been by the terms of the deed—a transaction between the two men, each acting for himself alone.

The judgment is reversed and cause remanded. And it is ordered that the defendants have twenty days to answer from the time notice shall have been given them of the filing of the remittitur.

THE PEOPLE *ex rel.* M. A. WHEATON v. WILLIAM K.
WESTON, COUNTY JUDGE OF SOLANO COUNTY.

STAMP ON APPEAL PAPERS.—On papers sent up on appeal from Justices' Courts no stamp is required under the Act of Congress requiring "writs or other process on appeal from Justices' Courts, or other Courts of inferior jurisdiction, to a Court of record" to be stamped with a fifty cent stamp.

MANDAMUS TO COUNTY JUDGE.—Mandamus will not lie to compel a County Judge to try a cause on the ground that he has improperly dismissed the appeal taken from a Justice's Court.

Opinion of the Court.

THIS was an original proceeding commenced in the Supreme Court, to obtain a writ of mandate requiring the County Judge of Solano County to proceed and try a cause which had been appealed from a Justice's Court.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, in *pro. per.*, for Relator.

G. W. McMurtrie, for Respondent.

By the Court, SAWYER, J.

The County Court dismissed the appeal from the Justice's Court on the ground that there was no stamp on the return, under the provision of the Act of Congress requiring "writs or other process on appeal from Justices' Courts, or other Courts of inferior jurisdiction to a Court of record" to be stamped with a fifty cent stamp. The Court doubtless erred in dismissing the appeal. There is no "writ," or "process," within the meaning of those terms required under our practice. If there is anything in the proceeding in any sense analogous to a "writ," or "process," it is the notice of appeal. The terms "writ," and "process," have well established legal significations, which do not include our notice of appeal, and these terms must be presumed to have been used in their established legal sense.

But the Court had jurisdiction to inquire and determine whether the appeal had been properly taken, and was then pending in that Court or not, and in determining that question acted judicially. The Court did not refuse to act, but acted, and judicially determined that the appeal had not been properly taken, and upon this ground dismissed it.

Where the act to be done is judicial in its character the writ will not direct in what manner the inferior Court shall act, but only direct it to act. It has been so held in many strictly analogous cases. (*Commonwealth v. Judges of Common Pleas, Phil. Co.*, 3 Bin. 275; *Ex parte Ostrander*, 1 Den. 681; *Judges Oneida Com. P. v. People*, 18 Wend. 92; *People*

Statement of Facts.

v. Judges of Dutchess C. P., 20 Wend. 659; *People v. Judges of Wayne Co.*, 1 Mich. 360; 3 Dal. U. S. C. 42; 9 Pet. 602; 1 Serg. & R. 187; 6 Pa. St. R. 470; Note to *Fish v. Weatherwax*, 2 John. Cases 217, Sec. 23, and cases cited; *Flagley v. Hubbard*, 22 Cal. 36; *People ex rel. Smith v. The Judge of the Twelfth District*, 17 Cal. 547; *People v. Sexton*, 24 Cal. 79; *People ex rel. Polhemus v. O. C. Pratt, Judge of the Twelfth District*, ante, 168.) The County Court has acted judicially, and as in most other cases within its jurisdiction, its determination, though erroneous, is final.

Mandamus denied.

EUGENE B. BUFFENDEAU v. BENJAMIN S. BROOKS
AND THOMAS B. VALENTINE.

TIME A BOND TAKES EFFECT.—A bond to indemnify a Sheriff takes effect from the time of its delivery.

BOND TO INDEMNIFY SHERIFF FOR UNLAWFUL ACT.—A bond given to a Sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale, is void, because an unlawful contract.

UNLAWFUL PURPOSE OF BOND GIVEN TO SHERIFF MAY BE SHOWN.—The fact that a bond was given to a Sheriff to indemnify him against selling property in violation of an order enjoining its sale may be shown, though the bond discloses no unlawful purpose on its face.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Buffendeau, on the 28th of March, 1859, sued the Sheriff for selling the cattle under the execution, and recovered judgment against him for about four thousand five hundred dollars, damages and costs. The bond of indemnity was then assigned to the appellant, and this action was instituted by him against the respondents.

The plaintiff appealed.

The other facts are stated in the opinion of the Court.

James C. Carey, for Appellant.

Argument for Appellant.

1st. The Court will sustain this bond if possible, and will not presume that the Sheriff intended a violation of his duty or the law. The fact is, the tendency of the Courts at this day is to reduce rather than increase the grounds that render contracts void on public policy. In *Richardson v. Meilish*, 2 Bing. 229, one objection was that the contract was contrary to public policy, and Mr. Chief Justice Best said he was not much disposed to yield to such arguments, and he thought an unquestionable case should be made out before the Court would set aside a contract on that ground. And Mr. Justice Burrough protested against arguing too strongly upon public policy. He said: "It is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law."

2d. The bond may be good in part, and bad in part. "The common law," it is said, "doth decide according to common reason, and having made that void that is against law, lets the rest stand. A statute, however, is like a tyrant; where he comes he makes all void. But the common law is like a nursing father; it only makes void that part where the fault is, and preserves the rest."

The proofs show that at the time the bond was delivered the Sheriff had notice that the judgment which he was about to enforce by a sale of the cattle under the execution had been discharged by operation of law, and also that an injunction was out against New, the plaintiff, restraining the sale. Now, conceding that the bond was void in so far as it contemplated indemnity to the Sheriff for violating the injunction, still it was good as an indemnity for acting under the execution after notice of the discharge in insolvency. The Sheriff might lawfully demand indemnity for that. (2 Kent, top p. 639, marg. p. 468; *Greenwood v. Hammersley*, 5 Taunt. 727; *See on Dem. of Thompson v. Pitcher*, 6 Taunt. 359.)

Brooks & Whitney, for Respondents.

Opinion of the Court.

By the Court, SHAFER, J.

The motion for a nonsuit was properly granted by the Court below. The action was upon a bond given by the defendants to P. E. Edmondson, Sheriff of Alameda County, "to indemnify and save him harmless from all damages, expenses, costs and charges, and against all loss and liability, which he, the said Sheriff, shall sustain or in anywise be put to for or by reason of the retention of said property, the levy, advertisement or delivery thereof, or for any act done under or by virtue of the said execution." The execution referred to issued upon a judgment against Buffendeau in favor of one New; it had been delivered previously to Edmondson for service, and he had, prior to the delivery of the bond, levied upon one hundred and fifty head of cattle as the property of Buffendeau, which is the "property" to the sale of which the indemnity relates. Buffendeau sues as the assignee of Edmondson.

The nonsuit was granted on the ground that the contract was unlawful.

The evidence of the plaintiff tended to prove that the levy was made on the 2d day of June, 1858; that the cattle were advertised for sale on the 17th, but were, in fact, sold on the 28th. That on the 16th Buffendeau instituted an action against New, for the purpose of enjoining him, "his agents, attorneys and servants, and all other persons claiming to act for him, from selling, or exposing for sale, said cattle, under and by virtue of said execution," on an allegation that he, Buffendeau, had been discharged from the judgment named under the Act relating to insolvency. That a temporary injunction was granted, and that Edmondson was duly served with a copy of the complaint and order on the same day. That Edmondson had, prior to the service of the injunction, been notified by Buffendeau's attorney, of his client's discharge in insolvency, and that he immediately after the service, sent the papers to the defendant Brooks, attorney of New. That Brooks told the Sheriff that "the injunction was irregular and he must not register it." That Edmondson, after he was notified of

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Buffendean's discharge and before the service of the injunction order, "told Brooks that he had been notified, and that he would not sell the cattle unless he (Brooks) would indemnify him, and that Brooks promised that he would do so." And that Edmondson, after the service of the injunction order, "told Brooks again that he must indemnify him." The evidence further tended to prove that the bond in suit, though dated on the 16th, was not in fact delivered until the 28th of June, the day of the sale.

The bond took effect from its delivery, and its legality is to be determined by reference to the state of things then existing. Though the undertaking discloses no unlawful purpose on its face, still it is entirely manifest that it was given for the purpose of inducing the Sheriff to violate an existing judicial order. Edmondson knew of the injunction and so did Brooks. Edmondson considered the discharge in insolvency as a reason why he should not sell without indemnity, and made known his views to Brooks on that subject soon after notice of the discharge was given; and when the injunction was served thereafter, he seems to have regarded it as an additional obstacle in the way of a safe and profitable vendue. Brooks made an effort to convince him that he was mistaken, but finding him not amenable to argument, he and his co-defendant executed the bond and the sale immediately followed.

The character of the bond depends upon the character of the sale; and the sale was not merely a civil injury to Buffendean, assuming that the judgment against him had been discharged in insolvency, but it involved a wilful and apparently deliberate disobedience to public authority. Edmondson could not maintain an action on this bond, and his assignee stands in no better position.

The judgment is affirmed.

Argument for Appellant.

BENJAMIN F. FERRIS v. HENRY P. IRVING, ADMINISTRATOR OF THE ESTATE OF JOSEPH K. IRVING, DECEASED, WILLIAM MCKENZIE, AND AMBROSE S. HURLBURT et als.

ACTION TO DETERMINE ADVERSE CLAIM TO LAND.—An action cannot be maintained to quiet a legal title to land vested in the plaintiff, unless the plaintiff is in possession of the property in dispute at the commencement of the action.

ENFORCEMENT OF CONTRACT OF INTESTATE TO CONVEY LAND.—An administrator will not be compelled to perform specifically a contract of the intestate to convey land, unless it is found as a fact that the intestate had contracted to convey the particular land described in the complaint. An agreement of the intestate to convey a parcel of his land, when he owned several parcels, without describing any particular tract, will not be enforced.

DEATH OF PRINCIPAL IN POWER OF ATTORNEY.—The death of the principal operates as a revocation of a power of attorney to convey land, and if, after the death of the principal, the attorney in fact makes a deed under the power, the deed is void, even if the attorney is ignorant of the death.

APPEAL from the District Court, Twelfth Judicial District, Alameda County.

Defendants recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Sharp & Lloyd, for Appellant.

The act of Fair, done in ignorance of the death of his principal, was good, and we refer the Court to *Cassaday v. McKenzie*, 4 Watts and Sergt. 282, which contains a full, learned, and logical discussion of the question, both upon reason and principle. Indeed, no stronger authority in favor of the soundness of our position can be cited than *Smout v. Ilberry*, 10 Mees. and Wels. 1, in which it is held that the agent is not liable, where he acts in good faith, without knowledge of the decease of the principal, and according to which authority neither Fair nor his estate is bound to us; we are to be the victims; we protest. We say that the old technical rule of the common law was that the power ceased with the death of the principal. The rule was the same in the civil law, but there we find the exception stated: "The acts of the agent

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done *bona fide* in ignorance of the death of his principal were held valid and binding on the heirs of the latter." (Story on Agency, Sec. 491.) The same rule has been adopted as the rule of commercial law in Continental Europe. (Ib. pp. 1-9.)

Samuel J. Clarke, Jr., and William H. Glascock, for Respondents.

The plaintiff's counsel relies much upon the fact that the death of J. K. Irving was not known either to Fair or Valdez at the time of the execution of the deed and release. This case, as well as the authorities referred to therein, make no such exception in favor of an act of an agent done *bona fide and in ignorance* of the fact of the revocation by the death of the principal. On the contrary, this very case of *Travers v. Crane*, contains a citation from Judge Kent, expressly repudiating any such position. Judge Kent remarks: "By the civil law and the law of those countries that have adopted the civil law, the act of an agent done *bona fide* after the death of the principal and before notice of his death, is binding upon his representatives.

"But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous and absolute revocation of the authority of the agent unless the power be coupled with an interest."

Upon this point the authorities are overwhelming. We contend, then, that at the instant of the death of J. K. Irving the title to these lots descended to his heirs; and that the title could not be divested by the act of an agent, whose authority had ceased to exist.

By the Court, SHAFER, J.

The complaint in this action is framed with a double aspect: first, as a bill filed under the two hundred and fifty-fourth section of the Practice Act to quiet a legal title already vested in the plaintiff; and second, as a proceeding to compel the specific performance of a contract to convey. The action is

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not maintainable under the first aspect, for there is no allegation that the plaintiff was in possession of any of the lots in controversy at the time the suit was instituted; nor can it be maintained under its second aspect, for it does not appear by the findings that any contract to convey the particular lots named in the complaint was ever made by J. K. Irving with Valdez, the plaintiff's assignor.

Should the complaint be considered as having a third aspect, viz: that of a bill *quia timet* to clear off a cloud upon title, still the action cannot stand, for the reason that the plaintiff has no title, legal or equitable, to be clouded or endangered.

It appears by the findings that on the 17th of August, 1853, Joseph K. Irving, then in life, was seized of the lots in controversy, together with a large number of other lots, in the City of Oakland, and a tract lying outside of said city known as a part of the Peralta Rancho; and that he on that day, for a good and valuable consideration, executed and delivered to José M. Valdez a certain instrument in writing, whereby he agreed to convey to said Valdez fifty acres of said ranch, outside of said city, to be located where said Valdez should think proper. It further appears that the parties, thereafter in the early part of 1854, entered into a parol agreement to exchange the fifty acres mentioned in said written contract for "some city lots in the City of Oakland." On the 16th of May, 1854, Irving executed a power of attorney to one William D. Fair, and before departing from the State he introduced Valdez to his said attorney and told him to make the exchange which Valdez and he had agreed upon. A few days thereafter Irving left for the East, and died in the City of New York on the 28th of June, 1854. Two days thereafter Fair, as attorney in fact of Irving, executed a deed of conveyance to Valdez of the lots in controversy, and the latter released Irving from his covenant to convey the outside lands. The defendants Hurlburt and McKenzie claim the city lots in dispute under an administrator's sale and deed.

First—The deed executed by Fair as attorney in fact of J. K. Irving is not the deed of Irving, nor can it be treated as

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a contract by him to convey the city lots named in it. Irving was dead at the time the deed was executed, and his death operated as a revocation of the power of attorney to Fair. The correctness of the doctrine that the death of the principal revokes the authority of the agent is disputed by the counsel of the appellant, but in view of the decision in *Travers v. Crane*, 15 Cal. 12, we do not consider its correctness to be an open question in this State.

Second — Nor is it found that Irving before he left for the East agreed in person to exchange the city lots in controversy for the outside lands; on the contrary, it is found, in effect, that he did not so agree.

The finding is that Irving agreed to exchange "some of the city lots," etc. But he owned a large number of city lots, and nothing was said as to how many Valdez was to receive, nor was any clue given to their location nor to their value, except as it may be inferred that they were to be equivalent in that particular to the value of Valdez's existing rights in the outside lands. A contract, in legal contemplation, is an agreement between two or more parties for the doing or not doing of some specified thing. Whatever else may have been specified in the parol agreement in question, it is apparent that a conveyance of the lots named in the complaint was not. Valdez called on Irving on the eve of his departure and proposed, in the most general form, an exchange of country for city property; and Irving assented to the overture in language as general as that in which it was made. To that extent there was undoubtedly a meeting of minds. Irving introduced Valdez to Fair, and told Fair to "make the exchange which he, Irving, and Valdez had agreed upon." But they had agreed upon nothing except as above stated. The clear result of all this is, that at the date of Irving's death he was, at the most, bound only by an agreement to make an agreement which, when made, would bind him to convey two or more of his city lots; and they might turn out to be the lots now in question; but it is just as true that they might not.

Under this view of the matter, it becomes unimportant to

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consider the questions made by the counsel respectively, bearing upon the defense of the Statute of Frauds, or any of the other points which have been argued.

Judgment affirmed.

SAWYER, J., concurring specially.

I concur on the second ground stated and discussed in the opinion.

In the other aspect presented by the complaint, the action, in my opinion, is not one of the new class of cases of which the Court is authorized to take cognizance under section two hundred fifty-four of the Practice Act; and it was not necessary for the plaintiff to aver that he was in possession to enable him to maintain the action, had his own title been otherwise sufficient to entitle him to have defendant's conveyances annulled as a cloud on his title. In this particular the principle announced in *Hagar v. Shindler*, 29 Cal. 471, applies. The action in this aspect of the case is aimed at a particular conveyance from the same source of title, subsequent in time and claimed to be a cloud upon the plaintiff's title. Such an action could have been maintained without the aid of section two hundred fifty-four, and the jurisdiction of the Court does not depend upon its provisions, or upon the possession of the complaining party at the time of the institution of the suit.

A. K. P. GLIDDEN v. J. A. PACKARD.

APPEAL FROM ORDER MADE AFTER FINAL JUDGMENT.—On an appeal from an order made after final judgment, the transcript should contain a copy of the order appealed from, and copies of all the papers used on the hearing when the order was made by the Court below.

AN APPEARANCE IN AN ACTION.—A notice given by an attorney on behalf of defendant to plaintiff's attorney that defendant will move before a Court Commissioner that an attachment issued in the case be dissolved, does not constitute an appearance in the action.

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JUDGMENT BY DEFAULT.—A notice that defendant will move before a Court Commissioner to dissolve an attachment issued in a cause is not such an appearance in an action as will authorize the Clerk to enter a judgment by default.

JUDGMENT BY DEFAULT—WHEN VOID.—A judgment entered by the Clerk by default, where there has been no service of summons or appearance, is utterly void.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. P. Treadwell, for Appellant.

Sharpstein & Smyth, for Respondent.

By the Court, SAWYER, J.

This is an appeal from an order subsequent to judgment on default, "that the defendant have leave to file his answer" to the merits. The only papers brought up in the transcript were the judgment in the case; the order appealed from allowing defendant to answer; the notice of motion for the order; and the proposed answer. A diminution of the record having been suggested by respondent, and the papers said to be omitted having been ordered to be certified to this Court, a full transcript of the judgment roll and the proceedings on attachment has been filed. The appellant insists that the original transcript contains all the papers required to be brought up on appeal from the order under section three hundred forty-six of the Practice Act; and that for this reason, the papers certified up in pursuance of the order of this Court cannot be considered. In this he is mistaken. The section referred to requires the appellant to furnish the Court "a copy of the order appealed from, and a copy of the papers used in the hearing of the Court below." In this case the notice is, that the motion will be made "upon the *papers filed in this action*, and upon a verified answer, * * * a copy of which answer is hereto annexed." Now, the only paper on file at the time of giving the notice brought up was a copy of the judgment, and there was manifestly an omission of portions

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of the moving papers, which are necessary to understand the action of the Court. And it was for this reason that the remaining papers were directed to be certified up. Upon an examination of the judgment roll, which was on file, and therefore, under the notice, a part of the moving papers, it appears that the summons was returned without service, the defendant not having been found. It also appears that the judgment was entered in the Clerk's office by the Clerk, on application of plaintiff's attorney, and not in open Court, or by order of the Court; that the Clerk entered the judgment, not upon evidence of service, but upon the affidavit of plaintiff's attorney that the defendant had appeared in the action; and the mode of appearance was shown by the affidavit to have been by an attorney giving notice on behalf of defendant to plaintiff's attorney of a motion before a Court Commissioner to dissolve the attachment issued in the case, on the ground that it was irregularly issued. The Clerk, regarding this as a general appearance in the case, entered judgment by default. This state of facts is shown by the judgment roll.

We think the notice of motion to dissolve the attachment, on the ground that it was irregularly issued, was not such an appearance in the case as would authorize the Clerk to enter judgment by default. (*Steinbach v. Leese*, 27 Cal. 295.) Had the motion been made under section one hundred and thirty-six, the plaintiff might have required an appearance as a condition of moving to dissolve the attachment. And this very provision, requiring the defendant to appear before moving to dissolve, shows that the Legislature did not contemplate that the motion itself should constitute an appearance.

In *Kelly v. Van Austin*, Mr. Chief Justice Field said: "The Clerk in entering judgment upon default acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the Clerk is only an agent by whom it is written out and placed among the records of the Court. He must, therefore, conform strictly to the provisions of the statute, or his proceedings will be without binding force." (17 Cal. 565. See also *Wallace v. Eldridge*,

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27 Cal. 495; *Stearns v. Aguirre*, 7 Cal. 449.) The action of the Clerk in entering judgment was without authority of law. It was not merely error, to be corrected on appeal, but utterly void for any purpose whatever. There was in fact no judgment, (the order does not purport to vacate any judgment,) and the defendant was entitled to answer as a matter of right. And the moving papers, as we have seen, show this right. But there having been neither personal service nor appearance by defendant, the sixty-eighth section of the Practice Act would apply, whether the construction claimed for it by respondent be correct or not. It does not appear upon what ground the Court based the order appealed from; but whatever reason may have been assigned, the order is undoubtedly correct.

It is therefore affirmed.

J. G. TREADWAY v. CHARLES D. SEMPLE.

CASE COMMENTED ON.—*Thornton v. Mahoney*, 24 Cal. 552, commented on and explained, and erroneous citation corrected.

LOCATION OF MEXICAN GRANTS.—The system of locating, by final survey, Mexican and Spanish grants of land in California, under the Act of Congress of March 3d, 1851, was essentially modified by the Act of Congress of June 14th, 1860.

DECREE OF COURT UPON SURVEY OF MEXICAN GRANT.—The proceedings had under the Act of Congress of June 14th, 1860, after the return of a survey and plat of a Mexican grant into the District Court, are strictly judicial in their character, and the decree rendered by the Court upon the survey is *res adjudicata*, and final and conclusive upon the rights of all those who become parties to it.

DECREES CONFIRMING TWO SURVEYS OF SAME LAND.—If after a decree confirming a survey of a Mexican grant, made in pursuance of the Act of June 14th, 1860, a decree is made confirming a survey of another prior grant covering the same land, and the confirmee in the first decree is a party to the second decree consenting thereto, he is bound by it.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

The plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Argument for Appellant.

Charles D. Semple, in propria persona, and P. L. Edwards, for Appellant.

The official survey of the Colus grant, being first approved and adopted by the United States District Court, from that time gave to appellant a perfect legal title to the land embraced in it, which could not be afterwards disturbed by any action of the Government. (*Waterman v. Smith*, 13 Cal. 373, and authorities there cited; Act of Congress, June 14, 1860; *Brewer v. Minturn*, 24 Cal. 645.)

The doctrine of relation has no application to this case. The parties had no privity the one with the other, but both had a just claim to the application of that doctrine as against intervening claimants and trespassers. (*Jackson v. Bard*, 4 Johnson, 234; 1 Johnson's Cases, 90, and Note; *Heath v. Ross*, 12 Johnson, 140; *Barnes v. Stark*, 4 Cal. 418.)

The claimants of "Colus" and "Jimeno" set forth in their petitions that they had claims against the Government. On the same day their claims are admitted to be valid. They both then demand that the proper officers shall point out the particular tract of land to which they were entitled, (since they cannot do this themselves — see *Fremont's Case*,) and pass to them the fee which was still in the United States. On the 2d day of February, 1861, the officer having the power of final approval, passed the fee of two leagues by metes and bounds to the Colus claimant. This act put a perfect legal title in the claimant which could not be disturbed by any subsequent action of the Government. (See *Waterman v. Smith*, 13 Cal.; *Fremont's Case*, 17 Howard, and cases cited.) Two months afterwards the same officer attempted to pass the fee of a part of the same land to the claimant of Jimeno. Was this last act a nullity? Was there any title in the United States to pass?

A. C. Whitcomb, for Respondent.

It is quite certain that until the Colus survey was filed in Court it was a mere private survey, and that its character

Argument for Respondent.

remained unchanged until the 2d day of February, 1861, when it was approved by the Court. Indeed, no validity is claimed for it until then.

It is not equally certain that on the 12th day of April, 1861, — the date of the order of appeal therefrom — it was not final or conclusive? From that time up to December, 1864, did not its inconclusive character remain unchanged? Was it not liable to be ordered set aside, and another survey approved in its place, just as the Supreme Court of the United States at its last term ordered the Sutter survey to be set aside, and an entirely different one approved?

So far from such a survey making "a perfect legal title," it has been held by this Court, over and over again, (commencing with *Thornton v. Mahoney et als.*, 24 Cal. 583,) that it was not operative for any purpose whatever until the appeal was disposed of by the appellate Court.

The survey law of June, 1860, provides for interventions; and this appellant was an intervenor in the Jimeno case, appearing in person in open Court, and consenting to the decree. And so consenting, the decree bound every interest he had in the land, whether under Jimeno or Colus, under a pre-emption or a swamp land location. It was adjudged thereby, not only as between the claimants and the United States, but as against the intervenor, Charles D. Semple, that the land embraced in the survey (approved by that decree) was truly, properly, and correctly appropriated to the Jimeno grant of November 4th, 1844; and that said grant rightfully attached to the identical eleven square leagues of land embraced and described in said survey. In fact, that said land was the identical tract granted in 1844 to Jimeno; and, of course, if granted to him in 1844, it could not have been granted to Bidwell in 1845; or if any part of it was included within the description of any grant in 1845 to Bidwell, such latter grant was to that extent inoperative and of no effect.

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By the Court, SAWYER, J.

This is an action brought under the provisions of section two hundred fifty-four of the Practice Act by the party in possession of Lot No. 1, in Block 32, in the Town of Colusa, for the purpose of determining a claim of title adverse to him, made by the defendant. The complaint—which is verified—sets out with great particularity a deraignment of the respective titles under which both of the parties claim. None of the material allegations of the complaint are denied, and they are, therefore, for the purposes of the action to be taken as true. Both claim under grants from the Mexican Government—the plaintiff under a grant to Manuel Jimeno, called the “Jimeno Grant”—the defendant under a grant to John Bidwell, called the “Colus Grant.” Both have been confirmed, and finally located so as to include the lot in dispute, and the question is, which party has the better title?

The grant to Jimeno of eleven leagues within larger boundaries, as shown by the record, was made November 4th, 1844; that to Bidwell of four leagues within the same larger area, October 4th, 1845. The claimants under the Jimeno grant presented their claim to the Board of Land Commissioners for confirmation March 24th, 1852, in pursuance of the provisions of the Act of March 3d, 1851; the claimants under the Colus grant, March 31st, 1852. The Jimeno grant was confirmed by the Board January 10th, 1853; the Colus grant rejected October 25th, 1853. Both cases having been appealed to the District Court for the Northern District of California, the decree confirming the Jimeno grant was affirmed, and that rejecting the Colus grant reversed, and the grant confirmed on the same day—July 5th, 1855. Both cases were again appealed to the Supreme Court of the United States, and at the December term, 1855, of that Court, the decree confirming the Jimeno grant was finally affirmed, and the appeal in the case of the Colus grant dismissed—the decree of confirmation thereby becoming final. The Jimeno grant was afterwards, in 1858, surveyed so as to include the lot in contro-

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versy, which survey was approved by the United States Surveyor-General for California, November 4th, 1858. Said official survey was, on application of defendant, Semple, claimant under the Colus grant, by the United States District Court ordered to be returned into Court, and having been filed, the said Semple, by leave of the Court, granted on his own motion, on the 26th day of September, 1860, under the provisions of the Act of Congress of June 14th, 1860, filed in the proceeding his intervention, as he alleged, "for the protection of his rights and interest as owner and claimant of Rancho Colus finally confirmed to him," and filed therein his written exceptions to the said official survey of the Jimeno Rancho, on the ground that it embraced lands (of which the lot in question was a part) claimed by him as being within the limits of the Colus Rancho. Testimony having been taken and arguments of the respective counsel had, the Court by order directed said survey to be set aside and another to be made in accordance with specifications in said order contained.

"On the third day of April, 1861, the said United States Surveyor-General returned to and filed in said Court in said proceeding a certified copy of the original plat of an official survey of the said Jimeno Rancho, made in conformity with the said order of said Court, and marked as approved by the said United States Surveyor-General, on the twenty-sixth day of March, 1861. On the sixth day of April, 1861, on the motion of the claimants' counsel to confirm said last named official survey, 'the counsel for the respective parties and Charles D. Semple, intervenor, in person appearing in Court and consenting to said motion and said official survey,' the said United States District Court rendered and entered a decree finally confirming, approving and adopting the said survey as the true, proper and correct survey of the said land finally confirmed to the said Larkin and Missroon, as the Jimeno Rancho as aforesaid." From this decree thus entered no appeal was taken either by claimants or defendant, Semple; but said Semple, as intervenor, in April, 1861, "especially waived, in writing under his hand, all right of appeal from

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said decrees." On the 12th of April, 1861, the United States appealed, which appeal was dismissed by the Attorney-General of the United States, May 29th, 1862, and the survey therefore became final and a patent issued thereon to the claimants under the Jimeno grant, July 18th, 1862, which patent embraces the premises in question.

A survey of the Colus grant was in the meantime made by the Surveyor-General, and also approved November 4th, 1858. Said survey did not embrace the land in controversy, or any land included in the survey of the Jimeno grant before mentioned, approved by the Surveyor-General on the same day. This survey was also on the application of said Semple returned into Court, and, October 17th, 1859, set aside, the said Court ordering a new survey to be made, "with the right to the said Semple to select a location of two square leagues of land within the exterior limits of the said Colus grant." November 5th, 1859, said Semple notified the Surveyor-General that he had elected the two square leagues of land embraced and contained in a certain private survey made in October, 1858, and that he consented that said last named survey should be adopted by the Surveyor-General as the proper location of said grant, and that the same be returned into Court in the room and stead of the new one directed to be made by said order of said Court. The said survey and another having been returned into Court, the survey so elected was confirmed by said District Court, February 2d, 1861. An appeal from said order of confirmation to the Supreme Court of the United States was taken by the United States, April 12th, 1861, and subsequently dismissed by the Attorney-General at the December term, 1864, of said Court. Said survey embraces the lot in question, but no patent has yet issued.

Although plaintiff has the elder grant (which was also first presented to the Board of Land Commissioners for confirmation,) and is in most respects prior in point of time, yet the defendant insists, that, under the principles advanced in *Waterman v. Smith*, 13 Cal. 373, his title is to be preferred, because

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the order confirming his survey was in fact entered by the District Court before the order confirming plaintiff's survey; that notwithstanding plaintiff's survey became final, and his patent issued long before the defendant's survey became final by dismissal of the appeal, that upon such dismissal his confirmation by relation took effect from the date of the decree of the District Court, and that his land was thereby first segregated. The claimant, on the contrary, insists that it was held by this Court in *Thornton v. Mahoney*, 24 Cal. 582, that the decree confirming the survey was not operative until the appeal was disposed of by the appellate Court, and that the finality of the respective decrees confirming the survey in these cases must therefore date from the time of the dismissal of the respective appeals. The question in that case was not whether, when the appeal is dismissed or the decree affirmed by the appellate Court, the rights of the parties become fixed by relation from the date of the decree of the District Court thus made final. It was simply whether, pending the appeal, the decree appealed from is to be regarded as finally locating the land, within the meaning of the provisions of the Act passed by the Legislature of California, April 26th, 1858, entitled "An Act for the better protection of settlers on public lands in this State, and to secure the rights of parties in certain cases" (Laws 1858, p. 345,) so as to enable parties to recover the lands under said Act before a final disposition of the appeal. There is an error in a reference in the case cited which may tend to produce some obscurity, and which we now desire to correct. The phrase, "the Act of Congress of June 14th, 1860" (page 582,) should read, "the Act of the Legislature of California of April 26th, 1858." We also take occasion, while the case is before us, to supply an inadvertent omission in the second line of page 584. The sentence should read, "It is not the practice for the United States when appellants in cases of appeals from the decree of the District Court," etc.

Without deciding the question, we shall, for the purposes of this decision, assume that the defendant's location, on dis-

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missing the appeal, became final by relation from the date of the decree confirming his survey by the District Court, and that the final decree is equivalent to a patent. Assuming these points, and accepting the decision in *Waterman v. Smith* as correctly determining the matters in controversy in that case, it does not follow that the principles of that decision are applicable to the facts of the case now under consideration.

The grant in question in *Waterman v. Smith* was located by the Executive Department of the Government in pursuance of the provisions of the Act of Congress of March 3d, 1851. But the system of locating grants was essentially modified by the Act of June 14th, 1860, and the surveys of the grants in controversy in this case were finally confirmed under the provisions of that Act. The Act provides that, when the Surveyor-General has completed and platted the survey of any confirmed claim, he shall give notice of the fact in some newspaper for a prescribed period of time, and that during that time the survey and plat shall remain in his office subject to inspection; that upon the application of any party interested, the said survey and plat may, upon the order of the District Court of the district within which the land is situate, be returned into said "District Court for examination and adjudication;" that notice shall be given in a mode prescribed "to all parties interested, that objection has been made to such survey and location, and admonishing all parties in interest to intervene for the protection of such interest;" that said parties in interest, after having intervened, may proceed to take testimony and contest the same, and that, "on hearing the allegations and proofs, the Court shall render judgment thereon; and if, in its opinion, the location and survey are erroneous, it is authorized to set aside and annul the same, or correct and modify it." It then provides for an appeal from the decree finally confirming the survey. (12 U. S. Stata. at Large, 33, 34.) The proceedings had under this Act after the return of the survey and plat, are strictly judicial in their character. The parties interested have an opportunity to be heard, and those appearing actually are heard, and their rights litigated

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and adjudicated; and when thus finally determined we see no reason why the matters determined should not, like all other judicial determinations upon points directly in issue, be regarded as *res adjudicata*, and be final and conclusive upon the rights of the parties. Such is the opinion of the Supreme Court of the United States, expressed in the recent case of *Rodrigues v. United States*, 1 Wallace, 587. In 1838 a provisional grant of a league of land was made to Ramona Sanchez, "known by the name of 'Butano,' which tract, in 1844, Governor Micheltorena granted to her, reciting his deed to be a ratification of the provisional title given to her in 1838." Rodrigues claimed under this grant. In 1842, subsequent to the provisional grant, a grant was also made to Simeon Castro. Castro's grant had been confirmed, surveyed and patented prior to June 14th, 1860, and to his proceedings neither Sanchez nor Rodrigues was a party. Sanchez's grant having been confirmed and subsequently surveyed, the survey and plat were ordered to be returned into Court, and after a contest there under the provisions of the Act of 1860, to which proceedings the claimants under the Castro grant made themselves parties — the grant was finally located in part upon lands already surveyed and patented to the claimants under the Castro grant. In reviewing this final location on appeal the Supreme Court of the United States — Mr. Justice Miller delivering the opinion — say:

"It is objected to this location of the grant that it places it on land which has already been confirmed, surveyed and patented to the representatives of Castro. The answer to this is, that we are called on in this proceeding to determine where the grant to the present claimant ought rightfully to be located, who was not a party to any of the proceedings by which Castro's claim was confirmed, surveyed or patented, and is not therefore bound or concluded by either the decree, survey, or patent, as expressly enacted by the fifteenth section of the Act of 1851. For Castro's survey was made before the Act of 1860, and there was no opportunity for this claimant to con-

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test its location. And lastly it may be added, that the holder of the Castro claim has made himself a party to the present proceeding, *and must be bound by its result.*"

Now the representative of the Castro claim held a subsequent grant, which was first finally segregated and patented. Under the act of 1860, he made himself a party to the subsequent proceedings, for locating a prior grant to Sanchez, which was, notwithstanding his opposition, located in part upon lands already patented to him. This is precisely the case under consideration, and if Castro's representatives by making himself a party to the proceedings, "must be bound by its results," as observed by Mr. Justice Miller — and we think he must — then defendant, Semple, is concluded in this case. Plaintiff's is the elder grant, and it was first presented for confirmation to the Board of Land Commissioners. Both claims having been surveyed so as not to interfere, they were ordered to be returned into Court, "for examination and adjudication," on application of defendant. On leave of the Court he intervened in plaintiff's proceedings; had plaintiff's survey — and in another proceeding his own — set aside, and new surveys ordered; and succeeded in getting his second survey first confirmed. Afterwards plaintiff's survey came up for determination and although embracing the lot in question, which had already been included in defendant's survey, on motion of plaintiff's counsel to confirm his survey, the Court rendered a "decree finally confirming, approving and adopting the said survey as the true, proper and correct survey of the said land finally confirmed as the Jimeno Rancho, 'Charles D. Semple, intervenor, in person appearing in Court and consenting to said motion and official survey.'" And said defendant, Semple, also afterwards on the same day "waived in writing, under his hand, all right to appeal from said decree." This must be regarded as an adjudication between the parties, and with the consent of defendant, that the plaintiff's prior grant is properly located; and that the defendant's subsequent grant to the extent of the interference was improperly located, and

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this determination is final and conclusive upon the rights of the parties. It follows that the title is in the plaintiff and the judgment must be affirmed.

And it is so ordered.

JEROME LINCOLN v. COLUSA COUNTY.

COMPLAINT FOR DAMAGES FOR LAYING OUT HIGHWAY.—A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the Act of 1861, fails to state a cause of action, unless it avers that the plaintiff had attempted to come to an agreement with the Board of Supervisors as to the amount of damages sustained, and could not agree with the Board as to such amount.

DAMAGES FOR LAYING OUT A PUBLIC HIGHWAY.—Under the Act of 1861 a person whose lands have been taken for a public road has no right of action against the county for damages until after a fair and honest attempt on his part to agree upon the amount with the Board of Supervisors.

EVIDENCE AS TO AGREEMENT WITH BOARD FOR DAMAGES FOR LAYING OUT ROAD.—The filing of a petition with the Board of Supervisors claiming damages in the event of a public road being laid out over the petitioner's land, is no evidence in an action brought by him for damages, that he could not compromise or agree with the Board respecting the damages.

POWER OF LEGISLATURE IN RELATION TO DAMAGES FOR OPENING ROADS.—It is competent for the Legislature to fix the mode of condemnation of land for public highways, and the method by which damages shall be ascertained, and the proceedings to be had for their recovery, and as strict a compliance with the Act is required by those claiming damages as by the public making the condemnation.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

The complaint described the tract of land, and alleged that plaintiff was the owner of it; that a petition was presented to the Board of Supervisors of Colusa County, praying for the location and establishment of a public road from the Town of Colusa to the northern boundary line of Colusa County; that the Board appointed viewers to survey and lay out the road; that on the day that these proceedings were had, the plaintiff presented his petition protesting against and objecting to the action of the Board in laying out said road, and claiming damages therefor, should said road be laid out; that subsequently, the viewers thus appointed made their report to the

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Board, to the effect that they had surveyed the road, which ran about one mile and a half through plaintiff's land, and that they had awarded to him, as damages, only one dollar therefor; that the report of the viewers was thereupon accepted and approved by the Board, the road declared a public highway, and ordered to be opened by the Road Overseer of the proper district. The complaint charged that the plaintiff had been greatly damaged by the location of the road; that he was dissatisfied with the award of the viewers, and refused to receive the same. The complaint further charged that the road as located took from the plaintiff a considerable portion of valuable farming land, and necessitated the building of several miles of fencing for the inclosure of plaintiff's land, besides cutting off a portion of the tract of land from the benefits of the water of the Sacramento River, all to plaintiff's damage to the amount of three thousand dollars.

Upon the trial of the case the plaintiff, after proving that he was the owner of the land, and after making his proof upon the question of damages, introduced in evidence a copy of his petition or protest against the action of the Board of Supervisors, and rested his case.

The petition did not state what damages the petitioner would sustain, nor what amount he claimed.

The plaintiff appealed.

The other facts are stated in the opinion of the Court.

H. H. Hartley, for Appellant.

It is not shown that there was any objection to the demand for damages, because there was no specific amount claimed. That the Board knew that the plaintiff, by his remonstrance and petition, claimed more than nominal damages, is beyond question; they could have allowed him one cent. If the Board was made to understand what plaintiff desired, it was all the law requires, and their refusal to comply with what is reasonable, puts an end to the discussion.

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It was the duty of the Board, under the Constitution, to have allowed and tendered him an equivalent for the loss. (*Henry v. Underwood*, 1 Dana, 257.) If, then, the plaintiff has presented his petition to the Board of Supervisors of said county, and said Board has acted upon it and refused to allow him a reasonable sum for his damages, or any more than nominal damages, and that he was dissatisfied with the allowance, and that the Board and he could not agree as to the amount, and that he has refused to receive the sum allowed, then the law, as contended for by the respondent's attorneys and the District Court, has been fully complied with, and the plaintiff is entitled to his action and his actual damages. The law gives the damages, and the Court should not have refused them to him.

A party damaged by acts of a county, city or State, by taking his property for public uses, has his remedy without statutory enactment; he has his right of action independent of the statute.

It should be borne in mind that this Road Act provides no time for the final hearing, mentioned in Section 7 of the Act. The order of the Board confirming the award may be made, the Board adjourn, and not meet again for three months. How, then, is a damnified land owner going to make an effort even to agree with the Board within ten days? There are ten chances to one that there will be no meeting of the Board within ten days. Negotiating with the individual Supervisors will do no good.

The language in the seventh section of the Road Act of 1861, in reference to the person damaged not being able to agree with the Board of Supervisors, means nothing more than that if he accepts the award of viewers, or makes any agreement with the Board for any other sum, he shall not sue the county. And there is no more necessity for his proving that he has *not* made an agreement with the Board, or has made any effort to do so and failed, than there would be in any action of tort in proving that the plaintiff had not made any agreement with the defendant as to the amount of damages.

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Hatch & McQuaid, for Respondent.

We maintain that the plaintiff has no right of action against the county. He had no right to sue the county until he had first presented his claim to the Board of Supervisors of the county for allowance, and until after they had rejected it in whole or in part. He had no right to sue the county until he had made an effort to "agree with the Board of Supervisors as to the amount of damages sustained" by him. (Road Law Statute, 1861, Sec. 7.)

It has been said that a county is not a person or a corporation. Again, it has been said that counties are *quasi* corporations. At common law, an action did not lie against a county; and such was the law of this State until the Legislature passed "An Act prescribing the manner of commencing and maintaining suits by or against counties," passed May 11th, 1854. The rule at common law proceeded upon the principle that a county government is part of the State government, and is, *pro tanto*, a part of the sovereign power. (*Hunsaker v. Borden*, 5 Cal. 228; *Gilman v. Contra Costa Co.*, 8 Cal. 52.)

The twenty-fourth section of the Act creating a Board of Supervisors in the several counties of this State, passed March 20th, 1855, shows how a person having a claim against a county may acquire a right to commence his action. The Supreme Court of this State have frequently had occasion to consider the section of the statute, above quoted, with reference to the right of the citizen to bring and maintain actions against a county. (*Price v. Sacramento Co.*, 6 Cal. 254; *McCann v. Sierra Co.*, 7 Cal. 121.)

By the Court, SHAFER, J.

This is an action to recover three thousand dollars as damages alleged to have been sustained by the plaintiff by reason of the location of a public highway over his land by order of the Board of Supervisors of the defendant county.

A nonsuit was ordered at the trial on the ground that it

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was neither alleged in the complaint nor proved as a fact, that the plaintiff prior to the commencement of the action "could not agree with the Board of Supervisors as to the amount of damages sustained," nor that he had even attempted such agreement.

The language of the statute is as follows: "If any person or persons claiming damages on account of the location or alteration of any road under the provisions of this Act shall be dissatisfied with the award of the road viewers, and cannot agree with the Board of Supervisors as to the amount of damages sustained, and shall refuse to receive the same, such person or persons shall within ten days from the time of the final hearing, commence an action against the county by name for such damages in a Court of competent jurisdiction; which action shall be conducted in like manner as other actions in civil cases in the Courts of Justice in this State." (Acts of 1861, p. 392, Sec. 7.)

Under the Constitution, private property cannot be taken for public use except upon compensation made. It is competent for the Legislature to fix the mode of condemnation, the method by which the damages to individuals shall be determined and the proceedings for their recovery. This power has been fully exercised, in relation to lands taken for public highways, in the Act of 1861. Strict compliance with the requirements of the Act is necessary to accomplish a condemnation on the part of the public, and a like compliance with all the provisions relating to the assessment of damages and their recovery is essential also on the part of the landowner. Under the Act of 1861, a person whose lands have been taken for a public road has no right of action against the county for damages until after a fair and honest attempt on his part to agree upon the amount with the Board of Supervisors. Such endeavor is a condition precedent to his right to sue. The provision is contained in most if not in all of our statutes relating to the condemnation of private property to public use, whether directly, or indirectly through the action of corporations. The object of the provision, wherever

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it appears, is to prevent a waste of money by needless litigation, and to expedite condemnations whenever the public good requires that they should be made. But it is unnecessary to pursue the argument, for in *Harper v. Richardson* (22 Cal. 251), the question was presented and decided, and it is broadly within the analogy of *Gilmer v. Lime Point* (19 Cal. 47).

Not only was the complaint defective on the ground that it contained no averment that the plaintiff "could not agree" with the Board of Supervisors on the damages, but the evidence upon which appellant relies as making out the fact itself, has no tendency to prove it. The petition for the road was presented to the Board of Supervisors on the 4th of August, 1862; and on the same day the plaintiff filed with the Clerk of the Board a petition for "just and reasonable damages," in the event that the road should be laid out. The filing of this paper with the Clerk was the only step taken by the plaintiff from first to last, in the matter of the damages. The fourth section of the Act of 1861 provides that "any person owning land through which it is proposed to locate a public highway, and desiring to apply for damages in consequence of such location, shall make application by petition in writing to the Board of Supervisors on the day on which such application shall be made, wherein he shall set forth the particular road referred to, the amount and character of the land affected thereby, and other circumstances relating to the subject of damages upon such land; and all persons who fail to do so shall be considered as waiving all rights to damages." Obviously, the plaintiff's purpose in filing his petition with the Clerk was to avert the consequence with the statute would have coupled with a failure on his part so to do. The petition was in the nature of a pleading, and was as essential to the life of his claim as is an answer in an ordinary action at law to save a defendant from judgment by default. It was a statute step taken by the plaintiff by way of initiating a claim for damages against the county, and the most that can be said concerning the document is, that the plaintiff, by filing it, took the first

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step in the statute series toward establishing his claim. The petition and the filing of it begin and end in that. If the plaintiff had not filed the petition, there would have been nothing to agree about, for the right would have been lost, and the Supervisors would have been guilty of malversation in office if they had allowed damages to the plaintiff in any amount. An attempt, at least, "to agree with the Board," is a condition precedent to a right of action; and we do not consider that the taking of one step amounts, in legal effect, to the taking of another differing from the first in purpose and essential nature. Nor is the filing of the petition to be set down for evidence that any overture or other move was ever made by the plaintiff looking to a compromise or agreement respecting his claim. He had his statute opportunity of making the merits of his claim known to the Board on the 22d of September, when they met under the sixth section of the Act, for the purpose of final action on the general question and all collateral matters connected therewith. But the plaintiff did not make known to the Board on that occasion, nor thereafter, what he conceived to be the amount of his "just and reasonable damages," nor the amount he would take in conciliation. He did not even attend the meeting. Under this state of facts we cannot consider that the evidence of the plaintiff had any tendency to show that he "*could not* agree with the Board of Supervisors as to the amount of damages sustained," and that he was driven to his action by necessity.

Judgment affirmed.

Mr. Justice RHODES expressed no opinion.

HENRY W. SEALE v. CHARLES McLAUGHLIN

VACATING JUDGMENT AND ALLOWING DEFENDANT TO ANSWER.—A defendant upon whom no service of summons was made, but against whom a judgment has been entered upon his demurrer, after an attorney had appeared and demurred for him without authority, is not entitled to have the judgment vacated where he is informed before judgment that an attorney has appeared for him, and a long time elapses before judgment, and he does not show that he has a meritorious defense.

AFFIRMED BY Appellant.

APPEARANCE OF ATTORNEY WITHOUT AUTHORITY.—The appearance of an attorney for a defendant, who has not been served with summons, gives the Court jurisdiction of the person, even if the attorney appears without authority.

JUDGMENT UPON OVERRULING DEMURRER.—Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the Court to enter a default and judgment for plaintiff upon overruling the demurrer.

• **APPEAL from the District Court, Third Judicial District, Santa Clara County.**

There were several defendants in the action, and upon overruling the demurrer, the Court entered a default against McLaughlin. The attorney did not ask for leave to answer for McLaughlin. McLaughlin alone appealed.

The other facts are stated in the opinion of the Court.

Charles N. Fox, for Appellant.

We claim that the Court erred, whatever may have been the facts in regard to the authority under which McLaughlin had been brought into Court:

First—In treating the joint demurrer of several defendants as the separate demurrer of McLaughlin alone.

Second—In entering default instantan upon overruling demurrer, without giving defendant an opportunity to answer. We think the same rule should apply in such cases as that laid down in the case of *Gallagher v. Delany*, 10 Cal. 410, where the Court held that it was error to render judgment final upon demurrer to plaintiff's complaint; that if the demurrer was sustained, it should have been with leave to amend; and in case plaintiff declined to amend, then the judgment should be entered.

We are entitled to relief under the sixty-eighth section of the Practice Act. This section "applies not only to cases where judgment has been taken regularly, without personal service, as upon publication, but also to cases of judgments entered erroneously, without any service of summons or appearance of defendant." (*Lewis v. Rigney et als.*, 21 Cal. 268.)

In this case there was no service of summons and no author-

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ized appearance. "It is sufficient that the judgment and final process against an individual are *unauthorized*, to justify an application by him to set them aside." (*Lambert v. Converse*, 22 Howard Pr. R. 265.)

And the granting of the relief in this case will not affect the rights of the plaintiff as against the other defendants, and consequently our rights to it need not be affected by the judgment or claim against them. (See *Lewis v. Bigney*, above cited.)

S. O. Houghton, for Respondent.

The judgment had become final by the expiration of the term at which it was rendered. (*Baldwin v. Kramer*, 2 Cal. 583; *Suydam v. Pitcher*, 4 Cal. 281; *De Castro v. Richardson*, 25 Cal. 49.)

Even though the Court had power to grant the motion of defendant, it would not do so unless it was made to appear that the defendant had or would sustain some injury by the judgment.

By the Court, SAWYER, J.

This is an appeal from a judgment entered upon default against defendant, McLaughlin, after overruling demurrer to the complaint, and from an order subsequent to the judgment denying motion to vacate it. The motion was made on affidavits of defendant, Gordon, and his attorney, on the ground that the appearance on behalf of McLaughlin was by mistake and without authority. The action was brought against Gordon and several of his tenants to recover certain lands claimed by Gordon. It does not appear in the affidavits by direct averment that McLaughlin was not also a tenant of Gordon. In fact, there seems to be in Gordon's affidavit, a studied avoidance of any statement as to the relation of McLaughlin to Gordon, or the land. There was, however, conversation between Gordon's clerks and McLaughlin upon the subject, and Gordon states that McLaughlin declined to join in the

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defense, and said he would defend for himself when served. The time to answer being about to expire, Gordon's attorney, by his direction, telegraphed to plaintiff's attorney: "Give us some ten days extension as to all the defendants except McGovern and Ramirez, who are not on our ranch." No answer having been received, to save a default till a stipulation for time could be procured, Gordon's attorney filed a demurrer for Gordon and all the defendants, (including McLaughlin by name,) except McGovern and Ramirez; and notified the plaintiff's attorney that he only did it to procure time, and that he did not intend to argue it. Time was subsequently given to all the defendants for whom the attorneys appeared. When the answer was filed McLaughlin's name was omitted. Gordon and his attorneys disavow any authority to appear for McLaughlin.

On the 12th of January the demurrer of McLaughlin was overruled, and his default for want of answer entered. The defendants who answered appeared, and proofs having been heard, judgment was rendered against all the defendants on the 13th of January. No proceedings were instituted to vacate the judgment against McLaughlin till May 2d, when notice of the motion was served — nearly four months after the entry of judgment, and long after the expiration of the term at which it was rendered.

There is no pretense set up in the affidavits that McLaughlin has any shadow of right to the land, or defense to the action; and McLaughlin himself does not even take the trouble to make an affidavit on his own behalf in the case. On the other hand, it appears by the affidavit of respondent — which is not in any particular contradicted — that he had taken a copy of summons and complaint for the purpose of having it sent to San Francisco for service on McLaughlin; that before service he was informed by his attorney that McLaughlin had appeared, and service was unnecessary; and, in consequence of this information, the summons was returned without service; that soon after receiving this information he saw defendant (McLaughlin) and informed him that Gordon had caused

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an appearance to be entered for him (McLaughlin); that considerable conversation was had between them upon the subject, and that McLaughlin treated the subject with such apparent indifference as to induce respondent to suppose that he (McLaughlin) cared little how the case would result. He also avers — and the averment is wholly uncontradicted — that McLaughlin has no right, title or interest of any kind whatever in the premises, and is but a trespasser thereon without any right whatever.

Conceding, for the purposes of the argument, that the defendant is one of the parties who is entitled to apply to have the judgment vacated after the expiration of the term under section sixty-eight of the Practice Act, we think the Court clearly right in denying the motion, under the circumstances of this case. There was an appearance, which gave the Court jurisdiction. The appearance, by filing demurrer, was on August 20th, 1863, and the judgment was not entered till January 13th, 1864. The defendant was informed of the fact of the appearance, made no objection, and took no steps to vacate it. The other party was misled by his action, and for that reason did not procure a service which he might have done. He does not pretend to show that he has any defense whatever; and the other party, without any contradiction, shows that he had none, but was a mere trespasser. If he has any meritorious defense he has not shown it, and he has manifested a great degree of *laches*, and a singular indifference in regard to his rights by which the plaintiff was misled to his injury. We think the motion properly denied.

There was no error in entering judgment for want of an answer upon the overruling of the demurrer. "When a demurrer to a complaint is overruled, and there is no answer filed, the Court may, upon such terms as may be just, and upon payment of costs, allow an answer to be filed." (Practice Act, Sec. 67.) But it does not follow that it must in all cases be done. Ordinarily, the Court should doubtless allow an answer to be filed where the demurrer has been interposed in good faith, with some ground for supposing that it would

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be sustained. But in this case no leave was asked to file an answer, and the demurrer was manifestly frivolous, and confessedly put in to obtain time, without any intention to rely upon it. Under the circumstances there was, it is true, no improper use intended or attempted to be made of it by the attorneys who put it in. But there was no error in entering judgment upon overruling the demurrer thus interposed.

Judgment and order affirmed.

Mr. Justice CURREY expressed no opinion.

THE NEVADA COUNTY AND SACRAMENTO CANAL COMPANY v. GEORGE W. KIDD *et als.*

IRRELEVANT MATTER IN A COMPLAINT.—Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action.

AMENDED COMPLAINT.—Unless new matter inserted in an amended complaint is entirely foreign to the cause of action in the original complaint, the question will not arise on motion to strike out, whether the amendments in the amended complaint go further than is allowed by our code of procedure touching amendments.

ORIGINAL AND AMENDED COMPLAINTS.—For the purpose of determining whether new matter contained in an amended complaint is entirely foreign to the cause of action contained in the original complaint, the original complaint must receive a liberal construction.

AMENDMENTS TO COMPLAINT FOR WATER RIGHTS.—If the complaint avers the ownership of land in the bed of and near the banks of a stream, and work done thereon to dig a canal and build a dam to use the waters of the stream, and is framed for a judgment to recover possession of the property from one who is averred to have ousted plaintiff, if the plaintiff asks it, he should be allowed to amend his complaint by inserting therein averments of his prior appropriation of the water and a diversion by defendant, with prayer for an injunction.

ALLOWANCE OF AMENDMENTS TO A COMPLAINT.—An amendment should be allowed to a complaint at the request of the plaintiff, so as to make it express the cause of action originally intended but ambiguously expressed, if the intention is manifest on the face of the complaint.

Per SANDERSON, C. J., CURREY, J., *concurring*:

CONSTRUCTION OF A PLEADING.—The common law rule that a pleading must be taken most strongly against the pleader where the language used is ambiguous, has no application where the pleader confesses that his pleading is ambiguous and asks to amend it.

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APPEAL from the District Court, Fourteenth Judicial District, Nevada County.

The following was the original complaint in this action:

"The plaintiff, a body corporate under the laws of the State of California, created on or about the 28th day of June, A. D. 1851, under the name and style of 'The South Yuba Mining and Sacramento Canal Company,' but now exercising its functions and using the corporate name of the 'Nevada County and Sacramento Canal Company,' by virtue of a special Act of the Legislature of the said State of California, which was duly signed, and on the same day approved by his excellency the Governor of said State, to wit: on the 20th day of January, A. D. 1855, whereby the same became a law, said plaintiff in its capacity of a corporate body, and by its name, complaining, charges and avers that on and before, and for a long time prior to the 14th, the 15th, and 16th days of February, A. D. 1855, the plaintiff was the owner in fee, as he is informed and believes, and had been in the peaceable and quite possession of the following described sections, lots, pieces, or parcels of land, enjoying the rents and profits thereof, to wit: the first commencing on the South Yuba River, four hundred and twenty rods above the summit of the gap which divides the south branch of the said Yuba from the waters of Bear River, and which summit is a part of a small valley reaching within eighty rods of the said Yuba River, and better known by the name of "Bear Valley Gap." Said point of commencement is designated by being a short distance above some falls or rapids in said river, and where a pine or fir tree had fallen, and on or about the said 14th, 15th, and 16th days of February, A. D. 1855, did lie quite across the stream of the said South Yuba River, above the water thereof; thence down the east side of said river with its meanders three hundred and forty rods; and thence eighty rods or thereabout into said valley to a cabin or small house erected by plaintiff; said section, lot, piece, or parcel of land having a width of six hundred and sixty feet, more or less, for its whole length, with the

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bank of the river and the mountains on the north and north-east, and on the south and southeast, Bear Valley; said premises being situated in part in said Bear Valley Gap, and a gorge running down from the mountains on the right hand side of said river, as the same is ascended from said gap, as he is informed and verily believes.

"The other section, lot, piece, or parcel of land, adjoins the first above described premises, commencing at said cabin or small house, having the same length and width, to wit: a length of four hundred and twenty rods, by a width of six hundred and sixty feet, more or less, and extending southwest into the said Bear Valley, and being a part thereof, as he is informed and verily believes.

"That by virtue of its ownership of said sections, lots, pieces or parcels of land, said plaintiff entered on said land with all and singular the appurtenances appertaining thereto, and was possessed thereof; and the said plaintiff being so possessed of said land and premises, caused levels to be taken, and a survey to be made for a flume, canal or ditch, and caused notices to be posted to the effect that plaintiff claimed all the waters of the South Yuba River for mining and other purposes, and thereupon plaintiff erected a cabin or small house, and commenced to work upon said flume, canal or ditch, and for a long time, to wit: from on or about the month of June, A. D. 1851, until on or about the 16th day of February, A. D. 1855, did work thereon by its representatives, agents, and servants, and did enjoy the profits and revenues thereof, as he is informed and verily believes. And that the point above described, where said pine or fir tree had fallen and lay across said stream, was located, held, enjoyed, and possessed by the plaintiff, as a location for a dam to turn the waters of the said South Yuba River into its flume, canal or ditch, and that upon said location and premises said plaintiff had expended large sums of money; that the defendants in the above entitled cause afterwards, to wit: on or about the sixteenth day of February, A. D. 1855, with force and arms, entered into and upon the above described two sections, lots,

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pieces or parcels of land, with the appurtenances belonging thereto, in the possession of said plaintiff, and the said defendants ejected said plaintiff out of the possession of the said two sections, lots, pieces or parcels of land, and out of all and singular the appurtenances thereunto belonging. And that said defendants did, on or about the 16th day of February, A. D. 1855, wrongfully and unlawfully, with force and arms, drive off the agents and servants of said plaintiff, who were then, in behalf of plaintiff, employed in the construction of the said dam which plaintiff was then building at the aforesaid point, for the purpose of diverting the waters of the stream of the said Yuba River, and that said defendants have, since said 16th day of February, constructed a flume, which runs from the point above described where said pine or fir tree lay across the said Yuba River, through the two sections of land above described belonging as aforesaid to plaintiff, southwest towards the summit dividing the waters of Bear River and Steep Hollow Creek, on the line surveyed through said lands of plaintiff, and upon which plaintiff has had his agents and servants employed in constructing its said flume, canal or ditch, and that said defendants unlawfully detain from plaintiff all said lots of land, and the appurtenances thereunto belonging, together with all the improvements made by said plaintiff as aforesaid, together with its line of survey, and have wrongfully and unlawfully, with force and arms, obstructed and prevented the erection of the works designed by plaintiff, thereby causing to plaintiff great damages and loss, to wit: damages in the sum of one hundred thousand dollars, and that said amount has accrued on account of said wrongful acts since the 6th day of March, A. D. 1855.

"Wherefore plaintiff brings this suit, and prays for a judgment for a restitution of all the above described premises, and one hundred thousand dollars damages, together with costs and money expended, and disbursements, and for general relief."

The Court, on defendants' motion, struck out of the amended complaint, as irrelevant and redundant, the following:

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"That said land and said point on said river was owned, possessed, and occupied by plaintiff, for the purpose of constructing a canal through and upon the same, to divert and carry the water of said river flowing down to said point into the mining region below said Bear Valley, to be used for mining and other purposes, and that plaintiff did locate and survey a line of ditch or canal for the purpose aforesaid, upon and through the land aforesaid, from the point aforesaid on said river, and located and occupied said point for the purpose of constructing a dam thereat and thereon, to divert all the water of said river at said point into the canal located by plaintiff as aforesaid. That having made said location of said claim and said canal, and having taken and acquired actual and peaceable possession of the premises aforesaid, plaintiff commenced the actual construction of a dam at the point aforesaid, for the purpose aforesaid, and the construction of a canal for the purpose aforesaid, on the line and upon the premises aforesaid, whereby plaintiff alleges that by reason of the matter hereinbefore stated it became entitled to the exclusive use and possession of the water flowing down said river at the point aforesaid, and the right to divert the same from its natural bed." * * * "and soon thereafter commenced the construction of a canal upon the line located by plaintiff as aforesaid, and through the land aforesaid, and the construction of a dam at the point aforesaid, for the purpose of diverting the water of said Yuba River into such canal, and continued such construction until they completed said dam and canal, the same being the canal known and called the South Yuba Canal, and diverted the water of said river at the point aforesaid by means of said dam and canal through said canal."

The amended complaint contained a prayer for an injunction. Defendant recovered judgment, and plaintiff appealed and assigned as error the order of the Court striking out portions of the complaint. The complaint as left, after the Court had made the order striking out, stated a cause of action for recovery of possession of the land.

Argument for Appellant.

The other facts are stated in the opinion of the Court.

E. Casserly, and *W. H. L. Barnes*, for Appellant.

The complaint, though inartificially, or even imperfectly drawn, indicates distinctly enough the scope and purpose of the suit. The action is for a series of trespasses upon the plaintiff's lands and property, but mainly upon its water rights in and connected with the same, and especially its rights to appropriate and divert all the waters of the South Yuba River, for mining and other purposes, by and through a dam connecting with a ditch or flume in course of construction at and from a point on the river, and passing through and over the plaintiff's lands.

In this State the liberal exercise of the right of amendment of pleadings is deemed to be highly conducive to the full and prompt administration of justice, and is broadly sustained by this Court. A few cases will be cited: first, for the general doctrine, and next for the particular applications of it:

General doctrine:—*McMillan v. Dana*, 18 Cal. 349, subd. 4; *Roland v. Kreyenhagen*, 18 Cal. 457; *Pierson v. McCahill*, 22 Cal. 130, 131; *Lestrade v. Barth*, 17 Cal. 289; *Gillen v. Hutchinson*, 16 Cal. 156, sub. fin.; *Smith v. Yreka County*, 14 Cal. 201, 202; *Connolly v. Peck*, 3 Cal. 82; *Gallagher v. Delany*, 10 Cal. 410; and see 12 Cal. 449.

Particular applications:—*McDonald v. Bear River Company*, 15 Cal. 145, 149—complaint held by this Court fatally defective as “looking to equitable relief only, and not sufficient to authorize a determination of the legal rights of the parties,” (p. 148,) allowed in this Court, upon remanding the cause, to be amended so as to obviate the defect. *Connolly v. Peck*, 3 Cal. 75–82—to the same effect. *Robinson v. Smith*, 14 Cal. 254—joint plea of Statute of Limitations amended on the trial, after it was held bad, by the filing of a separate plea. *Tryon v. Sutton*, 13 Cal. 490, 493, 494—complaint on assignment of a mortgage by a married woman without her husband's concurrence; held fatally defective, but allowed to be amended.

George Cadwalader, for Respondents.

It was a pure and simple complaint in ejectment, averring title and possession in plaintiff, an ouster and detention by defendants, and claiming judgment for restitution. Instead of a simple allegation of ouster by defendants, the complaint averred at length the manner of the ouster, or the intention of the defendants in seizing the land, etc. These comments were unnecessary and improper, (*Garrison v. Sampson*, 15 Cal. 95; *Boles v. Weifenback*, 15 Cal. 144; *Payne & Dewey v. Treadwell*, 16 Cal. 243,) and could have been stricken out on motion, (*Coryell v. Cain*, 16 Cal. 571;) but they do not alter the nature of the action, which was simple ejectment to recover possession of certain parcels of land.

The amendments raise the question of the right to the use of the waters of the Yuba, and claim damages for their diversion by defendants. Now, the defendants could admit every material allegation of the original complaint, and it would not follow that plaintiff is entitled to use a drop of the Yuba water. The plaintiff may have owned the strip of land, as claimed, and the defendants, by prior appropriation, or subsequent appropriation and adverse use, may have acquired a right to the water. The numerous cases cited by appellant's counsel in their brief merely show that where there has been no gross abuse of discretion by an inferior Court in the matter of an amendment, the appellate Court will not interfere.

By the Court, SANDERSON, C. J.

The motion to strike out certain portions of the amended complaint was made upon two grounds: first, because the same were irrelevant and redundant; and second, because they contained a cause or causes of action not embraced in the original complaint.

So far as the first ground is concerned, our examination must be confined to the amended complaint, for it cannot be said that any matter contained in one pleading is irrelevant or redundant to a cause of action set out in another and differ-

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ent pleading. It is obvious on inspection that the matter stricken from the amended complaint was not irrelevant or redundant to the cause of action therein set forth, and we do not understand counsel for the respondents as claiming that it was. We may therefore dismiss that branch of the motion without further comment.

It is unnecessary to discuss the questions (so elaborately argued by counsel) which would be presented were we to assume, as alleged in the second ground upon which the motion was made, that the amended complaint contains a cause or causes of action not alleged, or more properly speaking, attempted to be alleged in the original, for the reason that, after a careful examination and comparison of both, we have come to the conclusion that such is not the fact.

The matter stricken out of the amended complaint mainly relates to the alleged right of the plaintiff to the use of the waters of the South Yuba River, and the alleged interference by the defendants with the enjoyment of that right, to the damage and prejudice of the plaintiff. Is this matter entirely foreign to the original complaint? If it is, the question as to whether the amended complaint goes further than is allowed by our code of procedure touching amendments arises, otherwise not.

For the purpose of determining this question, the allegations of the original complaint must receive a liberal construction, with a view to substantial justice between the parties, (Prac. Act, Sec. 70;) and we may add, that they must be read in the light of the law governing water rights in the mineral regions of this State, as it stood at the time the complaint was drawn, which was as far back as October, 1855. At that time this branch of our local law had not altogether cast off its milk and swaddling clothes. The rules governing the acquisition and tenures of water rights by miners and ditch or canal companies had not been so clearly defined as they have been since that time. The profession had not fully learned to regard those rights as something separate and apart from an ownership of the soil, but to some extent, at least, continued to regard

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them as in some measure dependent upon a right or title to the land. There was also some doubt and conflict of opinion as to what was the proper remedy in case of an ouster or interference with the possession and enjoyment of such rights — whether it was necessary for the plaintiff to sue for the possession of the land, or content himself with alleging a prior appropriation of the water merely. The original complaint in this case, as will appear hereafter, was drawn upon the former theory. When, therefore, we read it for the purpose of ascertaining what is the substantial cause of action therein set forth, or attempted to be set forth, we must not overlook the condition of the law as above described.

The complaint commences by averring that the plaintiff is a corporation, and, although it is not expressly averred, yet it is apparent from the name and style of the corporation and other matters set out in the complaint, that the corporation was formed for the purpose of carrying on the canal or ditch business, as known and understood in the mineral regions of the State. Being a corporation, the plaintiff had no capacity to take or hold land beyond the necessities of its business. The very object and purpose of its formation was the acquisition and use of water rights and privileges as a principal thing, and not the acquisition and use of land except as something incidental to the main purpose. It is true that this fact, by itself considered, is not entitled to much weight, but when considered in connection with other facts and circumstances which appear, as we shall presently see, in the body of the complaint, it is worthy of notice in determining what was the substantial cause of action upon which the plaintiff relied, and which it intended to allege.

The complaint thereafter substantially takes on the form of a complaint for the recovery of real property and avers that the plaintiff is the owner in fee of certain lands, describing them in part as bounded by the South Yuba River; but it is apparent from what follows the description of the lands that a recovery of the possession of the lands was not the sole and

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only purpose of the action. On the contrary, the plaintiff seems to have alleged its ownership of the land more by way of inducement than as a principal thing, or as a supposed necessary foundation for the water rights or privileges subsequently asserted and claimed; for immediately upon the heel of the description of the lands, the complaint proceeds in these words: "*That by virtue of its ownership of said sections, lots, pieces or parcels of land, said plaintiff entered on said land with all and singular the appurtenances pertaining thereto, and was possessed thereof; and the said plaintiff, being so possessed of said land and premises, caused levels to be taken and a survey to be made for a flume, canal or ditch, and caused notices to be posted to the effect that plaintiff claimed all the waters of the South Yuba River, for mining and other purposes, and thereupon the plaintiff erected a cabin or small house and commenced to work upon said flume, canal or ditch, and for a long time, to wit: from on or about the month of June, 1851, until on or about the 16th day of February, 1855, did work thereon by its representatives, agents and servants, and did enjoy the profits and revenues thereof, as it is informed and verily believes. And that the point above described, where said pine or fir tree had fallen and lay across said stream, was located, held, enjoyed and possessed by the plaintiff as a location for a dam to turn the waters of the said South Yuba River into its flume, canal or ditch, and that upon said location and premises said plaintiff had expended large sums of money; that the defendants in the above entitled cause afterwards, to wit: on or about the 16th day of February, 1855, with force and arms, entered into and upon the above described two sections, lots, pieces or parcels of land, with the appurtenances belonging thereto, in the possession of said plaintiff, and the said defendants ejected said plaintiff out of the possession of the said two sections, lots, pieces or parcels of land, and out of all and singular the appurtenances thereunto belonging.*" By the word "appurtenances" the pleader manifestly refers to the plaintiff's alleged water rights.

Thereafter it is averred in substance that defendants entered

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and drove off the plaintiff's agents at work upon the dam and canal, and took forcible possession of the plaintiff's dam and survey, and constructed for themselves a dam and flume and forcibly prevented the plaintiff from proceeding with the erection of the works designed by it, to its damage, in the sum of one hundred thousand dollars, and closing with a prayer for restitution, damages and general relief.

To hold that this complaint was framed solely for the purpose of recovering the possession of the lands therein described, regardless of all right or claim to the waters of the South Yuba River for canal purposes, would be to hold that more than half of the body of the complaint is meaningless, and was inserted without design and for no useful purpose. We cannot so regard it. On the contrary, we are satisfied, from the whole tenor and scope of the complaint, that in the mind of the pleader the trespass upon the plaintiff's alleged water rights by the defendants was the gravamen of the action, and that a restoration to those rights was the principal object sought by the institution of the suit.

It follows that the Court below erred in allowing the motion to strike out, and that the judgment must be reversed and the cause remanded for further proceedings.

Ordered accordingly.

SAWYER, J., dissenting.

I dissent.

On petition for rehearing, SANDERSON, C. J., delivered the following opinion, CURREY, J., concurring:

A petition for rehearing has been filed in which it is suggested that in the interpretation of the original complaint in this case we have adopted the wrong rule of construction. We adopted the rule prescribed in the seventieth section of the code of procedure, which is in the following language:

"In the construction of a pleading for the purpose of deter-

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mining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties."

If the foregoing rule can have any application whatever it is to a case like the present.

The common law rule that a pleading must be taken most strongly against the pleader where the language used is ambiguous has not, as counsel seems to suppose, been forgotten by us; but we did not fall into the error of supposing that it had any application to the question presented by the record in this case. Where the pleader stands upon his pleading and maintains its sufficiency in law in the presence of a demurrer or other hostile attack, the rule to which counsel appeals with so much confidence undoubtedly applies. In such a case all doubts are to be resolved against the pleader. He asks no mercy and is entitled to no quarter. But that is not this case. Here the pleader confesses that his pleading is bad, and that it imperfectly and ambiguously expresses his meaning and intent, and he therefore appeals to the mercy of the Court to be allowed to amend it "in furtherance of justice," so as to present more clearly his cause of complaint. To such a case, the rule under consideration, which is a rule of war and not of mercy, can have no possible application; on the contrary, the utmost liberality, consistent with the ends of justice, ought to be exercised by the Court.

But it is, in effect, further claimed that the rule in question ought to be applied to this case at least, because the plaintiff has allowed it to sleep in the Clerk's office for nearly ten years. If the case has been allowed to sleep to the prejudice of the defendants, the fault is theirs. They have had it in their power to force the case to a final result at any time, as much so as the plaintiff. Why the case was thus allowed to sleep is entirely unexplained by the record, and we are bound to presume that it was by mutual consent. Such being the case, neither party can complain of the delay, whether there was any good cause for it or not.

Rehearing denied.

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SHAFTER, J., concurring specially.

I concur in the order.

Mr. Justice RHODES and Mr. Justice SAWYER did not express any opinion on the petition for rehearing.

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EXTRA ANNOTATION
TO
PRECEDING VOLUME

VOLUME XXVIII.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

28 Cal. 11-12. PRADER v. GRIMM.

Injunction Bond.—Plaintiff in action on, cannot recover attorney's fees unless they have been actually paid or secured, pp. 12, 13.

Principle of the decision approved and applied in *Roussin v. Stewart*, 33 Cal. 212; *Porter v. Hopkins*, 63 Cal. 54; *Elder v. Kutner*, 97 Cal. 495; and *California Dry-Dock Co. v. Armstrong*, 8 Sawy. 529; S. C. 17 Fed. Rep. 220. Distinguished in *Lott v. Mitchell*, 32 Cal. 25, holding that the sheriff could not maintain an action on an indemnity bond because a judgment had been recovered against him, but must first pay the judgment. Denied in *Wittich v. O'Neal*, 22 Fla. 599, as being contrary to the weight of authority. Cited, to the ruling stated, in 77 Am. Dec. 159, 160, note.

28 Cal. 13-21. FORD v. CHAMBERS.

Change of Possession of Goods Sold.—When vendee takes entire control of business, and an inventory is taken before levy, change of possession is sufficient, and retention of the clerks of the vendor in such case will not vitiate the transfer, pp. 119, 120.

Cited, as authority with approval, in *Levy v. Scott*, 115 Cal. 48; *Grady v. Baker*, 3 Dak. Ter. 300; *Shelton v. Franklin*, 68 Ill. 338; *Gray v. Sullivan*, 10 Nev. 424; and 11 Am. Rep. 90, note. Distinguished in *Howard v. Dwight*, 8 S. Dak. 404, in which case the vendee did not assume control of the business. Distinguished also in *Gray v. Sullivan*, 10 Nev. 437, dissenting opinion of Beatty, J.

General Citations.—In *Waldron v. Waldron*, 85 Cal. 259, holding that where, upon the findings of fact, the judgment should have been for the defendant and the case appears to have been thoroughly tried as to the facts, and it appears very improbable that a new trial would result more favorably to the plaintiff, the judgment will be reversed, and the court below directed to render judgment for defendant.

28 Cal. 21-26. DORSEY v. SMYTH.

Office and Officer.—Salary of an office is incident to the title, and payment of the salary to one in possession without title will not prevent the one having title from receiving the salary, p. 25.

Affirmed in *Stratton v. Oulton*, 23 Cal. 51; *Carroll v. Siebenthaler*, 37 Cal. 195; *People v. Potter*, 63 Cal. 128; *Burke v. Edgar*, 67 Cal. 184; and *Ward v. Marshall*, 96 Cal. 159; S. C. 31 Am. St. Rep. 200. Approved as authority in *Mayfield v. Moore*, 53 Ill. 432; S. C. 5 Am. Rep. 55; *Watterman v. Railroad Co.*, 139 Ill. 669; S. C. 32 Am. St. Rep. 235; *Adams v. Doyle*, 139 Cal. 680, on point that incumbent cannot claim salary unless lawfully entitled to hold the office; *City v. Luthardt*, 191 Ill. 523; *State v. Walbridge*, 153 Mo. 203; *Pratt v. Swan*, 16 Utah, 502; and *Rasmussen v. Board*, 8 Wyo. 289, 294, 297, 300, holding employee wrongfully discharged so entitled on reinstatement; *Brown v. Galveston etc. Co.*, 92 Tex. 524, applying rule to officer of private corporation absent without leave; *Williams v. Clayton*, 6 Utah, 89, on point that mandamus will lie to compel payment of the salary; *Booker v. Donohue*, 95 Va. 363, sustaining action for salary by officer wrongfully elected against the one who had recovered it; *Kreitz v. Behrensmeyer*, 149 Ill. 503, and holding that if an officer de facto has received the salary, fees, and emoluments, he is liable therefor to the officer de jure in an action for money had and received. So, to same effect, in *Douglas v. State*, 31 Ind. 437, 442; *State v. Carr*, 129 Ind. 57; S. C. 28 Am. St. Rep. 174; *McCue v. County of Wapello*, 56 Iowa, 704; S. C. 41 Am. Rep. 139; *Auditors v. Benoit*, 20 Mich. 192, in dissenting opinion of Cooley, J., *Stuhr v. Curran*, 44 N. J. L. 202, in dissenting opinion of Beasley, J.; *State v. Tate*, 70 N. C. 163; *Fylpoa v. Brown County*, 6 S. Dak. 640; *Chowning v. Boger*, 2 Tex. Civ. App. 653; *Board v. City of Decatur*, 64 Tex. 11; S. C. 53 Am. Rep. 737; *Nicols v. McLean*, 101 N. Y. 538; S. C. 54 Am. St. Rep. 736; and *Blair v. Marye*, 80 Va. 492. And so, in *Selby v. Portland*, 14 Oreg. 250; S. C. 58 Am. Rep. 312, but holding that the action cannot be maintained until there has been an adjudication in a direct proceeding declaring the complainant entitled to the office, and the incumbent a usurper. Cited, to the ruling stated, in 19 Am. Dec. 69, note; 27 Am. Rep. 754, note; 43 Am. Rep. 363, note; and 10 Am. St. Rep. 285, note. Denied in *Gorman v. County Commrs.*, 1 Idaho, 658; *Commissioners v. Anderson*, 20 Kan. 306; S. C. 27 Am. Rep. 172 (but see *Rule v. Tait*, 38 Kan. 765); *Auditors v. Benoit*, 20 Mich. 183; S. C. 4 Am. Rep. 386; and *Stuhr v. Curran*, 44 N. J. L. 186; S. C. 43 Am. Rep. 355.

General Citations.—In *Blair v. Marye*, 80 Va. 496, as authority that an officer's remedy for withholding salary attached to his office is by mandamus; *People v. Hartley*, 82 Am. Dec. 762, note, as authority for sufficiency of official bond. Referred to in *Stratton v. Oulton*, 23 Cal. 58, as having no bearing upon any point raised in the proceeding then

before the court, which was an application for a peremptory writ of mandamus.

28 Cal. 26-37. **LEESE v. CLARK**. S. C. before, 18 Cal. 535; 20 Cal. 387, where the general facts pertaining to the case are fully reported. S. C. again, 29 Cal. 665.

Judgment.—Entry of by clerk is a ministerial act, p. 36.

Affirmed in *County of Sacramento v. Central Pac. R. R. Co.*, 61 Cal. 255.

General Citations.—In *Schmidt v. Oregon Gold Min. Co.*, 28 Oreg. 25, S. C. 62 Am. St. Rep. 762, holding that where it appears in a decree that it was entered upon consent of the defendant, and it grants the relief prayed for in the complaint, and fixes the compensation of the plaintiff's attorneys and of the referee and stenographer, the consent of the plaintiff thereto will be presumed on appeal; 60 Am. Dec. 599, note, as authority that one or more defendants may be joined in ejectment, and they may answer separately, or demand separate verdicts; but, if they do not, they will be concluded by the general verdict.

28 Cal. 37-44. **RAMSDELL v. FULLER**. 87 Am. Dec. 103.

Husband and Wife.—Property purchased during coverture with funds constituting part of separate estate of wife, will also be her separate estate, p. 42.

Affirmed in *Kraemer v. Kraemer*, 53 Cal. 305, holding that real property purchased during coverture with money which was the separate property of either husband or wife, is also his or her separate property. Cited as authority in *Warren v. Brown*, 57 Am. Dec. 194, note, that a married woman can make a valid purchase of real estate without the consent of her husband.

Cloud on Title.—A mortgage by a grantee of a husband of property purchased with a wife's separate funds, and deeded to her during coverture, is a cloud upon her title, which equity will remove, p. 43.

Cited as authority, holding that where a sheriff's sale, though ineffectual to pass title, would yet be sufficient to cast a cloud upon plaintiff's title, a court of equity will enjoin the sale, in *Porter v. Pico*, 55 Cal. 176. Cited, also, to the ruling stated, in 28 Am. St. Rep. 33, note. Distinguished in *Archbishop of S. F. v. Shipman*, 69 Cal. 591, holding that a sale under a judgment for the foreclosure of a lien will not be enjoined as casting a cloud upon title, at the instance of one not a party to the judgment.

Community Property.—Presumption is, that property conveyed to either spouse for a money consideration is common property, and this presumption can only be overcome by clear and satisfactory evidence, p. 42.

Affirmed in *Peck v. Vandenberg*, 30 Cal. 42, 55; *Peck v. Brummagim*, 31 Cal. 448; S. C. 89 Am. Dec. 201; *Higgins v. Higgins*, 46 Cal. 263; *Schuyler v. Broughton*, 70 Cal. 283; *Morgan v. Lones*, 78 Cal. 62; and *Dimmick v. Dimmick*, 95 Cal. 327. Approved as correctly stating the law prior to the amendment of 1889 to section 164 of the Civil Code, in *Jackson v. Torrence*, 83 Cal. 529; *Tolman v. Smith*, 85 Cal. 284; and *Gwynn v. Diersen*, 101 Cal. 565. Cited in *Svetinich v. Sheean*, 124 Cal. 218, 71 Am. St. Rep. 52, holding property not subject to sale on execution against wife; *Neher v. Armijo*, 9 N. Mex. 334, but holding presumption not conclusive; holding that parol evidence is admissible to show that the consideration of a deed was other property given in exchange, instead of a money consideration as expressed in the deed, in *Lake v. Bender*, 18 Nev. 385; and cited, to the ruling stated, in 58 Am. Dec. 112, note; 73 Am. Dec. 543, note; 86 Am. Dec. 634, 637, 638, note; and 96 Am. Dec. 423, note. The California Civil Code, section 164, as amended, now provides that: "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

Constructive Notice.—Record of deed to wife is notice to all the world that the land may be the separate property of the wife, and is sufficient to put purchasers upon inquiry, p. 44.

Cited as authority in *Peck v. Vandenberg*, 30 Cal. 36, 60; *Vassault v. Austin*, 36 Cal. 697, 699, 700; *Higgins v. Higgins*, 46 Cal. 264; *Hassey v. Wilke*, 55 Cal. 529; *McComb v. Spangler*, 71 Cal. 427; *Jackson v. Torrence*, 83 Cal. 529; and 86 Am. Dec. 639, note.

28 Cal. 44-58. STRATTON v. OULTON.

Office and Officer.—Salary annexed to public office is incident to the title of the office, and not to its occupation and exercise, p. 51.

Affirmed in *Carroll v. Siebenthaler*, 37 Cal. 195; *People v. Potter*, 63 Cal. 128; and *Burke v. Edgar*, 67 Cal. 184. Approved in *State v. Harrison*, 113 Ind. 440; S. C. 3 Am. St. Rep. 667; *McCue v. County of Wapello*, 56 Iowa, 704; S. C. 41 Am. Rep. 139; *Meagher v. Storey County*, 5 Nev. 250; *Board v. City of Decatur*, 64 Tex. 11; S. C. 53 Am. Rep. 737; and *Blair v. Marye*, 80 Va. 492. Cited in *State v. Carr*, 129 Ind. 57, where other officer unlawfully held over; *Pratt v. Swan*, 16 Utah, 497, 502, noted under *Dorsey v. Smyth*, 28 Cal. 21; 19 Am. Dec. 60, note; and 64 Am. Dec. 54, note. Denied in *Stuhr v. Curran*, 44 N. J. L. 186, S. C. 43 Am. Rep. 355, holding that an officer de jure, having ousted an officer de facto holding in good faith, cannot recover from him the fees of the office received by him.

Same.—Officer may hold over until his successor is elected or appointed, and qualified, p. 55.

Affirmed in *People v. Stratton*, 28 Cal. 389, 390; *People v. Tilton*, 37

Cal. 623; *People v. Parker*, 37 Cal. 646; *Treadwell v. Yolo County*, 62 Cal. 566; *People v. Hammond*, 66 Cal. 658; and *Rosborough v. Boardman*, 67 Cal. 118, case holding that a public office does not become vacant except upon the happening of one of the events enumerated in the Political Code, section 906. Ruling approved in *State v. Wells*, 8 Nev. 109; *State v. Boucher*, 3 N. Dak. 399; and *Wheeling v. Black*, 25 W. Va. 277. Cited, as the view adopted by the American courts, in *State v. Harrison*, 113 Ind. 440, S. C. 3 Am. St. Rep. 667, and such is the rule under a provision of the Indiana constitution. So, in *State v. Simon*, 20 Oreg. 378, under a provision of the Oregon constitution; so in *State v. Murphy*, 32 Fla. 153, under Florida constitution; and so in *United States v. Justices*, 10 Fed. Rep. 464, and applied to a resigning officer, construing provisions of the constitution of Tennessee on the subject. Cited, but not assented to as a rule of universal application, in *People v. Bull*, 46 N. Y. 65; S. C. 7 Am. Rep. 308. So in *Territory v. Stokes*, 2 N. Mex. 68, holding that the rule has no application to a recess appointment.

Officers—Term.—Rule as to holding over does not apply to judicial officers, p. 56.

Cited in *People v. Campbell*, 138 Cal. 16, noted under *People v. Whitman*, 10 Cal. 38.

General Citations.—Referred to in *People v. Stratton*, 28 Cal. 387 (which was an information in the nature of a *quo warranto*), as setting forth the facts and the position of the parties in the litigation. Cited in *People v. Parker*, 37 Cal. 643, as trenching somewhat upon the doctrine announced in *People v. Reid*, 6 Cal. 288; and *People v. Mixner*, 7 Cal. 524; *People v. Parker*, 37 Cal. 647, discussing authority of governor to appoint to office.

28 Cal. 58-59. **WAKEMAN v. COLEMAN.**

Appeal.—In order to show that the required undertaking has been given, it is sufficient to set it out in the transcript, and certify its correctness, p. 59.

Cited in *Pacific etc. Co. v. Edgar*, 132 Cal. 198, noted under *Franklin v. Reiner*, 8 Cal. 540; *Railroad Co. v. Anderson*, 77 Cal. 299, and said to be no longer the law, as under the provisions of the Code of Civil Procedure, the undertaking on appeal is not one of the papers required to be set out in the transcript, and should not be embodied therein.

28 Cal. 65-68. **STOUT v. COFFIN.**

Pleading.—The proof must correspond with the substantial allegations of the pleadings, p. 67.

Cited in *Nichols v. Randall*, 136 Cal. 431, denying recovery because of variance; *Higgins v. Graham*, 143 Cal. 134, discussing general rules as

to variance; *Clark v. Phoenix Ins. Co.*, 36 Cal. 175, action on policy of insurance; *Reed v. Norton*, 99 Cal. 619, action to enforce mechanic's lien; and *Owen v. Meade*, 104 Cal. 182, action for professional services rendered as attorney.

28 Cal. 68-71. PEOPLE EX REL. CARPENTIER v. LOUCKS.

New Trial.—Pendency of motion for, does not stay proceedings under the judgment, p. 70.

Affirmed in *Harris v. Barnhart*, 97 Cal. 550; and cited as authority to the ruling stated in *Saville v. School District*, 22 Kan. 529; *Ex parte Craig*, 130 Mo. 595; *Young v. Brehe*, 19 Nev. 383; and *Savings Bank v. Griswold*, 50 Neb. 786; *Blyth v. Swenson*, 15 Utah, 365, as to dismissal of appeal, in dissenting opinion of Miner, J.

Mandamus.—Under constitution of 1849 the supreme court had original jurisdiction in cases of mandamus, p. 71.

Cited in *Hyatt v. Allen*, 54 Cal. 372, dissenting opinion of Thornton, J.

Same.—Clerk of court may be compelled by writ of mandate to issue process to enforce a judgment, notwithstanding his liability on his official bond for damages for refusal to do so, p. 71.

Cited in notes, 74 Am. St. Rep. 152, 153, and 70 Am. Dec. 714.

28 Cal. 75-97. MCGARRAHAN v. MAXWELL.

Appeal.—Effect of is, to suspend all proceedings in the court below, p. 91.

Affirmed in *McGarrahan v. Mining Co.*, 49 Cal. 336; *Harris v. Barnhart*, 97 Cal. 550; and *Spears v. County of Modoc*, 101 Cal. 304. Ruling approved in *Glenn v. Brush*, 3 Colo. 35; *Sharon v. Hill*, 11 Sawy. 305, 371; *S. C. 26 Fed. Rep.* 347, 391. Cited in *Slaughter-House cases*, 10 Wall. 297, holding that an appeal from a decree denying an injunction does not operate as a stay of proceedings, nor does an appeal from an order dissolving an injunction suspend the operation of the order.

28 Cal. 99-101. CORDER v. BAXTER.

Patent, if not void upon its face, cannot be collaterally attacked by one claiming no higher title, p. 100.

Cited in *Hagar v. Lucas*, 29 Cal. 312, and applied to patent for Mexican grant of land; and principal of the decision approved in *Rondell v. Fay*, 32 Cal. 365; *Durfee v. Plaisted*, 38 Cal. 83; and *Schieffery v. Tapia*, 68 Cal. 186. Cited, to the ruling stated, in 85 Am. Dec. 93, note.

New Trial.—Refusal by moving party to argue motion for, is not an abandonment of the motion, p. 101.

Approved in *Chabot v. Tucker*, 39 Cal. 435. So, in *State v. Central*

Pac. R. R. Co., 17 Nev. 267, and the rule held applicable where either party calls up the motion.

28 Cal. 101-102. DENNIS v. PACKARD.

Indemnity.—Sheriff cannot avail himself of summary remedy against indemnifying sureties, without strict compliance in giving notice of action, p. 102.

Cited, to the ruling stated, in *Charles v. Hoskins*, 83 Am. Dec. 357, note, where the subject is discussed at length.

28 Cal. 102-105. STEVENSON v. SMITH. 87 Am. Dec. 107.

Pleading.—When damages are special, the facts out of which they arise must be specially alleged in the complaint or they cannot be recovered, p. 104.

Affirmed in *Gay v. Winter*, 34 Cal. 162, damages for wrongful act causing death; *Lewiston Turnp. Co. v. Shasta etc. Road Co.*, 41 Cal. 565, damages caused by obstructing public highway; and *Treadwell v. Whittier*, 80 Cal. 580; S. C. 13 Am. St. Rep. 180, damages for injuries to person caused by falling of elevator. Cited, as authority to the ruling stated, in *Tucker v. Parks*, 7 Colo. 69, 70; *Parker v. Bond*, 5 Mont. 11; *Buckley v. Buckley*, 12 Nev. 435; *The Director*, 11 Sawy. 501; S. C. 26 Fed. Rep. 713; 100 Am. Dec. 217, note; 13 Am. St. Rep. 200, note.

Appeal.—Error of court in refusing to allow a party costs cannot be reviewed on appeal from an order denying a new trial, p. 105.

Cited in *Laaky v. Davis*, 33 Cal. 678, and holding that an appeal does not lie from an order made on a motion to retax costs. So in *Dooly v. Norton*, 41 Cal. 441, 443, but holding that an order on a motion to retax costs, if made after the entry of judgment, is a special order made after final judgment, from which an appeal lies, explaining *Laaky v. Davis*, *supra*.

General Citations.—In *Jones v. St. Johns Co.*, 2 Idaho, 60, and holding that on appeal the court will only notice the errors committed against the appellant; 90 Am. Dec. 438, note, as to damages recoverable on attachment bond for wrongful attachment.

28 Cal. 105-107. FARWELL v. JACKSON.

Statute of Limitations cannot be taken advantage of, on demurrer, without specially pointing out the objection in the demurrer, p. 107.

Cited as authority that the statute must be specially pleaded, in *Hexter v. Clifford*, 5 Colo. 173; *Thomas v. Glendinning*, 13 Utah, 53; *Fullerton v. Bailey*, 17 Utah, 92, noted under *Caulfield v. Sanders*, 17 Cal. 569.

28 Cal. 107-115. PEOPLE v. REYNOLDS.

Taxation.—Board of equalization cannot increase valuation of property, without complaint first made, and upon reasonable notice to the party interested, p. 111.

Affirmed in *People v. Goldtree*, 44 Cal. 324, and *Los Angeles v. Water Works Co.*, 49 Cal. 642. Cited in *Oakland v. S. P. Co.*, 131 Cal. 229, denying right of city to recover unpaid increase of taxes arbitrarily imposed without production of any evidence; *People v. Flint*, 39 Cal. 673, in which the complaint was held insufficient to give the board jurisdiction. Approved in *State v. Dodge County*, 20 Neb. 601, 604; and *Dixon County v. Halstead*, 23 Neb. 701. So in *Railroad Co. v. Standing*, 13 Utah, 493 (holding it unnecessary to file a formal allegation in writing); and so in *State v. Mining Co.*, 12 Nev. 94 (holding that the complaint may be made orally or in writing).

General Citations.—In *Farmers' etc. Bank v. Board*, 97 Cal. 325; *State v. Washoe County*, 14 Nev. 142; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oreg. 211; and *Cattle Co. v. Commissioners*, 45 Fed. Rep. 327, bearing generally upon jurisdiction of boards of equalization. *Gray v. Stiles*, 6 Okla. 493; *Wallace v. Bullen*, 9 Okla. 7.

28 Cal. 115-118. STURGIS v. SHEPARD.

Certiorari does not lie where there is an appeal, p. 117.

Affirmed in *Stuttmeister v. Superior Court*, 71 Cal. 323; *Noble v. Superior Court*, 109 Cal. 527; and *White v. Superior Court*, 110 Cal. 57. Approved as authority in *Alabama etc. R. R. Co. v. Christian*, 82 Ala. 309; *Evans v. Christian*, 4 Oreg. 377; and *Ramsey v. Pettengill*, 14 Oreg. 208, the last case holding that where the right of appeal has been lost by lapse of time, a writ of review does not lie.

28 Cal. 118-122. CAULFIELD v. STEVENS.

Jurisdiction.—Under amended constitution of 1862, county courts had exclusive jurisdiction of actions of unlawful detainer, as well as for forcible entry and detainer, pp. 119, 120.

Affirmed in *Brummagin v. Spencer*, 29 Cal. 662; *Stoppelkamp v. Mangeot*, 42 Cal. 324; *Johnson v. Chely*, 43 Cal. 304. So in *Mecham v. McKay*, 37 Cal. 162, sustaining the constitutionality of the forcible entry act of 1866; *Ivory v. Brown*, 137 Cal. 605, applying rule to concurrent jurisdiction of justices' courts; *Norblett v. Farwell*, 38 Cal. 157, holding that the act of 1863 remained in force, so far as it related to unlawful detainers, though repealed by the act of 1866 so far as it related to forcible entries and forcible detainers. Commented on in *Courtwright v. Bear River etc. Min. Co.*, 30 Cal. 577, 582, 594, and dictum as to concurrent jurisdiction disapproved. So, to same effect, in *Rosenberg v. Frank*, 58 Cal. 403; and *Robinson v. Fair*, 128 U. S. 80, 81, 83.

28 Cal. 122-123. SHELDON v. LOOMIS.

Sheriff's Jury.—Verdict of, adverse to claimant, is no protection to the officer in a suit against him by the claimant, nor is it admissible in evidence as a defense, p. 123.

Cited as authority in *Sponenbarger v. Lemer*, 23 Kan. 63; and *Graves v. Butcher*, 24 Kan. 292, holding that a judgment of a justice of the peace in a proceeding for the trial of right of property under the Kansas statute, is not conclusive. But denied in *Capital Lumbering Co. v. Hall*, 9 Oreg. 101.

28 Cal. 123-142. BUDD v. HOLDEN.

Election Contest.—Specific mode provided by statute to contest elections does not preclude resort to quo warranto proceedings, p. 129.

Approved as authority in *Snowball v. People*, 147 Ill. 266; *Bonner v. Lynch*, 25 La. Ann. 276, 278 (in dissenting opinion of Wyly, J.); *State v. Fransham*, 19 Mont. 283; *State v. Boyd*, 31 Neb. 706; and *State v. McConnell*, 3 Lea (Tenn.), 340. Cited, bearing upon nature of remedy by writ of quo warranto, in *Coglan v. Beard*, 67 Cal. 307; *State v. Gleason*, 12 Fla. 224; *Robertson v. State*, 109 Ind. 161; and *Osgood v. Jones*, 60 N. H. 548; *State v. Elliott*, 117 Ala. 173; *Haverstock v. Aylesworth*, 113 Iowa, 380, construing local statutes. Ruling denied in *Parks v. State*, 100 Ala. 648.

Same.—Complaint in action for usurpation of office, sustained as sufficient, p. 130.

Approved as authority in *People v. McIntyre*, 10 Mont. 168.

Same.—Ballots constitute the best evidence of the intentions of the voters, p. 133.

Affirmed in *Coglan v. Beard*, 67 Cal. 306; and approved in *Reynolds v. State*, 61 Ind. 423; *Hudson v. Solomon*, 19 Kan. 180; *Albert v. Twohig*, 35 Neb. 569; and *Schneider v. Bray*, 22 Nev. 278; Cited in *McMenomy v. Ruch*, 142 Cal. 79, holding burden of proving spoliation of ballots to be on person asserting it; and to same effect see *Davis v. Grunig*, 143 Cal. 341; *Leonard v. Woolford*, 91 Md. 635, construing local statutes; 11 Am. St. Rep. 798, note.

Same.—Ballot voted containing the same name two or more times should be counted as one vote for the person named, p. 134.

Approved as authority in *Misch v. Russell*, 136 Ill. 32; and *State v. Pierce*, 35 Wis. 98.

Same.—One removing his family with intent to reside in another county, loses his residence from time of removal, p. 134.

Cited as authority in *Kreitz v. Behrensmeyer*, 125 Ill. 195; S. C. 8 Am. St. Rep. 375.

Same.—Sojourn as a soldier neither creates nor destroys citizenship, but may give a residence if so intended, p. 137.

Affirmed in *Devlin v. Anderson*, 38 Cal. 93; and *Stewart v. Kyser*, 105 Cal. 463; and approved in *Darragh v. Bird*, 3 Oreg. 240; and *Wood v. Fitzgerald*, 3 Oreg. 573. Cited in *Estate of Gordon*, 142 Cal. 129, as to residence in soldier's home; *Powell v. Spackman*, 7 Idaho, 710, 719, under constitution an inmate of soldiers' home cannot acquire right to vote in county and precinct in which such institution is located.

Quo Warranto—Stipulation.—Query, whether stipulation by relator's attorney can bind state, p. 138.

Cited in *People v. Jeffers*, 126 Cal. 301, discussing imputation of laches to an irrigation district.

28 Cal. 151-157. CALDERWOOD v. BROOKS.

Summons.—Where affidavit of service of states the county in which service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made, p. 153.

Cited as authority in *King v. Blood*, 41 Cal. 317; and *Pellier v. Gillespie*, 67 Cal. 583.

New Trial.—Notice of Intention must be served and record must show service, p. 154.

Cited in *Fletcher v. Nelson*, 6 N. Dak. 99, but objection held waived because not made in lower court; *King v. Pony Gold Min. Co.*, 28 Mont. 83, notice of intention to move for new trial is not necessary part of record on appeal from order denying new trial unless some objection is presented to notice in trial court.

General Citations.—In *Marshall v. Shafter*, 32 Cal. 194, as authority that a judgment for plaintiff in ejectment determines that he was entitled to the possession, at the commencement of the action and the rendition of the judgment; *Valentine v. Mahoney*, 37 Cal. 394, that in ejectment against a tenant, if the landlord assumes the defense and puts his title in issue, the judgment rendered therein binds him, as evidence by way of estoppel, the same as though he was made a party defendant; *Reay v. Butler*, 69 Cal. 574, that prior to adoption of section 379 of the Code of Civil Procedure, the court had power, in ejectment against a tenant in possession, to substitute the landlord as party defendant, after a notice and motion to that effect; *Dominguez v. Mascotti*, 74 Cal. 270, that where a motion for new trial is denied, it will not be presumed from the mere fact that a statement or affidavits were filed that a notice of the motion was given or waived; *Pico v. Cohn*, 78 Cal. 387, that it must be made to appear by the statement that a notice of intention to move for a new trial has been given, or that the giving of such notice has been waived; and so, to same effect, in *Street v. Mining Co.*, 9 Nev. 253; *People v. Dodge*, 104 Cal. 490, 492, that

the description of land in a summons by reference to the complaint has the effect to make that portion of the complaint a part of the summons, and obviates the necessity of repeating the description in the summons; and in *Wilson v. Brookshire*, 126 Ind. 503, discussing question as to when a third person, not a party or privy, can be concluded by the judgment rendered in an action.

28 Cal. 157-162. ECHOLS v. CHENEY.

Agency.—Deed made by an attorney in fact, and to which he signs his own name opposite the seal, as the attorney in fact of his principal, does not convey the interest of the principal in the land therein described. The fact that the party of the first part is the attorney does not make the deed that of the principal, p. 161.

Referred to as decided before the abolition of the distinction between sealed and unsealed instruments, in *Southern Pac. R. R. Co. v. Dredge Co.*, 118 Cal. 371, holding that the rule as to simple contracts is now applicable, and that words of agency employed in the written contract are to be regarded, not as descriptive merely, but as imparting character and capacity, and in cases of doubt parol evidence may be used to determine whose contract it is.

Distinguished in *Donovan v. Welch*, 11 N. Dak. 116, upholding deed by attorney in fact wherein in body of deed grantor was described as attorney for his principal and same words repeated in describing grantor in covenants and used in signing instrument.

29 Cal. 162-165. HAGGIN v. CLARK.

Appeal, if taken from order made after final judgment, upon affidavits filed, statement may be omitted, p. 164.

Approved in *People v. Doe*, 45 Cal. 44.

Same.—If appellant makes a statement, and relies upon it in the appellate court, it must contain a specific assignment of errors, p. 165.

Approved in *Leffingwell v. Griffing*, 29 Cal. 193; *Wetherbee v. Carroll*, 33 Cal. 554; *Cross v. Zane*, 45 Cal. 90; and *Wilson v. Wilson*, 45 Cal. 405. Referred to, and the ruling sustained, in *Leroy v. Rogers*, 30 Cal. 232, 233, 234; S. C. 89 Am. Dec. 89, 90, 91.

28 Cal. 166-170. PEOPLE v. PRATT. 87 Am. Dec. 110.

Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, but if the duty is judicial, the writ cannot direct what decision or judgment shall be rendered, p. 169.

Approved in *People v. Weston*, 28 Cal. 641; *Lewis v. Barclay*, 35 Cal. 214; *People v. Sexton*, 37 Cal. 534; *Beguhl v. Swan*, 39 Cal. 411; *Strong v. Grant*, 99 Cal. 102; and *People v. Superior Court*, 114 Cal. 471, 472. Commented on, in the similar case of *People v. Loewy*, 29 Cal. 266, and

the principle of the decision applied. Approved in *Board of Commissioners v. Mayhew*, 5 Idaho, 580, mandamus will not lie to reverse order of inferior tribunal continuing hearing of action or proceeding before it when tribunal is exercising judicial discretion vested in it by law; 96 Am. Dec. 333, note; 98 Am. Dec. 375, note; and 25 Am. St. Rep. 34, note.

28 Cal. 170-175. **MORE v. DEL VALLE.**

Appeal.—Clerk's minutes of the trial constitute no part of the transcript, p. 174.

Affirmed in *People v. Empire etc. Min. Co.*, 33 Cal. 173; Cited in *Heckl etc. Co. v. Gisborn*, 21 Utah, 75, noted under *Dawley v. Hovious*, 23 Cal. 103.

Same.—Exceptions taken during the trial should be written down, settled, and signed by the judge, filed in the case, and annexed to the judgment roll, p. 174.

Approved in *Wetherbee v. Carroll*, 33 Cal. 553. Cited in *Feely v. Shirley*, 43 Cal. 370, holding that the ruling of the court in striking out part of a pleading does not form a part of the judgment-roll, and cannot be reviewed, unless incorporated into the record by statement or bill of exceptions.

Pleading.—If allegation of complaint consists of several clauses connected by word "and," a denial of the entire allegation is evasive and insufficient, p. 172.

Cited as authority in *Westbay v. Gray*, 116 Cal. 663, case of evasive answer to complaint in foreclosure suit.

Forcible Entry and Detainer.—Complaint must show actual possession by plaintiff, p. 173.

Cited in *Knowles v. Crocker Estate Co.*, 125 Cal. 265, noted under *Cummins v. Scott*, 23 Cal. 526.

General Citations.—In 87 Am. Dec. 126, note, as sustaining constitutionality of "specific contract laws."

28 Cal. 175-180. **FRANKLIN v. DORLAND.**

Deed.—Recitals in, can only be used by a stranger as simple admissions of the grantor, p. 178.

Cited as authority in *Satterlee v. Bliss*, 36 Cal. 505, holding that a stranger to the deed is not precluded from showing the purpose for which it was executed; and cited to the ruling stated in 40 Am. St. Rep. 81.

Same.—In case of discrepancies between the monuments and the courses and distances set forth in deeds, the monuments govern, p. 178.

Cited in 94 Am. Dec. 313, note; 3 Am. St. Rep. 721, note; and 39 Am. St. Rep. 825, note.

Same.—Grantor may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee, p. 180.

Approved as authority in *Dorland v. Magilton*, 47 Cal. 487; *Lord v. Sawyer*, 57 Cal. 67; *Garabaldi v. Shattuck*, 70 Cal. 512; Cited in *Baker v. Clark*, 128 Cal. 187, sustaining action to quiet title by grantor against grantee based on such possession; 94 Am. Dec. 333, note; 91 Am. Dec. 183, note.

28 Cal. 180-181. HOPKINS v. CHEESEMAN.

Supreme Court has no jurisdiction where the amount in controversy in the lower court is less than three hundred dollars, p. 181.

Distinguished in *Winter v. Fitzpatrick*, 35 Cal. 273, holding that jurisdiction on appeal from judgment rendered in a certiorari case does not depend upon the amount in controversy.

28 Cal. 182-187. LUCAS v. TODD.

Judgments.—Probate court, having jurisdiction of the subject matter, all intendments are in favor of the action of the court, p. 185.

Affirmed in *Luco v. Commercial Bank*, 70 Cal. 342; and cited as authority in *Holmes v. Railroad Co.*, 7 Sawy. 396; S. C. 9 Fed. Rep. 241.

Same.—Orders of probate court not to be reviewed in a collateral attack, p. 187.

Approved in *Goldtree v. McAlister*, 86 Cal. 102.

28 Cal. 187-194. HOAG v. PIERCE.

Forcible Entry and Detainer.—In action of, defendant may, to show character and extent of his possession, put in evidence the deed of his grantor, and that his grantor, before plaintiff's entry, took up the land under the Possessory Act, and occupied and improved it, even though he failed to fully comply with the act, p. 190.

Cited as authority in *Thompson v. Smith*, 28 Cal. 532; so in *Bowers v. Cherokee Bob*, 45 Cal. 508. Cited also in *Beeler v. Cardwell*, 77 Am. Dec. 563, note.

Possession.—Where a party enters upon land under color of title, and has actual possession of a part, he has constructive possession of the whole tract described in the document, pp. 190, 191.

Approved in *Walsh v. Hill*, 38 Cal. 487; and *Webber v. Clark*, 74 Cal. 16, and cited as authority to ruling stated in 85 Am. Dec. 125, note.

Same.—Plaintiff in forcible entry and detainer must show an actual,

peaceable, and exclusive possession in himself, and a scrambling or interrupted possession is insufficient, p. 191.

Approved as authority in *Castro v. Tewksbury*, 69 Cal. 564; *Brooks v. Warren*, 5 Utah, 122. Cited in *Kelley v. Andrew*, 3 Colo. App. 124, holding that the plaintiff cannot recover upon constructive possession evidenced by deeds conveying the title.

28 Cal. 194-205. HORN v. JONES.

Quieting Title.—Plaintiff in action to quiet title may recover upon point of possession, unless the defendant shows a better right, p. 202.

Cited, setting forth requisites of complaint in action to determine adverse claim, in *Castro v. Barry*, 79 Cal. 447; *Goldberg v. Taylor*, 2 Utah, 491, 492, as to right of action to quiet title; *Shelton Logging Co. v. Gosser*, 26 Wash. 132, where in action to quiet title, plaintiff shows title under which his possession is claimed, court must then pass upon validity of title and lawfulness of possession.

Mortgage Foreclosure.—Title under relates back to time of mortgage, p. 202.

Cited in *Johnson v. Friant*, 140 Cal. 262, discussing priorities of purchasers under various sales.

Lis Pendens.—In foreclosure suit, party who purchases pendente lite with notice of lis pendens is bound by the decree of foreclosure, p. 204.

Cited in *McNamara v. Oakland etc. Assn.*, 132 Cal. 249, applying rule to homesteader pendente lite though not a party to the action. Cited as authority to the ruling stated, in *Sharp v. Lumley*, 34 Cal. 615; 70 Am. Dec. 754, note; and *Stout v. Manufacturing etc. Co.*, 56 Am. St. Rep. 857, note, discussing at length the rule of lis pendens.

General Citations.—In *Brady v. Burke*, 90 Cal. 6, priority of liens; so in *Jacobus v. Insurance Co.*, 27 N. J. Eq. 626; *Dixon v. Schirmeier*, 110 Cal. 585, that title of purchaser at sale under foreclosure of mortgage has relation to the date of the mortgage; and in *Gold Hill etc. Min. Co. v. Ish*, 5 Oreg. 106, that right of mining for gold is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign of the privilege.

28 Cal. 205-212. PEOPLE v. AH WOO.

Criminal Law.—Sufficiency of indictment is to be determined by the rules prescribed by the criminal code, and if an indictment stands this test, it is sufficient, p. 208.

Cited as authority to the ruling stated, in *People v. Rozelle*, 78 Cal. 90; and 87 Am. Dec. 101, note.

Indictment is sufficient if conformable to the statutes, p. 209.

Cited in *Fitzpatrick v. United States*, 178 U. S. 309, noted under *Peo-*

ple v. Dolan, 9 Cal. 576; State v. Kelly, 41 Or. 22, upholding information for assault with intent to kill.

Forgery.—Indictment need not allege in what manner the payer of the forged order was or could have been defrauded. This is matter of evidence, p. 211.

Approved in People v. Todd, 77 Cal. 466; and People v. Leonard, 103 Cal. 203 (case of false entries in books of bank).

Same.—Indictment may charge acts or intent conjunctively, in one count, where the statute describes them disjunctively, p. 212.

Affirmed in People v. Tomlinson, 35 Cal. 508; and People v. Thompson, 111 Cal. 256.

Same.—Uttering and passing, as well as the making of a forged instrument, is forgery, p. 212.

Cited as authority in State v. Malish, 15 Mont. 509; and State v. Evans, 15 Mont. 540; S. C. 48 Am. St. Rep. 702, construing a similar statute.

Same.—Indictment for forging instrument in foreign language is good, if it set out a translation in the English language of the instrument charged to be forged, p. 209.

Cited in 22 Am. Dec. 320, note, giving examples of instruments held subject to forgery.

General Citation.—People v. O'Brien, 130 Cal. 4.

28 Cal. 212-214. HARDING v. COWING.

Gold Coin Note.—In action on, if defendant suffers a default, the clerk may enter a judgment against him payable in gold coin, p. 214.

Cited in 87 Am. Dec. 126, note, as authority sustaining the constitutionality of "specific laws."

28 Cal. 214-218. PEOPLE v. THOMPSON.

Indictment.—One offense may be set forth in different forms under different counts, but it should appear that the matters set forth in different counts are descriptive of one and the same transaction, p. 216.

Approved in People v. Jailles, 146 Cal. 304, upholding information for rape charging in one count rape committed by force violence and resistance, and other count simply alleging sexual intercourse with female under age of sixteen; People v. Frank, 28 Cal. 513, an indictment for forgery; so in Territory v. Poulier, 8 Mont. 150; People v. Garcia, 58 Cal. 103, information charging defendant of crime of assault with intent to commit murder; State v. Chapman, 6 Nev. 325, indictment for robbery; State v. Malim, 14 Nev. 290, indictment for embezzlement; and United States v. Howell, 85 Fed. Rep. 405, indictment for being in pos-

session of counterfeit money. Cited to the ruling stated, in 92 Am. Dec. 662, note.

Same.—Second count in indictment should refer to the first, in such manner as to identify the offense as the same already described, p. 217.

Approved in *People v. Ah Sam*, 46 Cal. 648.

Identity.—General rule is, that identity of the name is prima facie evidence of the identity of the person, p. 218.

Cited as authority to the ruling stated, in *Garwood v. Garwood*, 29 Cal. 520.

Appeal.—Appellate court will not review alleged errors in instructions in a criminal case, unless embodied in a bill of exceptions, or there is an indorsement thereon, signed by the judge, showing the action of the court thereon, p. 218.

Approved in *People v. Martin*, 32 Cal. 92; *People v. Ferguson*, 34 Cal. 310; *People v. Trim*, 37 Cal. 275; *People v. Padillia*, 42 Cal. 538; *People v. Clark*, 84 Cal. 581; and *People v. Pettit*, 5 Utah, 242; *People v. Tetherow*, 40 Cal. 287, refusing to consider alleged errors in charge.

General Citations.—Referred to for instances of judicial notice, in 89 Am. Dec. 677, 691, note, where the matter of judicial notice is discussed at length. *California Oil etc. Co. v. Miller*, 96 Fed. 20.

28 Cal. 219-224. CARLETON v. TOWNSEND.

New Trial.—Assignment in statement on motion for, should specify the particulars in which the evidence is insufficient to justify the verdict, or it will be disregarded, p. 221.

Approved in *Beans v. Emanuelli*, 36 Cal. 120; *Spanagel v. Dellinger*, 38 Cal. 280.

Identity of names is prima facie evidence of the identity of persons, p. 221.

Cited as authority to ruling stated, in *People v. Thompson*, 28 Cal. 219; *Garwood v. Garwood*, 29 Cal. 520; and *Stapleton v. Pease*, 2 Mont. 553. So in 40 Am. Dec. 240, note, that designation of place of residence affixed to a party's name is no part of the name, but mere matter of description.

Pueblo Lands.—Tenure by which such lands are held by San Francisco is of a fiduciary nature, and cannot be alienated except in accordance with the trust, p. 222.

Cited as authority in *San Francisco v. Canavan*, 42 Cal. 557.

Ejectment.—If plaintiff shows possession in himself, defendant will not be permitted to overcome the presumption of title in the plaintiff by showing title in a stranger, p. 224.

Cited as authority in *Niagara Min. Co. v. Mining Co.*, 50 Cal. 613, as

action to quiet title. So in *Sullivan v. Eddy*, 164 Ill. 396, asserting the doctrine that a mere intruder upon the notorious adverse possession of another cannot justify his trespass under an outstanding title in a stranger, in the absence of evidence connecting him with such title.

28 Cal. 226-228. POETT v. STEARNS. S. C. 31 Cal. 78.

Pleadings.—In action to foreclose mortgage, a general allegation in the complaint that the defendants had, or claimed to have, some interest in the premises, is sufficient, p. 228.

Applied in *Himmelman v. Spanagel*, 39 Cal. 391, action to recover an assessment for street improvements; and in *Schler v. Look*, 93 Cal. 608, action to foreclose mortgage; *Blair v. Mines*, 84 Fed. 738, but denying right of such defendant to plead statute of limitations as to debt. So in *Howard v. Iron and Land Co.*, 62 Min. 300; and *Rust-Owen Lumber Co. v. Fitch*, 3 S. Dak. 216, action to enforce mechanic's lien. Cited to ruling stated, in 26 Am. St. Rep. 870, note.

28 Cal. 228-232. PEOPLE v. BOARD OF SUPERVISORS.

Mandamus.—Writ of will lie to compel board of supervisors to issue warrant, in a proper case, for payment of bills for expenses of volunteer companies, p. 231.

Cited in *People v. San Francisco*, 36 Cal. 604, mandamus to compel supervisors to proceed with work altering grade of street.

28 Cal. 232-238. JEWELL v. JEWELL.

Husband and Wife.—On death of husband intestate, leaving no descendants, surviving wife, and surviving father of deceased, each inherit one-half of the husband's half of the common property, p. 237.

Cited in *In re Boody*, 113 Cal. 688, holding that at the death of the husband without descendants, the wife is entitled to succeed to three-fourths of the community property, which passes to her heirs at her death. Cited, also, in *Pratt v. Douglas*, 38 N. J. Eq. 535, construing a will. In this case husband and wife were domiciled in California, where the husband died seised of lands in California and also in New Jersey. He disposed of all his property by will to his wife and it was held that the community law of California did not apply to the testator's lands in New Jersey. So in *Spark v. Spence*, 40 Tex. 701, referring to the amount of litigation relative to community property, attributing it to the state of the statutes on the subject.

"Descendants" of a Person are his children, grandchildren, and their children to the remotest degree, p. 236.

Approved in *Bates v. Gillett*, 132 Ill. 297; and cited to ruling stated, in 12 Am. St. Rep. 112, note.

28 Cal. 238-245. BRYAN v. MAUME.

Statement on appeal must be filed and served within statutory time, p. 241.

Cited as authority in *Cody v. Filley*, 4 Colo. 437; *St. Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 473; *Seeley v. Sebastian*, 3 Oreg. 565; and *National Bank v. Irvine*, 2 Mont. 556; *Cameron v. Arcata etc. Co.*, 129 Cal. 282, denying right of court to extend time after default or beyond period allowed by Code of Civil Procedure, 1054.

Pleadings.—Affirmative allegations of answer stand controverted by the plaintiff, and burden is on defendant to prove the truth of such allegations, p. 244.

Cited in *Wilson v. California etc. R. R. Co.*, 94 Cal. 172, to the general rule that the burden is on the defendant to prove new matter alleged as a defense. So, to same effect, in *Cox v. Stage Co.*, 1 Idaho, 381. *Hamilton v. Spokane etc. R. R.*, 3 Idaho, 167, applying rule in action for damages caused by grading railway roadbed through plaintiff's land.

Findings of Fact should not be interblended with matter of argument or the conclusions of law, p. 244.

Approved in *Jones v. Block*, 30 Cal. 229. Cited, holding that objections to findings of fact cannot be made available on appeal, unless application to correct or amend them is shown to have been made in the court below, in *State v. Mining Co.*, 4 Nev. 337.

28 Cal. 245-247. JONES v. FROST.

Venue.—Proceedings amounting to waiver of right to have change of, set forth, p. 246.

Cited, holding that application for change of venue must be made by defendant in the answer, or contemporaneously with the filing of an answer or demurrer in *Cook v. Pendergast*, 61 Cal. 75; *Hearne v. De Young*, 111 Cal. 376, holding that the right to have a cause tried in a particular county is one which may be waived either expressly or by implication; *Scott v. Hoover*, 99 Fed. 248, on point that general demurrer is waiver of objection that action was not brought in proper circuit court.

Pleadings.—Filing of new complaint after demurrer sustained is not the commencement of a new action, p. 246.

Cited as authority, holding that an amended complaint takes the place of the original, in *Barber v. Reynolds*, 33 Cal. 501; *Easton v. O'Reilly*, 63 Cal. 308; *McFadden v. Mining Co.*, 8 Nev. 60; and in *Louisville etc. Co. v. House*, 104 Tenn. 111, noted under *Gilman v. Coagrove*, 22 Cal. 356; *White v. Soto*, 82 Cal. 658, holding that the amended com-

plaint relates back to the date upon which the original complaint was filed.

28 Cal. 247-254. MATTER OF EDWARD RING.

Habeas Corpus.—Doctrine of *res adjudicata* does not apply to proceedings on, p. 251.

Cited as authority, holding that a judgment on habeas corpus remanding a judgment debtor arrested on execution is no bar to an action by him against the creditor for assault and false imprisonment, in *Bradley v. Beetle*, 153 Mass. 157; *Rogers v. Superior Court*, 145 Cal. 89, on certiorari to review judgment finding for contempt for refusing to answer questions, former judgment of supreme court on habeas to review contempt proceedings for refusal to answer some questions, is not bar to certiorari; *People v. Fairman*, 59 Mich. 570, holding that writ of error does not lie to a final order made in proceedings upon habeas corpus; *State v. Kennie*, 24 Mont. 51, and *Miskimmins v. Shaver*, 8 Wyo. 404, noted under *In re Perkins*, 2 Cal. 424.

Judgment is sufficient in a criminal case, if it states of what offense the defendant was finally convicted, and the penalty imposed by the court, p. 253.

Approved as authority in *Ex parte Dobson*, 31 Cal. 499; *Ex parte Baye*, 63 Cal. 492; *Ex parte Young Ah Gow*, 78 Cal. 442; *Ex parte Turner*, 75 Cal. 228; *People v. Douglass*, 87 Cal. 283; and *Ex parte Williams*, 89 Cal. 427. Cited in *People v. Terrill*, 133 Cal. 123, defining "record" and construing section 1207, Penal Code; *La Grange etc. Co. v. Carter*, 142 Cal. 565, applying rule to form of order of equalization board raising assessment; *Ex parte Dela*, 25 Nev. 350, holding judgment sufficient in rape case; *People v. Trim*, 37 Cal. 275, setting forth requisites of bill of exceptions in criminal cases.

Detention of Prisoner.—Certified copy of judgment properly entered is sufficient authority in hands of prison warden for detention of defendant, p. 253.

Approved in *Ex parte Gibson*, 31 Cal. 623; S. C. 91 Am. Dec. 549, *Matter of Brown*, 32 Cal. 49; *Ex parte Ahern*, 103 Cal. 414; and *Ex parte Peacock*, 25 Fla. 500.

General Citation.—*Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1862.

28 Cal. 254-259. PEOPLE v. SAN FRANCISCO AND SAN JOSE RAILROAD COMPANY.

Statutes.—Repeal of, by implication is not favored, p. 257.

Approved in *Matter of Yick Wo*, 68 Cal. 304, holding that in case of irreconcilable conflict, the last act must govern. Cited as authority to ruling stated in *Saguache v. Decker*, 10 Colo. 163.

28 Cal. 261-263. KAVANAGH v. MAUS.

Appeal.—Statement on, is waived if not served within the statutory time, p. 262.

Cited in *Cody v. Filley*, 4 Colo. 437; and so in *St. Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 473, and applied to bill of exceptions.

28 Cal. 263-265. ZIEGLER v. WELLS, FARGO AND CO.

Pleadings.—Immaterial variance between pleading and proof will be disregarded, p. 265.

Approved in *Clark v. Chapman*, 98 Cal. 114, case of immaterial variance between agreement of arbitration and the undertaking.

Irrelevant Testimony.—Admission of, not ground for reversal, if there is uncontradicted testimony sufficient to warrant the verdict, p. 264.

Cited to ruling stated in *Winkley v. Foye*, 66 Am. Dec. 717, extended note bearing on subject. Referred to in 83 Am. Dec. 89, note.

28 Cal. 265-276. PEOPLE v. KING.

Criminal Law.—If defendant refuses to plead after demurrer to indictment overruled, the court may direct a plea of not guilty to be entered for him, pp. 269, 270.

Affirmed in *People v. Jocelyn*, 29 Cal. 563; and principle approved in *Conneau v. Geis*, 73 Cal. 178, S. C. 2 Am. St. Rep. 786, holding that a party demanding a jury trial, and refusing to pay jury fees in advance, waives his right to a jury.

Same.—Defendant may voluntarily testify before a grand jury, and it is not ground for setting aside the indictment, p. 272.

Approved in *People v. Page*, 116 Cal. 392; and *People v. Lander*, 82 Mich. 120.

Same.—Motion to set aside indictment must be made before demurrer or plea, p. 272.

Affirmed in *People v. Stacey*, 34 Cal. 308.

Same.—Judgment that defendant be imprisoned for a specified number of years from the date of his incarceration, is not void for uncertainty, p. 272.

Approved in *People v. Hughes*, 29 Cal. 262.

Statutes.—In construction of, an act referring in terms to one section may be held to refer to another, if it would otherwise be a nullity, pp. 272 et seq.

Approved in *Edwards v. Railroad Co.*, 13 Colo. 62; *State v. Small*, 29 Minn. 218; and *Russell v. Ayer*, 120 N. C. 210. So in *In re Vanderberg*, 28 Kan. 259, holding that if it clearly appears that a provision of a statute has been inserted through inadvertence, it will be disregarded.

Principle of the decision approved and applied in *Ex parte Hedley*, 31 Cal. 114; *Haney v. State*, 34 Ark. 270; *Gray v. County Commrs.*, 83 Me. 436; *People v. Hill*, 3 Utah, 353; *Cohen v. Cleveland*, 43 Ohio St. 195; and *State v. Archibald*, 52 Ohio St. 10, the last case not being, however, within the principle.

28 Cal. 276-281. SPENCER v. PRINDLE.

Legal Tender Notes.—Verdict in action to recover value of services rendered will not be set aside on the ground that the jury adopted legal tender notes as the standard of value, pp. 277 et seq.

Approved as authority in *Tarpy v. Shepherd*, 30 Cal. 181; *Poett v. Stearns*, 31 Cal. 80; and *Carpentier v. Small*, 35 Cal. 357. Cited as authority to constitutionality of "specific contract laws" in 87 Am. Dec. 126, note.

28 Cal. 281-288. McCOMB v. REED. 87 Am. Dec. 115.

Attachment, if regular upon its face, is not void because the complaint does not set up a cause of action warranting an attachment, p. 285.

Cited to ruling stated, in 7 Am. St. Rep. 633, note. Referred to in *Mentzer v. Ellison*, 7 Colo. App. 328, as authority that objections to regularity of attachment proceedings cannot be first raised in collateral suits. Dissenting opinion of Bissell, J. So, to same effect, in *Moresi v. Swift*, 15 Nev. 220.

Same.—It is duty of sheriff to apply money on attachments in the order of the attachments, p. 287.

Cited in note to 62 Am. St. Rep. 606; 53 Am. St. Rep. 155.

Pleading.—If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, p. 284.

Cited as authority in *Nordholt v. Nordholt*, 87 Cal. 556; 8. C. 22 Am. St. Rep. 271.

General Citations.—In 79 Am. Dec. 142, note, that it is the duty of the sheriff to obey the orders of a court of competent jurisdiction in proceedings before it; 81 Am. Dec. 160, note, referred to as authority for the alternative modes which may be pursued by a subsequent attaching creditor for the protection of his rights; *People v. Palmer*, 95 Am. Dec. 427, note, that sheriff cannot set up defects in process in excuse for his failure to execute the same; and in 87 Am. Dec. 126, note, as authority for constitutionality of specific contract laws.

28 Cal. 288-295. LANE v. GLUCKAUF.

Specific Contract.—Contract to pay in gold coin, or such sum as may

equal market value of legal tender notes, may be enforced according to its meaning, and warrants a judgment in coin, p. 294.

Approved in *Burnett v. Stearns*, 33 Cal. 468, 473; dissenting opinion in *Fox v. Minor*, 32 Cal. 180, main opinion holding sureties on guardian's bond not liable in gold coin. Distinguished in *Reese v. Stearns*, 29 Cal. 275, 277; *Knox v. Gerhauser*, 3 Mont. 281; and *Wells v. Van Sickle*, 6 Nev. 50, cases of alternative contracts. Referred to as to effect of legal tender acts upon contracts to pay in gold, in 89 Am. Dec. 648, note; 91 Am. Dec. 138, note; 91 Am. Dec. 571, note; and 95 Am. Dec. 368, note.

Judgment.—In action on note and a trial had, the court may render judgment for the amount of the note and interest, although the complaint only prays for judgment for the face of the note, p. 294.

Approved as authority in *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 5; *Corcoran v. Doll*, 32 Cal. 88; *Nevada Co. etc. Canal Co. v. Kidd*, 37 Cal. 324, dissenting opinion of Sanderson, J.; *Texas etc. Ry. Co. v. Donnelly*, 46 Ark. 95; and *Rhemke v. Clinton*, 2 Utah, 237, the last case holding that the court may instruct the jury to give interest as damages in cases of destruction of property.

Same.—Where judgment is by default, the court cannot grant greater relief than is demanded in the complaint, p. 294.

Cited as authority in *Gautier v. English*, 29 Cal. 168.

28 Cal. 295-301. ABBOTT v. DOUGLASS.

Appeal.—Interlocutory orders will not be reviewed unless embodied in a statement or bill of exceptions, p. 296.

Cited in *Ryan v. Dougherty*, 30 Cal. 221, holding that statement not filed in time forms no part of record; *Dimick v. Campbell*, 31 Cal. 240; and *Strathern v. Dakin*, 63 Cal. 480, specifying papers constituting no part of judgment-roll, and improperly in the record; and in *Quivey v. Gambert*, 32 Cal. 323, setting forth mode of making up the record; Cited in *People v. Empire etc. Co.*, 33 Cal. 173, applying rule to matters contained in clerk's minutes; *Hecla etc. Co. v. Gisborn*, 21 Utah, 75, noted under *Dawley v. Hovious*, 23 Cal. 103. But cf. *Hawley v. Kocher*, 123 Cal. 81, discussing effect of recital in judgment as to interlocutory order. Approved as authority to the ruling stated in *Wetherbee v. Carroll*, 33 Cal. 554; and *Graham v. Lineham*, 1 Idaho, 781.

Pleading.—After cause has been submitted for trial, the court cannot strike out the answer, p. 297.

Cited in *People v. McComber*, 72 Am. Dec. 525, note, discussing subject of striking out answer as sham.

Same.—Answer, notwithstanding order to strike out, constitutes part of judgment-roll, p. 300.

Cited as authority, and applied in case of demurrer stricken out, in *Davis v. Honey Lake Water Co.*, 98 Cal. 417; Cited in *Gregg v. Groesbeck*, 11 Utah, 322, 323, on point that error in striking out pleading is reviewable on appeal based on judgment-roll alone; *Warren v. Stoddard*, 6 Idaho, 701, order striking out portion of pleading on part of record need not be embodied in bill of exceptions for purpose of review; *Dougall v. Schulenberg*, 101 Cal. 158, applied to complaint.

28 Cal. 301-320. *HIDDEN v. JORDAN*. S. C. 21 Cal. 92; 32 Cal. 397; 39 Cal. 61; and 57 Cal. 184.

New Trial.—When judgment is reversed and new trial granted in general terms, the case goes back for trial upon all the issues of fact raised by the pleadings, p. 330.

Cited in *Phelps v. Winona etc. R. R. Co.*, 37 Minn. 490, S. C. 5 Am. St. Rep. 871, holding that the award of a new trial wipes out the verdict. So, to same effect, in *Fisher v. Emerson*, 15 Utah, 522; *State v. Templin*, 122 Ind. 238; and *Louisville etc. Ry. Co. v. Miller*, 141 Ind. 539.

Same.—Presumption is that the statement on motion for a new trial includes all the testimony material to the points specified, although the record does not show affirmatively that such was the case, p. 303.

Cited as authority to the ruling stated, in *Smith v. Athern*, 34 Cal. 511; *Clark v. Gridley*, 35 Cal. 403; *Judson v. Lyford*, 84 Cal. 509; and *Randall v. Burk Township*, 4 S. Dak. 344. So in *James v. Williams*, 31 Cal. 213, holding that the court is presumed to have found the facts necessary to sustain the judgment. So, to same effect, in *Poppe v. Athern*, 42 Cal. 617; so in *Ervin v. Collier*, 2 Mont. 607, holding that the appellate court must presume that the papers not in the transcript were not used on hearing of motion.

Findings.—Party requiring a finding as to any fact in issue should specify the point upon which he desires a finding, without dictating how the fact should be found, p. 304.

Approved in *Miller v. Steen*, 30 Cal. 408; S. C. 89 Am. Dec. 127; *Prince v. Lynch*, 38 Cal. 531; S. C. 99 Am. Dec. 428; *Porter v. Woodward*, 57 Cal. 538; *Edgar v. Stevenson*, 70 Cal. 287; and *Warren v. Quill*, 9 Nev. 266. Cited, bearing on the practice in such case, in *Holcomb v. Keliher*, 3 S. Dak. 500.

Same.—If judge errs in his findings, the only proper proceeding to correct them is by motion for a new trial, p. 305.

Affirmed in *Prince v. Lynch*, 38 Cal. 536; and *Wunderlin v. Cadogan*, 75 Cal. 618. Cited in *Clawson v. Wallace*, 16 Utah, 308, on point that court cannot make additional findings to support a judgment after its entry; bearing on mode of reviewing findings, in *Kahn v. Smelting Co.*, 2 Utah, 382.

Same.—A finding should be a concise and pointed statement of the several facts found, followed by the conclusions of law. It is not an opinion, and forms no part of the judgment-roll, p. 306.

Approved in *Duryea v. Burt*, 28 Cal. 588; *Jones v. Black*, 30 Cal. 229; *McClory v. McClory*, 38 Cal. 577; *Partalongo v. Larco*, 47 Cal. 382; *Wilson v. Wilson*, 64 Cal. 94; *Wixson v. Devine*, 67 Cal. 342; *Hamilton v. Railway Co.*, 2 Idaho, 902; *Thorp v. Freed*, 1 Mont. 664; *Bard v. Kleer*, 1 Wash. St. 376; and *Potwin v. Blasher*, 9 Wash. St. 465.

Same.—If a discrepancy exist, the more specific findings of particular facts must control, p. 306.

Affirmed in *Warder v. Enslen*, 73 Cal. 294; and approved as authority in *Walley v. Deseret Nat. Bank*, 14 Utah, 322; and *Barnes v. Sabron*, 10 Nev. 248; *Jacks v. Estee*, 139 Cal. 512, as to findings on insanity.

Accounting.—Where taking of account is required, the court in its discretion may take and state it, or refer it to some proper person to state it, p. 308.

Affirmed in *Trumpler v. Cotton*, 109 Cal. 255, and *Davis v. Hofer*, 38 Or. 158, both following rule.

Mortgagee in possession is accountable for the actual receipts of the rents and profits, and is allowed for necessary expenses in managing the property, p. 309.

Cited as authority in *Murdock v. Clarke*, 59 Cal. 695; and *Renshow v. Taylor*, 7 Oreg. 325. So in *Murdock v. Clarke*, 90 Cal. 439, holding that a mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof; and so, to same effect, in 4 Am. St. Rep. 69, note.

Same.—Mortgagee in possession may make such repairs as are reasonably necessary for the preservation of the property, but permanent improvements, or things which conduce merely to his comfort or convenience, are not necessary expenses for which he can recover, p. 309.

Approved in *Raynor v. Drew*, 72 Cal. 312; and principle of the decision approved and applied in *Woodward v. Wright*, 82 Cal. 206.

Interest.—Circumstances under which a parol contract for a greater than the legal rate of interest will be enforced, set forth, pp. 315, 316.

Cited as authority in *Pujol v. McKinlay*, 42 Cal. 568, and the rule applied in the settlement of a long standing account in equity.

General Citations.—*Connor v. Corson*, 13 S. D. 554; *Gilbert v. Stephens*, 6 Okla. 689.

28 Cal. 320-323. **GATES v. SALMON.**

Statute is not Retroactive unless so declared, p. 321.

Cited in *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 647, noted under *People v. San Francisco*, 4 Cal. 127.

Interlocutory decree in action for partition was not appealable prior to act of 1864, which was not retroactive, pp. 321, 322.

Affirmed in *Peck v. Vandenberg*, 30 Cal. 21; and *Peck v. Curtis*, 31 Cal. 209. Approved in *Sterling v. Sterling*, 43 Or. 204, final decree on report of referee in partition is the final appealable decree; In re *Estate of Williamson*, 26 Utah, 53, order directing sale by executor is not final appealable order. Explained and distinguished in *Bensley v. Ellis*, 39 Cal. 314, construing act of 1866, and holding it to be retrospective in its operation. Cited in *Regan v. McMahon*, 43 Cal. 627, holding that a motion for a new trial may be resorted to for the purpose of correcting the errors in a preliminary decree of partition. So, as to the practice in such case, is cited in *Mills v. Miller*, 2 Neb. 310; 60 Am. Dec. 429, 434, note.

28 Cal. 327-328. **BELL v. CRIPPEN.**

District Courts have no jurisdiction of action to recover taxes where the amount sued for was less than three hundred dollars, and the complaint did not pray for foreclosure of the tax lien, p. 328.

Cited, discussing subject of concurrent jurisdiction among the several courts, in *Courtwright v. Bear River etc. Min. Co.*, 30 Cal. 581.

28 Cal. 328-331. **PEOPLE v. CORBETT.**

Criminal Procedure.—Verdict in criminal case without an arraignment or plea is a nullity, and no valid judgment can be rendered thereon, p. 330.

Approved in *People v. Monaghan*, 102 Cal. 233; *Early v. State*, 1 Tex. App. 270; *Stacy v. State*, 3 Tex. App. 123; *Pate v. State*, 21 Tex. App. 198; *Hatfield v. State*, 9 Ind. App. 303; and *Crain v. United States*, 163 U. S. 640. Cited in *Browning v. State*, 54 Neb. 204, 208, further discussing procedure at trial when fact of nonarraignment is then first discovered; *State v. Flester*, 32 Or. 266, but permitting amendment of record to show arraignment if done within due time and on due notice. Distinguished in *People v. Rodondo*, 44 Cal. 542, in which case the defendant was arraigned and put in his plea. So in *People v. Bowman*, 81 Cal. 569, in which case the defendant was given an opportunity to plead. Cited to ruling stated, in 68 Am. Dec. 223, 226, note; and so in *Fletcher v. State*, 54 Ind. 467.

Same.—Defendant does not waive arraignment and plea by submitting to a trial, p. 330.

Affirmed in *People v. Monaghan*, 102 Cal. 233. Approved in *Early v. State*, 1 Tex. App. 271. Cited in *People v. Lightner*, 49 Cal. 228; *Dixon v. State*, 13 Fla. 634; and *People v. Waters*, 1 Idaho, 562, holding that

mere formalities are waived by plea; and to the ruling stated, in 68 Am. Dec. 221, note.

General Citations.—*Gaines v. United States*, 1 Ind. Ter. 302; *Rolph v. City of Fargo*, 7 N. D. 662.

28 Cal. 331-335. HAWXHURST v. LANDER.

Possession.—One in actual possession of real estate may rely on his possession alone until the opposite party shows a better right, p. 333.

Approved as a general rule in *McManus v. O'Sullivan*, 48 Cal. 17, but holding that a mere naked possession antecedently held by the plaintiff's intestate, and not sufficient in point of duration to entitle him to the protection of the statute of limitations, cannot operate to create a presumption that the claim of the possessor was connected with any particular source of title.

28 Cal. 335-340. CASEMENT v. RINGGOLD.

Judgment cannot be vacated after the adjournment of the term on motion, except as provided by statute, p. 337.

Cited in *Brackett v. Banegas*, 99 Cal. 626, giving the history and development of the procedure upon the subject. So in *Kaufman v. Shain*, 111 Cal. 20; S. C. 52 Am. St. Rep. 141, discussing subject of amendment of records. Approved in *Fredericks v. Davis*, 6 Mont. 463; *Jones v. Sulphur Co.*, 14 Nev. 174; and *Lang Syne Min. Co. v. Ross*, 20 Nev. 137; S. C. 19 Am. St. Rep. 342.

Same.—Clerk acts ministerially in entering judgment, and this ministerial act may be performed by him in vacation, p. 340.

Approved in *Genella v. Relyea*, 32 Cal. 160, and holding that the time within which to appeal from a judgment commences to run at the time the court announces its judgment and the order for judgment is entered in the minutes. So, to same effect, in *Douglas Co. Road Co. v. Abraham*, 5 Oreg. 324. Followed in *Wakelee v. Davis*, 62 Cal. 514, reversing an order vacating a judgment entered more than three years previously. Ruling approved in *In re Newman*, 75 Cal. 221; S. C. 7 Am. St. Rep. 151; 77 Cal. 225; S. C. 11 Am. St. Rep. 271; *Marshall v. Taylor*, 97 Cal. 426; *Baker v. Brickell*, 102 Cal. 623.

28 Cal. 340-345. FERREA v. KNIPE.

Waters.—Riparian proprietor to whom water first comes has no right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run, p. 344.

Ruling approved in *Lux v. Haggin*, 69 Cal. 359, 393, 395; *Stanford v. Felt*, 71 Cal. 250; *Heilbron v. Canal Co.*, 75 Cal. 431; S. C. 7 Am. St. Rep. 187; *White v. East Lake Land Co.*, 96 Ga. 420; S. C. 51 Am. St. Rep. 145; and *Union Mill and Min. Co. v. Danberg*, 81 Fed. Rep. 97. Cited in *Barneich v. Mercy*, 136 Cal. 206, enjoining maintenance of dam by upper

owner; *California Pastoral etc. Co. v. Enterprise etc. Co.*, 127 Fed. 742, dicta. Cited in 43 Am. Dec. 276, note; 57 Am. Dec. 687, note; 79 Am. Dec. 644, note; 90 Am. Dec. 541, note; 97 Am. Dec. 565, note; and 3 Am. St. Rep. 797, note.

28 Cal. 345-380. **EMERY v. SAN FRANCISCO GAS COMPANY.**

Taxation.—The constitutional provision which requires taxation of property to be proportioned to the value thereof applies only to taxation in its ordinary and received sense, and not to local assessments, where the money raised is expended on the property taxed, p. 356.

Cited and ruling approved in *Emery v. Bradford*, 29 Cal. 83, 95, discussing theory of liability for street assessments; *Taylor v. Palmer*, 31 Cal. 251, 255, defining terms "taxation" and "assessment"; *Taylor v. Palmer*, 31 Cal. 670, 690, dissenting opinion of Sawyer, J.; *Nolan v. Reese*, 32 Cal. 485, street contracts under act of 1862. So in *Meuser v. Risdon*, 36 Cal. 244; *Himmelmänn v. Spanagel*, 39 Cal. 392; *Hagar v. Supervisors*, 47 Cal. 234; *Dyer v. Barstow*, 50 Cal. 664; *Hartman v. Olvera*, 51 Cal. 501, holding that a license fee for the transaction of business is a tax; *State v. French*, 17 Mont. 59; *San Diego v. Linda Vista I. Dist.*, 108 Cal. 193, assessment by irrigation district; *City of Pueblo v. Robinson*, 12 Colo. 596; *Denver City v. Knowles*, 17 Colo. 209, 211, 212; *Hayden v. Atlanta*, 70 Ga. 823; *Palmer v. Stumph*, 29 Ind. 336; *Asphalt Pav. Co. v. Gogreve*, 41 La. Ann. 264; *Daily v. Swope*, 47 Miss. 385; *City of Kansas v. Ridenour*, 84 Mo. 259; *State v. Mayor etc.*, 36 N. J. L. 490; S. C. 13 Am. Rep. 466; *Lima v. Cemetery Assn.*, 42 Ohio St. 131; S. C. 51 Am. Rep. 812, construction of statute; *King v. Portland*, 2 Oreg. 158; *Cleveland v. Tripp*, 13 R. I. 61; *Winona etc. R. R. Co. v. Watertown*, 1 S. Dak. 51, 54, 59; *Roundtree v. Galveston*, 42 Tex. 626; *McFadden v. Longham*, 58 Tex. 584; *Railroad Co. v. Lynchburg*, 81 Va. 477; *Reclamation Dist. v. Hagar*, 6 Sawy. 570; S. C. 4 Fed. Rep. 369; *Santa Clara Railroad Tax case*, 9 Sawy. 223; S. C. 18 Fed. Rep. 424. Cited in *Morrison v. Morey*, 146 Mo. 565, as to assessment on lands of levee district; *State v. Frazier*, 36 Or. 186, construing "taxes" as used in local statutes. Examined and disapproved in *McBean v. Chandler*, 9 Heisk. 363; S. C. 24 Am. Rep. 315. And so in *Irwin v. Mayor etc.*, 57 Ala. 10. Cited, bearing on subject of uniformity of taxation, in 52 Am. Dec. 335, note; in 55 Am. Dec. 285, note, distinction between right of taxation and of eminent domain; 55 Am. Dec. 287, note, distinction between taxes and assessment; 55 Am. Dec. 288, note, apportionment of taxes and assessments; 55 Cal. 289, note; in 60 Am. Dec. 649, note, power to assess for public improvements; and so in 61 Am. Dec. 519, note; 69 Am. Dec. 482, note; and 73 Am. Dec. 522, note. In 72 Am. Dec. 281, note, cited to the ruling stated.

Same.—The legislature may confer upon municipal corporations the power to assess upon adjoining lots the cost of street improvements, p. 372.

Affirmed in *Emery v. Bradford*, 29 Cal. 82; *Walsh v. Mathews*, 29 Cal. 123, 124; and *Jennings v. Le Breton*, 80 Cal. 15. Cited in *Hornung v. McCarthy*, 126 Cal. 21, on point that rights of street contractor grow out of governmental power of taxation. Cited as authority to the ruling stated, in *Taylor v. Palmer*, 31 Cal. 250, 667; *Hendrick v. Crowley*, 31 Cal. 474; *Chambers v. Satterlee*, 40 Cal. 514; *Mahoney v. Braverman*, 54 Cal. 568; In re *Madera Irrigation District*, 92 Cal. 325; S. C. 27 Am. St. Rep. 126; *City of Ludlow v. Trustees etc.*, 78 Ky. 364; and *State v. Dodge County*, 8 Neb. 130; S. C. 30 Am. Rep. 823.

Same.—It is in the discretion of the legislature to say upon what principle the assessment on lots fronting on a street, to pay for street improvements, shall be apportioned among the lots, p. 372.

Approved in *Speer v. Mayor etc.*, 85 Ga. 62; and *Hammett v. Philadelphia*, 65 Pa. St. 186. Cited in *English v. Mayor*, 2 Marv. (Del.) 89, sustaining local statute as to payment for sewer construction; *Rolph v. City*, 7 N. Dak. 656, 664, 669, ruling similarly as to assessment for paving street and citing main case also on other points.

Same.—Resolution of board of supervisors, declaring an intention to improve a street, may include a declaration of intention to both grade and macadamize, p. 375.

Approved in *Deady v. Townsend*, 57 Cal. 300; and *Dyer v. Hudson*, 65 Cal. 375; *Partridge v. Lucas*, 99 Cal. 522. Cited in *Taylor v. Palmer*, 31 Cal. 246, *Harney v. Heller*, 47 Cal. 17, and *Bates v. Twist*, 138 Cal. 54, sustaining contracts and resolutions as to street improvement; but cf. *Schwiesau v. Mahon*, 128 Cal. 116, holding specification insufficient; construing contract to improve streets in city of Oakland, in *Beandry v. Valdez*, 32 Cal. 276, 279. So, as to validity of contracts for street work, is cited in *Gafney v. San Francisco*, 72 Cal. 151; *Fox v. Middleborough Town Co.*, 96 Ky. 272; and *Verdin v. St. Louis*, 131 Mo. 127.

Streets.—Resolution of Intention will be construed to extend only to improvements within the powers of the board, p. 377.

Cited in *German etc. Soc. v. Ramish*, 138 Cal. 128, construing ordinance to grade streets.

28 Cal. 380-382. PEOPLE v. JUAREZ.

Criminal Law.—The felonious and fraudulent taking of property with intent to deprive the owner thereof is larceny, p. 382.

Approved in *People v. Brown*, 105 Cal. 70; and so, in *State v. Ryan*, 12 Nev. 403; S. C. 28 Am. Rep. 803; and *State v. Slingerland*, 19 Nev. 139. Cited in *State v. Rue*, 72 Minn. 307, distinguishing between embezzlement and larceny; 57 Am. Dec. 274, note; also in *Wilson v. State*, 51 Am. Rep. 315, 316, 317, note, where the authorities bearing on the subject are collected.

28 Cal. 382-392. PEOPLE v. STRATTON.

Pleadings.—Defendant in action to try right to office may set forth in his answer more than one defense, p. 387.

Cited to ruling stated, in 30 Am. Dec. 52, note.

Office.—In the abstract, "office" signifies a place of trust. In legal idea, an office is an entity, and may exist in fact, though it be without an incumbent, p. 388.

Definition approved in *People v. Hopt*, 3 Utah, 402; *Kendall v. Raybould*, 13 Utah, 234; and *Coler v. Rhoda School Township*, 6 S. Dak. 651; Cited in *White v. City of Alameda*, 124 Cal. 96, 97, noted under *Webster v. Wade*, 19 Cal. 292; *Moore v. Strichling*, 46 W. Va. 518, holding an office not property within statute as to jury trials; note to *State v. Hocker*, 63 Am. St. Rep. 182, 186, 189, on public offices; 72 Am. Dec. 180, note.

Same.—Incumbent of office created by legislature, who has been elected or appointed thereto, continues to hold until a successor has been duly elected or appointed, p. 390.

Examined and the ruling approved in *People v. Parker*, 37 Cal. 643, 646; *Treadwell v. Yolo County*, 62 Cal. 566; *People v. Edwards*, 93 Cal. 157, 158; *Weeks v. Gamble*, 13 Fla. 20; *State v. Simon*, 20 Oreg. 378; *People v. Clayton*, 4 Utah, 433; and *United States v. Justices*, 10 Fed. Rep. 464, construing Tennessee statute. Cited, and held to have no application to a recess appointment, in *Territory v. Stokes*, 2 N. Mex. 68.

Same.—When mode of filling vacancy in office is provided by law, other than by appointment of governor, the governor has no power to fill such vacancy by his appointment, p. 392.

Cited as authority to ruling stated, in *People v. Parker*, 37 Cal. 647.

28 Cal. 393-395. CHAPMAN v. MORRIS.

County Warrants.—Law authorizing county to fund its outstanding warrants which were not to draw interest, and to make the bonds given in exchange therefor bear interest, is constitutional, p. 395.

Approved in *Hotchkiss v. Marion*, 12 Mont. 224; and cited to the ruling stated, in 68 Am. Dec. 298, 299, note.

28 Cal. 395-396. PEOPLE v. STEWART.

Criminal Evidence.—In murder, prisoner's reputation for peace and good order is admissible in evidence, p. 396.

Approved in *Morgan v. State*, 88 Ala. 224, but holding that the defendant cannot give evidence of his good character for truth and veracity, since it is not involved in the issue. Dictum that a jury may properly be instructed that evidence as to previous good character is

not entitled to any weight, except in doubtful cases, denied in *People v. Ashe*, 44 Cal. 291, holding that the good character of the prisoner, when proven, is itself a fact in the case; *Daniels v. State*, 2 Penne. 596, as overruled by *People v. Ashe*, 44 Cal. 288.

28 Cal. 402-404. **KILE v. TUBBS.** S. C. before, 23 Cal. 431; and S. C. again 32 Cal. 332.

Impeachment of Patent.—One who has secured a right of pre-emption stands in such relation to the United States government as enables him to attack a patent from the state collaterally, p. 403.

Cited as authority, discussing subject of impeachment of patent for public lands, in 85 Am. Dec. 93, note.

28 Cal. 406-409, **TYLER v. GREEN.** 87 Am. Dec. 130.

Pre-emption.—In action to recover possession, of public lands, plaintiff claiming to recover by reason of prior possession, and the defendant claiming as a pre-emptor under laws of United States, he is entitled to prove the necessary facts to establish his pre-emption right, p. 408.

Cited in *Schieffery v. Tapia*, 68 Cal. 186, holding that the defendant must connect himself with the United States, the original source of title. So in 3 Am. St. Rep. 888, note; 31 Am. St. Rep. 198, note; 35 Am. St. Rep. 267, note; 39 Am. St. Rep. 768, note; and 42 Am. St. Rep. 488, note; all bearing upon the subject of pre-emptor's rights.

Judgment will not be reversed for error that could not affect the rights of the parties, p. 409.

Cited to ruling stated in 90 Am. Dec. 554, note; 92 Am. Dec. 340, note; and 94 Am. Dec. 363, note.

28 Cal. 409-414. **VILHAC v. BIVEN.**

Statement on motion for new trial must specify the particulars wherein it is alleged the evidence is insufficient to justify the verdict and the errors upon which the appellant will rely, p. 413.

Approved in *Spanagel v. Dellinger*, 38 Cal. 280; *Raymond v. Thexton*, 7 Mont. 305; and *Caldwell v. Greely*, 5 Nev. 261. Cited in *Stater v. U. P. Ry. Co.*, 8 Utah, 180, holding new trial improperly granted when statement was insufficient; dissenting opinion of Sawyer, J., in *Quivey v. Gambert*, 32 Cal. 326, as authorizing the practice of striking out statement on motion for new trial.

28 Cal. 414-416. **EX PARTE KELLY.**

Criminal Law.—Judgment may direct imprisonment for payment of fine until paid, at a certain rate per day, and such imprisonment may be ended at any time by payment of remainder of fine, p. 415.

Approved in *Ex parte Casey*, 85 Cal. 38, in which case the prisoner was convicted of misdemeanor; *Ex parte McGee*, 33 Or. 170, 172, quoting *State v. Sheppard*, 15 Or. 601, and construing local statutes. Distinguished in *Ex parte Ellis*, 64 Cal. 206, it not appearing in the latter case that any part of the fine had been paid or tendered. So in *Ex parte Baldwin*, 60 Cal. 435, the judgment being different; and so in *Ex parte Harrison*, 63 Cal. 300. So, to same effect, in *State v. Sheppard*, 15 Oreg. 601, construing provisions of the Oregon code.

28 Cal. 416-423. GRAY v. PALMER.

Final Judgment has been "rendered" when an order for judgment has been made and regularly entered by the clerk in the minutes of the court, and the judgment has been drawn up in good form, signed by the judge, and filed with the clerk, pp. 419, 420.

Approved as to what constitutes "rendition" of judgment, in *Harrie v. Railroad Co.*, 41 Cal. 407. So, to same effect, in *Young v. Wright*, 52 Cal. 410; *In re Newman*, 75 Cal. 221; S. C. 7 Am. St. Rep. 151; *In re Cook*, 77 Cal. 224; S. C. 11 Am. St. Rep. 270; *Schurtz v. Romer*, 81 Cal. 247; *Marshall v. Taylor*, 97 Cal. 426; *Hodgins v. Harris*, 4 Idaho, 518, an order for a judgment is not a final appealable judgment; *Crim v. Kessing*, 89 Cal. 488; S. C. 23 Am. St. Rep. 497, in which case it is noted that under the provisions of the Code of Civil Procedure, whenever findings are required there can be no "rendition of the judgment" until they are made and filed with the clerk. Ruling also approved in *Durant v. Comegys*, 2 Idaho, 811; S. C. 35 Am. St. Rep. 267; *Harmon v. Comstock etc. Cattle Co.*, 9 Mont. 248; *State v. Biesman*, 12 Mont. 16; *Parrott v. Kane*, 14 Mont. 27; *Douglas Co. Road Co. v. Abraham*, 5 Oreg. 324, dissenting opinion of Shattuck, J.; *Mayer v. Haggerty*, 138 Ind. 631; *Galpin v. Page*, 1 Sawy. 336; and *Schuster v. Rader*, 13 Colo. 334, but holding that judgment by confession from the time of actual entry in the record as provided by the Colorado statute.

Same.—In entering such judgment in the judgment book the clerk acts ministerially, p. 421.

Cited as authority in *County of Sacramento v. Railroad Co.*, 61 Cal. 255; and *King v. Higgins*, 3 Oreg. 412.

Same.—The time fixed within which an appeal must be taken from a judgment begins to run from the time of its "rendition," and the failure of the clerk to enter the judgment in the judgment book cannot extend the time to appeal, p. 419.

Affirmed in *Peck v. Curtis*, 31 Cal. 209; *Genella v. Relyea*, 82 Cal. 159; *Wetherbee v. Dunn*, 36 Cal. 252; and approved as authority in *Anderson v. Mitchell*, 58 Ind. 595; and *Mayer v. Haggerty*, 138 Ind. 631. Cited in dissenting opinion in *Bell v. Staacke*, 137 Cal. 310, construing section 939, Code of Civil Procedure; in *Ex parte Morton*, 69 Ark. 52, construing similar local statute as to appeal from order; *Me-*

Laughlin v. Doherty, 54 Cal. 519, but noting that under section 939 of the Code of Civil Procedure, an appeal must be taken within one year after the "entry" of judgment, and holding that an appeal taken before the entry, though after the rendition of judgment, will be dismissed. And so in *Thomas v. Anderson*, 55 Cal. 45, and *In re Rose*, 80 Cal. 169, the latter case holding, however, that an interlocutory order settling the account of an administrator but not discharging him from his trust, is not a final judgment, within the meaning of section 939 of the Code of Civil Procedure. Distinguished in *Trenouth v. Farrington*, 54 Cal. 274, holding that under a different statute the time prescribed for the limitation of an action upon a judgment begins to run with the entry of the judgment, and not upon its rendition.

28 Cal. 423-429. **PEOPLE v. KELLY.**

Criminal Evidence.—Circumstantial evidence, in a criminal case, is sufficient, if it produces in the minds of the jury a conviction of the defendant's guilt beyond a reasonable doubt, p. 425.

Cited to the ruling stated, in 36 Am. Dec. 563, note; and 52 Am. Dec. 737, note.

Same.—Possession by a party of stolen goods soon after the larceny was committed is a fact or circumstance from which his complicity in the larceny may be inferred, p. 426.

Cited as authority in *Perry v. State*, 41 Tex. 486; also, in 70 Am. Dec. 447, 450, note.

Instructions.—If instructions in a criminal case embody the law of the case, it is not error to refuse other instructions which also embody the law, p. 428.

Cited in *Muller v. Hale*, 138 Cal. 168, applying rule in negligence action; *People v. Dodge*, 30 Cal. 450, and holding that the court may alter or add to instructions asked by counsel. And so, to same effect, in *People v. Ramirez*, 56 Cal. 438; *People v. Etting*, 99 Cal. 578; and *United States v. Cannon*, 4 Utah, 139.

28 Cal. 429-444. **PEOPLE v. BOARD OF SUPERVISORS OF CITY AND COUNTY OF SAN FRANCISCO.**

Mandamus is the proper remedy where a board of supervisors, alleging want of legal authority, refuse to act on a claim presented to them, p. 431.

Approved in *Tilden v. Sacramento County*, 41 Cal. 77, dissenting opinion of Crockett, J.; Cited in *Nickens v. Lewis Co.*, 23 Wash. 129, noted under *Price v. Sacramento Co.*, 6 Cal. 254; as authority to the ruling stated, in 68 Am. Dec. 297, note; and 70 Am. Dec. 746, note. Questioned in *Lehn v. San Francisco*, 66 Cal. 77, holding that the charter of the city of San Francisco does not require a claim against the

municipality to be presented to the supervisors for allowance, before suit can be brought upon it.

28 Cal. 445-449. PEOPLE v. DODGE.

Criminal Law.—Defendant is entitled to a continuance to enable him to obtain the personal attendance of his witnesses, if the same can be obtained without delay, p. 448.

Approved in *People v. Brown*, 46 Cal. 103; and *State v. O'Neil*, 13 Ore. 185. So in *Willard v. Superior Court*, 82 Cal. 465, 466, 467, dissenting opinion of Thornton, J.; and *State v. Jennings*, 81 Mo. 201, dissenting opinion of Sherwood, J. *People v. Plyler*, 121 Cal. 165, holding continuance improperly refused; but cf. *People v. Breen*, 130 Cal. 77, ruling aliter under facts stated. Distinguished in *People v. Francis*, 38 Cal. 187, in which case the absent witnesses resided in a foreign country.

28 Cal. 449-456. BEALS v. BOARD OF SUPERVISORS OF AMADOR COUNTY.

County Indebtedness.—Act of 1855 organizing Amador county out of part of territory of Calaveras county, and compelling the former to pay a portion of the debt of the latter, does not require Amador county to pay interest on its proportion of the debt due to the county of Calaveras, p. 453.

Commented on and explained in *Beals v. Amador Co.*, 35 Cal. 631. So, *Kendall v. Porter*, 120 Cal. 110, *McFarland, J.*, dissenting, p. 113. Principle of the decision approved and applied in *Soher v. Supervisors etc.*, 39 Cal. 136; *Davis v. Porter*, 66 Cal. 661; and *Bates v. Gerber*, 82 Cal. 555. So, to same effect, in *Road Commrs. v. Freeholders etc.*, 45 N. J. L. 176. Explained and distinguished in *Nash v. El Dorado County*, 11 Sawy. 91, S. C. 24 Fed. Rep. 256, holding that where no provision is made for interest, both bonds and coupons bear interest after maturity at the legal rate.

28 Cal. 456-465. PEOPLE v. OLWELL.

Criminal Law.—If defendant appeals from a judgment of conviction, but does not move for a new trial, and the judgment is reversed, and a new trial ordered, the former conviction is not a bar to another trial, pp. 461 et seq.

Affirmed in *People v. Barrie*, 49 Cal. 346; *People v. Traversa*, 77 Cal. 178; *People v. Lee Yune Chong*, 94 Cal. 386, 387; and *People v. Bennett*, 114 Cal. 59. Ruling approved in *Lovett v. State*, 33 Fla. 393; Ex parte *Bradley*, 48 Ind. 552; *State v. Knouse*, 33 Iowa, 368; *People v. Murray*, 89 Mich. 292; S. C. 28 Am. St. Rep. 306; *State v. Thompson*, 10 Mont. 562; and *State v. Rover*, 10 Nev. 399, 400; S. C. 21 Am. Rep. 753.

28 Cal. 465-476. PEOPLE v. HENDERSON.

Criminal Practice.—A judge who did not try the case, if legally presiding, has jurisdiction to pronounce sentence, p. 472.

Cited as authority that a statement on motion for a new trial may be settled and passed upon by the successor of the judge who tried the case, in *Territory v. Bryson*, 9 Mont. 42.

General Citation.—*Carter v. United States*, 1 Ind. Ter. 350.

28 Cal. 479-484. GORHAM v. GILSON.

Corporation.—Title to property of remains in the corporation and not in the stockholders, and the latter have no power, as such, to authorize the sale of the corporate property, p. 484.

Affirmed in *Gashwiler v. Willis*, 33 Cal. 19; S. C. 91 Am. Dec. 612; and *Kohl v. Lilienthal*, 81 Cal. 385.

28 Cal. 484-489. 87 Am. Dec. 135. CARPENTER v. MENDENHALL.

Tenancy in Common.—A finding of a demand by one tenant in common, to be let into possession, and a refusal by his cotenant, is not a finding of ouster, but the intent to oust must be established as a fact by the finding of the jury, p. 487.

Principle of the decision approved and applied in *Bull v. Bray*, 89 Cal. 298; *Board of Education v. Martin*, 92 Cal. 214; and *Highstone v. Burdette*, 54 Mich. 332. Referred to as distinguishing between the finding in a special verdict of an ouster, and of probative facts, which go toward establishing an ouster, in *Packard v. Johnson*, 57 Cal. 183; and in *Bell v. Hudson*, 73 Cal. 290; S. C. 2 Am. St. Rep. 795 to the same effect cited to ruling stated in 92 Am. Dec. 589, note; and 50 Am. St. Rep. 844, note.

Same.—Presumption is, that possession of one tenant in common is amicable until the contrary is shown, p. 487.

Approved in *Carpentier v. Small*, 35 Cal. 356. Explained and harmonized in *Frick v. Simon*, 75 Cal. 241; S. C. 7 Am. St. Rep. 179. Cited as authority in *McCloskey v. Barr*, 47 Fed. Rep. 160. Questioned in *Elder v. McCloskey*, 70 Fed. Rep. 548, referring to *Winterburn v. Chambers*, 61 Cal. 170. Cited to the ruling stated, in 82 Am. Dec. 160, note; 92 Am. Dec. 589, note; 94 Am. Dec. 358, note; 97 Am. Dec. 247, note; 100 Am. Dec. 669, note; 8 Am. St. Rep. 821, note; 35 Am. St. Rep. 72, note.

General Citations.—Referred to in *Carpentier v. Gardiner*, 29 Cal. 163; and *Carpentier v. Mitchell*, 29 Cal. 333, as determining some of the principal questions in the two latter cases. Cited on question of damages for an ouster by a cotenant, in *Carpentier v. Mitchell*, 29 Cal. 334; and so in *Pico v. Colimas*, 32 Cal. 580. Referred to as bearing on subject of ejectment by tenant in common against cotenant, in 98 Am. Dec. 298.

28 Cal. 489. HICKINBOTHAM v. MONROE.

Appeal.—When time for filing briefs has expired, and no briefs or points have been filed, the judgment will be affirmed, p. 489.

Affirmed, asserting the rule, that where the appellant neither makes an oral argument, nor files any brief, the court will affirm the judgment without an examination of the record, in *Faris v. Lampson*, 73 Cal. 191; *Peek v. Peek*, 75 Cal. 299; and *Drexler v. Seal Rock Tobacco Co.*, 78 Cal. 625. **Approved as correct practice** in *Tucker v. Constable*, 16 Oreg. 239,

28 Cal. 490-496. PEOPLE v. SHULER.

Indictment must be regarded as sufficient, if the offense is charged essentially and substantially as it is defined by the statute, p. 492.

Approved in *People v. Rice*, 73 Cal. 221, an information for receiving stolen property. Referred to, discussing sufficiency of common-law indictment, in *Houston v. Commonwealth*, 87 Va. 263.

Same.—An indictment for robbery charging that the property was taken from one person, and that another person was the owner of it, is sufficient, p. 493.

Rule recognized in *People v. Ammerman*, 118 Cal. 25, but holding an averment of the ownership of the property in another person than the defendant, essential; *People v. Walbridge*, 123 Cal. 274; *Darzey v. State*, 126 Ala. 19, sustaining information and indictment. **Approved** as authority in *State v. Ah Loi*, 5 Nev. 102; *State v. Adams*, 58 Kan. 367; and cited to the ruling stated, in 38 Am. Dec. 250, note; and 70 Am. Dec. 181, 182, note. **Denied** to be the rule of the common law, in *State v. Lawler*, 130 Mo. 376; S. C. 51 Am. St. Rep. 581.

Change of Venue.—Bias or prejudice of the presiding judge is no legal ground for, p. 494.

Affirmed in *In re Jones*, 103 Cal. 398; and **approved** as authority in *In re Davis' Estate*, 11 Mont. 19. Cited as authority as to requisites of affidavits on application for change of venue, in *People v. Yoakum*, 53 Cal. 567; *Territory v. Egan*, 3 Dak. 125; *Kennon v. Gilmer*, 5 Mont. 263; *Territory v. Manton*, 8 Mont. 103; and 74 Am. Dec. 245, note.

Change of Venue.—Affidavit for, is insufficient when based on information or belief as to bias, p. 495.

Cited in *Higgins v. City of San Diego*, 126 Cal. 314; *State v. Spotted Hawk*, 22 Mont. 53, noted under *People v. McCauley*, 1 Cal. 379.

Change of Venue.—Bias of Sheriff.—Quaere, whether sufficient ground for, p. 495.

Cited in *State v. Savage*, 36 Or. 201, discussing propriety of appointment of elisor for disqualification of sheriff.

Circumstantial Evidence if alone relied on to sustain a criminal

charge, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, p. 495.

Affirmed in *People v. Strong*, 30 Cal. 154; and *People v. Davis*, 64 Cal. 441. Approved in *Jones v. State*, 34 Tex. App. 491.

It will be Presumed on appeal that the charge of the court to the jury in a criminal case was in writing, unless the record shows otherwise, p. 496.

Affirmed in *People v. Wright*, 45 Cal. 261; and cited as authority in *Territory v. Duffield*, 1 Ariz. Ter. 74.

28 Cal. 497-498. STONE v. BUNKER HILL MINING COMPANY.

Court commissioner cannot hear motion to dissolve an injunction unless referred to him by the court, p. 498.

Approved in *Quiggle v. Trumbo*, 56 Cal. 627, holding that a court commissioner has no jurisdiction to appoint a receiver.

28 Cal. 498-502. COMBS v. JELLY.

While certificate of purchase remains uncanceled, claims not forfeited for nonperformance of labor, p. 499.

Approved in *Southern Cross Gold Min. Co. v. Sexton*, 147 Cal. 760, where owner of mining claim after applying for patent obtains certificate of purchase secretary of interior cannot make cancellation retroactive for nonperformance of labor.

28 Cal. 502-507. PEOPLE EX REL. VANTINE v. SENTER.

Estates of Decedents.—Mexican system of administration upon, was superseded by the adoption of the common law in California, April 13, 1850, p. 505.

Cited as authority in *Coppinger v. Rice*, 33 Cal. 424, holding that estates of persons dying before the passage of the probate laws of the state, were governed by Mexican law. So in *Ryder v. Cohn*, 37 Cal. 91, dissenting opinion of Rhodes, J.; *McNeil v. Congregational Soc.*, 66 Cal. 108, 112; *Seaverns v. Gerke*, 3 Sawy. 363, Fed. Cas. No. 12,595; and 65 Am. Dec. 547, note. Referred to in *Ryder v. Cohn*, 37 Cal. 89, as deciding that where an intestate died after the passage of the probate act of 1850, and before it was repealed by the act of 1851, letters of administration might be taken out under the latter act. Cited in *Maddock v. Russell*, 109 Cal. 422, holding that proceedings in California for the administration of the estates of decedents are purely statutory, and the statutory rule is to be followed, in any case, so far as given, before resort can be had for guidance to the rules of the common law.

General Citations.—*Graves v. Hebron*, 125 Cal. 406. *Morganstern v. Commonwealth*, 94 Va. 790.

28 Cal. 507-520. PEOPLE v. FRANK.

Indictment.—Where a statute in defining an offense enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, p. 513.

Affirmed in *People v. De La Guerra*, 31 Cal. 461; *People v. Tomlinson*, 35 Cal. 508; *Ex parte McCarthy*, 72 Cal. 386; *People v. Harrold*, 84 Cal. 568; *People v. Gossett*, 93 Cal. 643; and *People v. Leyshon*, 108 Cal. 442; *People v. Mitchell*, 92 Cal. 590; *Territory v. Poulier*, 8 Mont. 150. Cited in *People v. Gusti*, 113 Cal. 179, noted under *People v. Shotwell*, 27 Cal. 394; *State v. Greenwood*, 76 Minn. 210, sustaining indictment for forgery; *State v. Newton*, 29 Wash. 378, 390, upholding information charging that defendant feloniously made, forged and counterfeited a certain bank check, and then and there unlawfully uttered and published it as true. Principle of the decision approved and applied in *People v. Thompson*, 111 Cal. 252; and *Territory v. Ashby*, 2 Mont. 95. Cited to the ruling stated, in 58 Am. Dec. 243, 244, note.

Forgery.—Crime of may be committed by forging an indorsement upon an unstamped draft, p. 514.

Approved in *People v. Munroe*, 100 Cal. 666; S. C. 38 Am. St. Rep. 324, holding that a writing purporting to be a sale or assignment of the unearned salary of a public school teacher may be the subject of forgery. Explained and harmonized in *People v. Tomlinson*, 35 Cal. 507. Cited to the ruling stated, in 22 Am. Dec. 319, note; 59 Am. Dec. 559, note; and 8 Am. St. Rep. 466, note.

Same.—Other forged instruments uttered by the defendant about the same time may be used to prove guilty knowledge, though acquitted of forging them, p. 515.

Cited as authority in *Garwood v. Garwood*, 29 Cal. 523; *People v. Garnett*, 29 Cal. 631; *People v. Bibby*, 91 Cal. 476; *Bell v. State*, 57 Md. 118; *Humpfer v. Osborne*, 2 S. Dak. 322; *Withaup v. United States*, 127 Fed. 532, following rule; 76 Am. Dec. 479, note, as to conclusiveness of verdict.

Evidence.—Objection to must be specific, p. 519.

Approved in *People v. Louie Foo*, 112 Cal. 22; *People v. Owens*, 123 Cal. 490, as to objection to admission of dying declaration; *People v. Eckman*, 72 Cal. 583, and applied in the case of a party moving to strike out the answer of a witness. Cited as authority in *Hamilton v. Mining Co.*, 13 Sawy. 120; S. C. 33 Fed. Rep. 567.

Same.—On a criminal trial, the existence of a corporation may be proved by general reputation, p. 519.

Ruling approved in the following cases: *People v. Ah Sam*, 41 Cal. 652; *People v. Barrie*, 49 Cal. 344; *People v. Leonard*, 106 Cal. 310; *People v. Oldham*, 111 Cal. 651; *State v. Thompson*, 23 Kan. 340; S. C.

33 Am. Rep. 166; and *State v. Habib*, 18 R. I. 559. Cited in *State v. Missio*, 105 Tenn. 225, holding evidence sufficient on charge of receiving stolen goods belonging to railroad company.

28 Cal. 520-527. CULVER v. ROGERS.

Lien of Judgment.—Judgment on mortgage foreclosure, even if docketed, does not become a lien until a sale of the mortgaged property, and the balance, if any, reported by the sheriff and docketed by the clerk, and then only for such balance, p. 524.

Approved in *Boyd v. Desmond*, 79 Cal. 257; *McKean v. German-Am. Sav. Bank*, 118 Cal. 340; and *Weil v. Howard*, 4 Nev. 390, 391, 393. Denied in *Creighton v. Hershfield*, 2 Mont. 389.

Execution Sale will be enjoined when creating a cloud, p. 526.

Cited in *Einstein v. Bank*, 137 Cal. 50, noted under *Shattuck v. Carson*, 2 Cal. 589.

Same.—If homestead is claimed before balance is ascertained, there is no lien on it for deficiency, and it cannot be sold under execution, p. 527.

Principle of the decision approved and applied in *Reeves v. Peterman*, 109 Ala. 369; *Jacoby v. Distilling Co.*, 41 Minn. 230. Declared to be the settled law of California, in *In re Henkel*, 2 Sawy. 308; and declared to be the law of Kansas, in *Kelly v. Sparks*, 54 Fed. Rep. 72. Cited as authority in *Lubbock v. McMann*, 82 Cal. 230; S. C. 16 Am. St. Rep. 111, holding that although the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation, and will therefore be enjoined. So in *Roth v. Insley*, 86 Cal. 140; 28 Am. Dec. 441, note; and 70 Am. Dec. 691, note.

28 Cal. 527-534. THOMPSON v. SMITH.

Forcible Entry and Detainer.—Unlawful entry must have some ingredient of fraud or willful wrong without a bona fide claim or color of title, p. 532.

Cited in *Carteri v. Roberts*, 140 Cal. 166, quoting *Voll v. Hollis*, 60 Cal. 569; *McMinn v. Bliss*, 31 Cal. 126, holding that if the complaint charges a forcible entry with a multitude of people, and a forcible and unlawful detainer, the forcible entry is the gist of the action. Ruling approved in *Shelby v. Houston*, 38 Cal. 422. Cited, as to evidence of title in defendant, in *Dennis v. Wood*, 48 Cal. 363, 364. So in *Voll v. Hollis*, 60 Cal. 575, holding that under the provisions of the Code of Civil Procedure, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of the recovery in this form of action. Distinguished in *Valencia v. Couch*, 32 Cal. 346; S. C. 91 Am. Dec. 595, setting forth requisites of complaint in forcible entry and detainer. Cited as to admissibility of deed in evidence, in 77 Am. Dec. 554, note.

Order Granting New Trial.—Order vacating a verdict or finding and granting a new trial necessarily vacates the judgment in the case resting on such verdict or finding, p. 534.

Cited in *Knowles v. Thompson*, 133 Cal. 247, on point that judgment not appealable after new trial is granted; *Pierce v. Birkholm*, 110 Cal. 672, holding that the reversal of an order granting a new trial leaves the verdict and judgment standing. Cited as authority to ruling stated, in *Bedford v. Kissick*, 8 S. Dak. 587.

General Citations.—In *Brooks v. Warren*, 5 Utah, 122, that a mere scrambling possession is not sufficient to maintain the action for forcible entry and detainer. *New Orleans v. Stempel*, 175 U. S. 319.

28 Cal. 534-539. **HAWKINS v. REICHERT.**

Where Occupant is Mere Servant, his occupation may be occupation of employer, and if so, employer should be made defendant in ejectment, p. 536.

Approved in *Carothers v. Mining etc. Co.*, 122 Fed. 308, resident agent of foreign corporation who has merely served on plaintiff a notice, signed by him as managing director, that plaintiff is wrongfully occupying premises and will be held as trespasser unless he surrenders them, cannot be made defendant to ejectment against corporation so as to prevent removal.

Ejectment.—Only real parties in possession should be defendants, p. 536.

Affirmed in *Dizick v. Derringer*, 32 Cal. 491; *Mahoney v. Middleton*, 41 Cal. 53; *Polack v. Mansfield*, 44 Cal. 39; S. C. 13 Am. Rep. 154; *Frazier v. Lynch*, 97 Cal. 372; and approved in *Morrison v. Holladay*, 27 Oreg. 187; *Stewart v. Pace*, 30 Ark. 597; and *Grundy v. Hadfield*, 16 R. I. 583. Cited to ruling stated, in 82 Am. Dec. 775, note.

Motion for New Trial is addressed to the sound legal discretion of the court, p. 539.

Cited as authority in *Hall v. Bark "Emily Banning,"* 38 Cal. 525; *Bates v. Howard*, 105 Cal. 179; *Rosina v. Trowbridge*, 20 Nev. 121; and *Wright v. Missouri Pac. Ry. Co.*, 20 Mo. App. 485.

Cited in *Welland v. Williams*, 21 Nev. 233, on point that order will not be reviewed on conflict of evidence, even though made by successor to trial judge; *Serles v. Serles*, 35 Or. 297, noted under *Walton v. Maguire*, 17 Cal. 92; distinguished in *Magnusson v. Linwell*, 9 N. Dak. 156, affirming order denying new trial.

28 Cal. 539-544. **LALLY v. WISE.**

Interest.—Only rate not agreed upon in writing, allowable for detention of money, is the legal rate, pp. 543, 544.

Approved on question of damages, in *North Star Boot and Shoe Co. v. Stebbins*, 3 S. Dak. 544.

Parties.—Each of the parties to whom an injunction bond is made payable may sue thereon for his several damages, although the bond is made payable to the obligees jointly, p. 543.

Approved in *Austin v. Snider*, 17 Colo. App. 180, where an appeal and injunction bond were payable to plaintiff and two other appellees, one of whom was sued only as receiver and held only for plaintiff and was discharged before suit on bonds, and pending appeal other payee died leaving appeal as sole heir, plaintiff could sue alone on bonds; *Montana Min. Co. v. St. Louis etc. Milling Co.*, 19 Mont. 320, 321, holding that in an action for debt on an injunction bond all of the obligees are necessary parties to the action.

28 Cal. 545-548. JOHNSON v. SANTA CLARA COUNTY.

County is not liable for medical treatment of sick, unless indigent residents, p. 548.

Approved as authority in *Lebcher v. Commissioners etc.*, 9 Mont. 322; and *Tucker v. Virginia City*, 4 Nev. 29.

Pleadings.—Pleader must state the facts of his case, and not leave them to be deduced by argument and inference, p. 547.

Cited as authority to ruling stated, in 76 Am. Dec. 498, note.

28 Cal. 549-551. DENVER v. BURTON.

Pleadings.—Material fact in a complaint should be directly averred, p. 550.

Cited to the ruling stated, in *Stringer v. Davis*, 30 Cal. 321; *People v. Jones*, 123 Cal. 301, applying rule to allegation of agency in indictment; *Weinberger v. Weidman*, 134 Cal. 601, holding averment as to renewal of note insufficient.

28 Cal. 551-555. MOORE v. MORROW.

Tenancy by Sufferance is not by the consent but by the laches of the owner, p. 554.

Approved in *Johnson v. Donaldson*, 17 R. L. 108. Cited as authority to the proposition that the estate is destroyed when the owner makes an entry and ousts the tenant, in 91 Am. Dec. 564, note; and in 42 Am. Dec. 130, note, that tenant by sufferance is not entitled to notice to quit.

28 Cal. 555-561. BUCKMAN v. WHITNEY.

Appeal.—None can be taken if lost record be not supplied, p. 560.

Cited as authority, holding that the appellate court can only act upon

a transcript of the record as it exists in the lower court, duly authenticated in the mode prescribed by law, in *Satterlee v. Bliss*, 36 Cal. 522; and to same effect, in *People v. Center*, 54 Cal. 237; *Thompson v. Patterson*, 54 Cal. 547; and *Close v. Close*, 28 Oreg. 109.

28 Cal. 561-567. **RANDOLPH v. HARRIS.** S. C. 87 Am. Dec. 139.

Lost Instruments.—In action upon a lost instrument indemnity should be tendered before suit, but failure to do so only affects the question of costs, p. 565.

Cited as authority in *Schuttler v. King*, 13 Mont. 229, holding that the tender of indemnity constitutes no part of the plaintiff's cause of action. *Farmers' Exch. Bank v. Altura etc. Min. Co.*, 129 Cal. 270. So in *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 61. Cited on question of necessity of indemnity in action on lost instrument, in 13 Am. Dec. 481, 482, note; 60 Am. Dec. 581, note; 91 Am. Dec. 746, note; and 24 Am. St. Rep. 566, note.

28 Cal. 567-569. **COLEMAN v. WOODWORTH.**

Survival of Action.—Cause of action for the wrongful taking and conversion of personal property survives against the personal representative of the deceased wrongdoer, p. 568.

Cited as authority in *Fox v. Hale and Norcross Silver Min. Co.*, 108 Cal. 483; *Warren v. Robison*, 21 Utah, 445, holding action based on fiduciary capacity to survive against defendant's executors; in 53 Am. Rep. 529, note.

Presentation of Claim.—Objection that claim against estate of decedent has not been presented to the administrator for allowance or rejection, if not made in court below, cannot be raised on appeal, p. 568.

Affirmed in *Peterson v. Hornblower*, 33 Cal. 278; *Bank of Stockton v. Howland*, 42 Cal. 134; and *Preston v. Knapp*, 85 Cal. 561. Approved in *Chase v. Evoy*, 58 Cal. 353; *Wise v. Hogan*, 77 Cal. 188; *Toulouse v. Burkett*, 2 Idaho, 173; and *Heis v. Farquharson*, 9 Wash. St. 517. Cited in *Bemmerly v. Woodward*, 124 Cal. 574, noted under *Hantsch v. Porter*, 10 Cal. 555.

28 Cal. 569-589. **DURYEA v. BURT.**

Mining Partnership exists between owners working the mine, and sharing profit and loss according to interest, without express partnership agreement. It differs from an ordinary partnership in not being founded on the *delectus personae*, p. 578.

Approved as authority, treating of nature of mining partnerships, in *Dougherty v. Creary*, 30 Cal. 300; S. C. 89 Am. Dec. 123; *McConnell v. Denver*, 35 Cal. 369; S. C. 95 Am. Dec. 108; *Decker v. Howell*, 42 Cal. 642; *Smith v. Cooley*, 65 Cal. 49; *Charles v. Eshleman*, 5 Colo. 112; *Man-*

ville v. Paris, 7 Colo. 133, 134; Meagher v. Reed, 14 Colo. 354, 355; Patrick v. Weston, 22 Colo. 49; Snyder v. Burnham, 77 Mo. 54; Priest v. Chouteau, 85 Mo. 406; S. C. 55 Am. Rep. 378; Nolan v. Lovelock, 1 Mont. 227; Southmayd v. Southmayd, 4 Mont. 112; Anaconda Copper Min. Co. v. Butte etc. Min. Co., 17 Mont. 523; Congdon v. Olds, 18 Mont. 490; Treat v. Hiles, 68 Wis. 354; S. C. 60 Am. Rep. 863; and Biesel v. Foss, 114 U. S. 261. Cited in Childers v. Neely, 47 W. Va. 73, 77, applying rule to joint tenants under oil lease who work the property and sustaining lien of one partner for advancements made; G. V. B. Min. Co. v. Bank, 95 Fed. 38, 39, 40, but denying lien under facts stated, note to Breaux v. Le Blanc, 69 Am. St. Rep. 418, on general subject; opinion of Hayne, C., in Smith v. Smith, 80 Cal. 327, as to the interest which one partner takes under deed made to firm. Cited, discussing the subject in 83 Am. Dec. 103, 104, 106, 110, note.

Same.—Mining claim so worked is to be treated in equity as partnership property, whenever acquired, pp. 579, 587.

Approved in Meagher v. Reed, 14 Colo. 367; Hogle v. Lowe, 12 Nev. 295, 298; Riedeburg v. Schmitt, 71 Wis. 655; and Holton v. Guinn, 65 Fed. Rep. 454. Cited in 83 Am. Dec. 110, note; 98 Am. Dec. 198, note; and 43 Am. St. Rep. 378, note. Referred to in Iron Works v. Davidson, 73 Cal. 392, treating of priority of firm creditors.

Same.—One of the partners may convey his interest in the mine and business without dissolving the partnership, p. 578.

Approved in Southmayd v. Southmayd, 4 Mont. 113; and Kahn v. Mining Co., 102 U. S. 646; reversing S. C. 2 Utah, 218; Hawkins v. Spokane etc. Min. Co., (2 Idaho, 975), 3 Idaho, 245, 655, holding majority owner has right to control means used and method adopted in working mine and may restrain minority owner from working it otherwise than as he directs; 83 Am. Dec. 107, note.

Same.—Each member of the partnership has a lien for money advanced and for debts due creditors, until he sells out, p. 579.

Approved in Jones v. Clark, 42 Cal. 194; and cited to ruling stated, in 83 Am. Dec. 109, note.

Finding of Facts by court is not an opinion, p. 588.

Approved in Jones v. Block, 30 Cal. 229.

General Citations.—In Galigher v. Lockhart, 11 Mont. 113, that incoming partner is not liable to another partner for the value of the latter's services rendered to the firm prior to his coming into the partnership, there being no agreement among the former partners that such services should be compensated.

28 Cal. 589-590. PEOPLE v. DE LACEY.

New Trial.—On application for, on ground that the court denied

a continuance, defendant should procure the affidavits of the absent witnesses, showing that they can testify to the facts sought to be proved, or give good reason for not obtaining such affidavits, p. 590.

Approved in *People v. Jocelyn*, 29 Cal. 563. So, to same effect, in *Arnold v. Skaggs*, 35 Cal. 688; and *Cox v. N. W. Stage Co.*, 1 Idaho, 382. Cited in *People v. Breen*, 130 Cal. 78, holding discretion not abused on denial of continuance.

28 Cal. 591-599. **LUCAS v. CITY OF SAN FRANCISCO.** S. C. sub nom., **WETMORE v. SAN FRANCISCO**, 44 Cal. 298.

Law of Case.—Judgment of an appellate court upon a point in issue involved in the case becomes the law of the case in all its stages, p. 594.

Approved in *Dodge v. Gaylord*, 53 Ind. 372; *Powell v. Railroad Co.*, 14 Oreg. 23; and *Meyers v. Dittmar*, 47 Tex. 375.

Appeal.—Defective finding not excepted to, after refusal to correct, was not reviewable under act of 1861, p. 596.

Approved in *James v. Williams*, 31 Cal. 213; *Poppe v. Athearn*, 42 Cal. 617; and *Warren v. Quill*, 9 Nev. 264, construing a similar statute; *Emeric v. Alvarado*, 64 Cal. 604, and holding that the findings of a court should state separately the facts found, and the conclusions of law.

Distinguished in *White v. Beale etc. Co.*, 65 Ark. 236, and held inapplicable under the local statutes.

28 Cal. 599-602. **BENNETT v. BENNETT.**

Divorce.—Plaintiff must aver and prove a bona fide residence within the state for the required time as a jurisdictional fact, p. 601.

Approved in *Adams v. Adams*, 154 Mass. 295. Referred to in *Dutcher v. Dutcher*, 39 Wis. 667, construing Wisconsin divorce statute; *Smith v. Smith*, 10 N. Dak. 231, holding necessity of proof of residence not obviated by admissions in answer; *National etc. Co. v. Syndicate*, 106 Fed. 114, discussing sufficiency of notice of sale under foreclosure.

28 Cal. 603-605. **PEOPLE v. MIDDLETON.**

Officers.—Commissioners of funded debt of San Francisco are not officers within the constitutional provision that no officer shall hold office for more than four years, p. 604.

Approved as authority in *Territory v. Scott*, 3 Dak. Ter. 417. Cited, discussing subject of office and officers, in *Shelby v. Alcorn*, 72 Am. Dec. 180, 185, extended note. Distinguished in *People v. Perry*, 79 Cal. 113, and holding that the members of the board of health of the city and county of San Francisco are officers within the meaning of the constitutional provision referred to.

28 Cal. 605-612. **PAGE v. FOWLER**. S. C. 37 Cal. 105; 39 Cal. 415; 46 Cal. 320, sub nom., **ATHERTON v. FOWLER**.

To constitute Adverse Possession of public land, it is sufficient if the party in possession claims the right against all the world except the United States, p. 611.

Approved in *McManus v. O'Sullivan*, 48 Cal. 15; *Lord v. Sawyer*, 57 Cal. 67; and *Rathbone v. Boyd*, 30 Kan. 490; *Altschul v. O'Neill*, 35 Or. 212, 216, holding use and occupation with intent to acquire government title not adverse as to one previously obtaining that title without possessor's knowledge; note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 481, on general subject.

Replevin for hay cut on public lands cannot be maintained by a prior possessor against one in adverse possession, claiming a pre-emption right when he cut the hay, p. 610.

Approved in *Hull v. Hull*, 1 Idaho, 363; *Rathbone v. Boyd*, 30 Kan. 491; *Lehigh Zinc and Iron Co. v. Iron Co.*, 55 N. J. L. 358; *Johnson v. Gravel Co.*, 86 Fed. Rep. 271; and *McCannaughy v. Wiley*, 13 Sawy. 154, 155; S. C. 33 Fed. Rep. 453, 454, holding that the action would lie against a mere intruder; *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 477, action involving damage for trespass on quartz ledge in another state by mining upon dip thereof on ground in possession of defendant is local and superior court has no jurisdiction. Cited as authority to the ruling stated, in 53 Am. Dec. 618, note; 85 Am. Dec. 323, note; and 89 Am. Dec. 429, note. Commented on in *Page v. Fowler*, 39 Cal. 416, 417, 418.

Action for Crops Cut.—A purchaser from Vallejo of part of Suscol Ranch, who entered into possession, cannot maintain a personal action for crops cut on the land by one who under a claim of pre-emption right entered on his possession in 1862, pp. 607, et seq.

Affirmed in *Hutton v. Frisbie*, 37 Cal. 490, 491.

Personal Action.—Title to real property cannot be determined in. p. 610.

Cited as authority in *King v. Mason*, 89 Am. Dec. 423, full note discussing the subject.

General Citation.—*Phillips v. Keysaw*, 7 Okla. 683.

28 Cal. 612-616. **PEOPLE v. SNEATH**.

Taxation.—Personal property may be assessed for taxes in bulk, without any statement of the character of the property, p. 615.

Approved in *People v. McCreery*, 34 Cal. 441; *San Francisco v. Flood*, 64 Cal. 505, 506; and *San Francisco v. Pennie*, 93 Cal. 470.

Same.—Assessment of personal property of former member of a firm made to the firm after its dissolution, is void, p. 616.

Cited in *Weinreich v. Hensley*, 121 Cal. 659, noted under *Kelsey v. Abbott*, 13 Cal. 609; *Smith v. Davis*, 30 Cal. 538, an assessment to a deceased person; *Taylor v. Donner*, 31 Cal. 482, holding an assessment void unless made to the true owner or to "unknown owners"; so in *Blatner v. Davis*, 32 Cal. 332; so in *Crawford v. Schmidt*, 47 Cal. 618, holding void an assessment made to the owner by his surname, leaving a blank for his given name. Cited in *Pearson v. Creed*, 69 Cal. 539, and noting that section 3628 of the Political Code, as amended in 1880, provides that a mistake in the name or supposed name of the owner of real property shall not render an assessment invalid. And cited as authority to the proposition that taxes must be assessed in strict accordance with the provisions of the statute, in *Huntington v. Railroad Co.*, 2 Sawy. 512; *Tilton v. Military Road Co.*, 3 Sawy. 24; and 85 Am. Dec. 100, note.

28 Cal. 616-618. **THOMAS v. VANLIEU.**

Bona Fide Purchaser.—A judgment creditor purchasing at his own sale, without notice of a prior unrecorded mortgage, must show that his sheriff's deed was first recorded, before he can claim to be a purchaser in good faith and for a valuable consideration, p. 617.

Cited as authority in *Vaughn v. Schmalsle*, 10 Mont. 197. Cited in *Commercial Bank v. Pritchard*, 126 Cal. 604, holding conveyance subject to prior mortgage if not previously recorded.

28 Cal. 618-628. **FICKEN v. JONES.**

Negligence.—Degree of care required to be exercised by persons driving cattle through the streets of a city is the same as that exacted of carriers of passengers, p. 627.

Approved in *Clowdis v. Fresno Flume etc. Co.*, 118 Cal. 322, case of injuries inflicted by a vicious bull; *Eichel v. Schuhenn*, 2 Ind. App. 210; *Ryan v. Gilmer*, 2 Mont. 523; S. C. 25 Am. Rep. 748, 750, treating of liability of passenger carriers; and so in *Kennon v. Gilmer*, 5 Mont. 272. Cited in dissenting opinion of *Crockett, J.*, in *Laverone v. Mangianti*, 41 Cal. 141; and distinguished in *Cunningham v. Los Angeles Ry Co.*, 115 Cal. 564, case of injury to infant by electric railway car.

Same.—In action for damage to the person by cattle being driven through a city, the plaintiff having proved that he sustained the injury without fault on his part, makes a case of prima facie negligence, and the burden is on the defendant to show he was not in fault, p. 628.

Approved in *Yeomans v. Contra Costa S. N. Co.*, 44 Cal. 84. Distinguished in *Towle v. Pacific Imp. Co.*, 98 Cal. 344, case of injury resulting from careless driving of team.

Same.—In such case, the defendant may show in defense that the persons employed by him in driving the cattle had competent skill in the business, p. 628.

Denied in *Hays v. Millar*, 77 Pa. St. 241, S. C. 18 Am. Rep. 449, case of injury caused by the negligence or unskillfulness of persons managing a towboat.

General Citation.—*Holliday v. Gardner*, 27 Ind. App. 241.

28 Cal. 628-631. CASSACIA v. PHOENIX INSURANCE COMPANY.

Pleading.—Keeping of gunpowder contrary to contract must be specially pleaded as a defense to action on insurance policy, p. 630.

Cited as authority, holding that fact of increase of risk by the assured must be set up in the answer, in *Tischler v. Insurance Co.*, 66 Cal. 179; and *Sperry v. Insurance Co.*, 22 Fed. Rep. 518; so in *Insurance Co. v. Thorp*, 48 Kan. 243, as authority for sufficiency of allegation of loss in suit on policy; *Cronin v. Fire Assn.*, 112 Mich. 109; *Hong Sling v. Insurance Co.*, 7 Utah, 444; and *Kahn v. Insurance Co.*, 4 Wyo. 448, 62 Am. St. Rep. 58, holding certain defenses properly excluded because not so pleaded. Referred to in 85 Am. Dec. 231, note.

Judgment for Interest.—Where answer is filed, judgment may be rendered for the principal and interest added thereto, although the complaint only prays for judgment for the principal, p. 630.

Approved as authority in Texas etc. *R. R. Co. v. Donnelly*, 46 Ark. 95; and cited to the ruling stated, in 87 Am. Dec. 128, note.

28 Cal. 632-639. BURT v. WILSON. 87 Am. Dec. 142.

Trusts.—Express trust in lands cannot be created or proved without a writing, p. 637.

Approved in *Barr v. O'Donnell*, 76 Cal. 471; S. C. 9 Am. St. Rep. 244; *Morrall v. Waterson*, 7 Kan. 207; and *Rogers v. Rainey*, 137 Mo. 609. Cited as authority, holding that a trust does not result to the grantor merely because there was no consideration for the conveyance, in *Tillaux v. Tillaux*, 115 Cal. 668.

Deed.—If language of is that intended to be used by the grantor, his mistake as to its legal effect will afford him no ground for relief in equity, p. 637.

Approved in *Kopp v. Gunther*, 95 Cal. 74; and cited as authority to ruling stated, in 100 Am. Dec. 187, note; 3 Am. St. Rep. 161, note; and 55 Am. St. Rep. 515, note.

Defendant waives benefit of statute of frauds by admitting the contract sued on and failing to specifically plead the statute, but if he claims the benefit of the statute in his answer, he is entitled to it, p. 638.

Cited in *Jamison v. Hyde*, 141 Cal. 112, but holding plea of statute not waived by answer under facts stated; *Bickle v. Irvine*, 9 Mont. 253, holding that the facts constituting constructive as well as actual fraud must be alleged in order to be proved. Harmonized in *Feeney v.*

Howard, 79 Cal. 534, S. C. 12 Am. St. Rep. 169, and holding that if the plaintiff relies upon a contract within the statute of frauds, a denial of the contract is sufficient to raise the question of its validity under the statute. See notes 86 Am. Dec. 686, 687; 93 Am. Dec. 758; 12 Am. St. Rep. 171; and 78 Am. St. Rep. 657.

Vendor's Lien upon sale by one partner to another may be enforced before partnership affairs are adjusted, p. 638.

Approved in the similar case of *Reese v. Kinkead*, 18 Nev. 129; and cited as recognizing existence of vendor's lien in California, in 4 Am. St. Rep. 705, note.

Pleading.—A claim to enforce a trust may be joined in a complaint to enforce a vendor's lien existing without any written contract, p. 639.

Referred to in 59 Am. St. Rep. 707, note, joinder of causes of action.

28 Cal. 639-641. PEOPLE v. WESTON.

Appeal.—Papers on appeal from justices' courts required no stamp under revenue act of Congress, p. 640.

Cited in 59 Am. Dec. 559, note, discussing validity of contracts.

Mandamus.—Where the act to be done is judicial in its character, the writ will not direct in what manner the inferior court shall act, but only direct it to act, p. 640.

Approved and applied denying the writ in the following cases of dismissals of appeals: *Lewis v. Barclay*, 35 Cal. 214; *People v. Garnett*, 130 Ill. 343; and *Ewing v. Cohen*, 63 Tex. 485. Cited in *Kerr v. Superior Court*, 130 Cal. 185, 186, noted under *People v. Sexton*, 24 Cal. 78; *State v. Booth*, 21 Utah, 95, denying writ to compel reinstatement of criminal cause after its dismissal; *Board of Commissioners v. Mayhew*, 5 Idaho, 580, mandamus will not lie to reverse order of inferior tribunal continuing hearing of proceeding before it when such tribunal is exercising judicial discretion vested in it by law; *State v. Curler*, 4 Nev. 447, refusal of motion to transfer cause from state to federal court; so, to same effect, in *Francisco v. Insurance Co.*, 36 Cal. 287; so in *People v. Sexton*, 37 Cal. 534, decision of motion for leave to intervene in action; and *Strong v. Grant*, 99 Cal. 102; denial of defendant's motion to dismiss a criminal prosecution. Cited, holding that the writ will lie to compel a judge to settle a statement on motion for a new trial, in *Keane v. Murphy*, 19 Nev. 92. Distinguished in *Cahill v. Superior Court*, 145 Cal. 45, determination of court that it did not have jurisdiction to modify order setting apart probate homestead, is not conclusive on supreme court in mandamus where no question of fact involved in ruling. Disapproved in *State v. Philips*, 97 Mo. 344, and holding that the writ will lie where an appellate court has plainly erred on a point of practice in dismissing an appeal.

28 Cal. 641-644. BUFFENDEAU v. BROOKS.

Indemnity Bond.—Bond indemnifying sheriff for selling property levied on in violation of an order enjoining the sale, is void, p. 644.

Cited as authority, holding that a bond indemnifying a sheriff against loss for omitting to do that which it is his duty to do, is void as against public policy, in *Harrington v. Crawford*, 61 Mo. App. 224; S. C. affirmed, 136 Mo. 472; 58 Am. St. Rep. 656; *Klock v. Pack*, 112 Mich. 672, but holding valid the indemnity bond there sued on, and see *Ray v. McDevitt*, 126 Mich. 421, 86 Am. St. Rep. 551, noting distinction between these cases; 40 Am. Dec. 426, note.

Same.—The purpose for which such bond was given may be shown, though the bond itself discloses no unlawful purpose on its face, p. 644.

Distinguished in *Daw v. Niles*, 104 Cal. 118, which was an action to foreclose a mortgage, and it was held that evidence of a contemporaneous oral agreement between the parties that the mortgagor should pay the taxes that might be assessed on the mortgage or the indebtedness secured thereby, and which was offered for the purpose of invalidating the written stipulation for interest contained in the note and mortgage, was inadmissible.

28 Cal. 645-649. FERRIS v. IRVING.

Action to Quiet Title.—Under Practice Act, possession of plaintiff at time of bringing suit was essential, p. 647.

Cited as authority, construing similar statutory provision, in *North Pac. Ry. Co. v. Cannon*, 46 Fed. 229; and *North Pac. Ry. Co. v. Amacker*, 49 Fed. Rep. 538. Referred to, bearing on right of action to quiet title in *Wagner v. Law*, 3 Wash. St. 511; S. C. 28 Am. St. Rep. 65; and so in *In re Estes*, 6 Sawy. 464; S. C. 3 Fed. Rep. 139; and *In re Beadle*, 5 Sawy. 353, Fed. Cas. No. 1155.

Specific Performance.—Land purported to be bargained for must be so described that it may be identified, otherwise specific performance will not be decreed, p. 647.

Cited as authority in *Mariner v. Dennison*, 78 Cal. 208; and 26 Am. Dec. 665, note.

Power of Attorney.—Death of principal operates as a revocation of a power of attorney to convey land, p. 648.

Cited to ruling stated, in 10 Am. Dec. 41, note; and 39 Am. Dec. 34, note.

General Citation.—*Ferguson v. Blackwell*, 8 Okla. 496.

28 Cal. 649-652. GLIDDEN v. PACKARD.

Appeal.—On appeal from order made after final judgment, the tran-

script should contain a copy of the order, and copies of all the papers used on the hearing when the order was made, p. 650.

Approved in *Ervin v. Collier*, 2 Mont. 607.

Default.—Notice that defendant will move to dissolve an attachment issued in the case does not constitute an appearance in the action, p. 651.

Ruling approved in *Belknap v. Charlton*, 25 Oreg. 47.

Same.—Judgment entered by the clerk by default, there having been no service of summons or appearance, is void, p. 652.

Approved, holding that the clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, in *Wilson v. Cleveland*, 30 Cal. 198. So, to same effect, in *Providence Tool Co. v. Prader*, 32 Cal. 636; S. C. 91 Am. Dec. 600; *Reinhart v. Lugo*, 86 Cal. 398; S. C. 21 Am. St. Rep. 54; and *Graydon v. Thomas*, 3 Oreg. 252. Distinguished in *Bond v. Pacheco*, 30 Cal. 534, holding that a judgment entered by the clerk on default is not void when merely erroneous, as where it is entered for a sum greater than that demanded in the complaint.

28 Cal. 652-662. TREADWAY v. SEMPLE.

Mexican Grant.—Decree of court upon survey of *is res adjudicata*, and final and conclusive upon the rights of all those who become parties to it, p. 660.

Affirmed in *Semple v. Wright*, 32 Cal. 666, 667, 668; *Bernal v. Lynch*, 36 Cal. 144; *Yates v. Smith*, 38 Cal. 61, *Crockett, J.*, dissenting, pp. 63, 72; and *Hagar v. Spect*, 48 Cal. 408. Ruling approved in *Bissell v. Henshaw*, 1 Sawy. 565, 583, 584; *Boyle v. Hinds*, 2 Sawy. 530; *Southern Pac. Ry. Co. v. Dull*, 10 Sawy. 516; S. C. 32 Fed. Rep. 496.

28 Cal. 662-668. LINCOLN v. COLUSA COUNTY.

Eminent Domain.—Legislature may fix the mode of condemnation of land for public highways, and the method by which damages shall be ascertained, and the proceedings to be had for their recovery, p. 666.

Approved in *Kimball v. Alameda County*, 46 Cal. 23.

28 Cal. 668-673. SEALE v. McLAUGHLIN.

Default.—Motion to vacate judgment by default will be denied where the party has manifested a great degree of laches, and fails to show that he has a meritorious defense, p. 672.

Cited as authority in *Burnham v. Hays*, 58 Am. Dec. 395, 398, note, where the authorities are collected. So, *Blyth v. Swenson*, 15 Utah, 363. Distinguished in *Whiteside v. Logan*, 7 Mont. 383, in which case the defendant set out a meritorious defense.

Jurisdiction.—Appearance of attorney for defendant, not served with process, gives the court jurisdiction of the person, although the attorney appears without authority, p. 672.

Cited in *University v. Lassiter*, 83 N. C. 43, and holding that the judgment will not be vacated if the attorney be solvent and able to respond in damages. Referred to in 75 Am. Dec. 148, note, as being in accord with the earlier California decisions, but citing *Baker v. O'Riordan*, 65 Cal. 368, as maintaining a different doctrine. And see *Hill v. City Cab etc. Co.* 79 Cal. 191.

Demurrer.—Where a frivolous demurrer is filed, and no leave asked to file an answer, the court may enter a default and judgment for plaintiff upon overruling demurrer, p. 672.

Approved in *Barron v. Deleval*, 58 Cal. 97.

28 Cal. 673-685. NEVADA COUNTY AND SACRAMENTO CANAL COMPANY v. KIDD. S. C. 37 Cal. 282.

Pleadings.—Common-law rule that pleading must be taken most strongly against the pleader where the language is ambiguous, does not apply where the pleader confesses that his pleading is ambiguous and asks to amend it, p. 684.

Cited in *Frost v. Witter*, 132 Cal. 425, on point that complaint is amendable to set out facts entitling plaintiff to additional remedy where original cause of action is not abandoned; *Marshall v. Shafter*, 32 Cal. 192, discussing requisites of complaint in ejectment. So, in 34 Am. Dec. 159, note, construction of pleadings.

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Referred to in *In re Jessup*, 81 Cal. 489, discussing subject of rehearings.

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